

ISSUE BRIEF

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CFIUS Tested in the 2018 NDAA, Maintains Focus on National Security

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Congress is concerned over the ability of the Committee on Foreign Investment in the U.S. (CFIUS) to do its job in protecting U.S. national security from risky foreign investments. Section 1069 of the 2018 National Defense Authorization Act (NDAA) includes a plan and recommendations for interagency vetting of foreign investment.¹ The U.S. should have a whole-of-government strategy to mitigate risks from investments originating from questionable countries but should also be careful not to reform CFIUS in a way that restricts harmless investments.

Reforms to CFIUS should do no damage to the current investment climate in the U.S. The NDAA more or less keeps the review of foreign investment focused on how it impacts U.S. national security. The recommendations for foreign investment review in the NDAA may be just what CFIUS needs to avoid a major congressional overhaul.

Recent Trends in Investment Reviews

CFIUS is reviewing an increasing number of transactions.² In 2010, there were 93 reviews. This increased to 143 reviews in 2015 and 172 reviews in 2016. The number of transactions that require additional investigation is also increasing, steadily.

In 2010, 35 investigations took place. By 2016, this number had more than doubled to 79. The increase in investigations is accredited to both the increase in total transactions and the increasing complexity of transactions that are reviewed. Increased numbers of complex or questionable transactions are having to be withdrawn and refiled with CFIUS. The number of refiles has doubled over the past two years, reaching 15 in total. In that same time period, the number of transactions that have been abandoned because of national security concerns has increased to five.

The number of transactions coming from China covered under CFIUS is increasing.³ In 2015, 29 transactions from China were reviewed, an increase of eight since 2013. The Chinese are investing more in manufacturing, finance, information, and services. But Chinese transactions make up only about 20 percent of all transactions reviewed by CFIUS. A significant number of the transactions reviewed continue to originate from Canada, Japan, and the U.K. However, these three countries also represent more than a third of total investment in the U.S. while Chinese investments only make up roughly 1 percent.

Plans and Recommendations for Interagency Vetting

Section 1069 of the NDAA would have the Secretaries of Defense, State, and Treasury, and the Director of National Intelligence consult to assess foreign investment coming in the U.S. Together they would plan and create recommendations for how agencies other than the Department of Defense would improve their effectiveness in vetting foreign investment. By and large, the current review pro-

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cess for foreign investment is comprehensive. But CFIUS may not have the resources needed to review the increasing number of investments. Agencies are also stovepiped in what they consider important for maintain U.S. national security.

For the assessment, planning, and recommendations for interagency vetting of foreign investments, Section 1069 outlines three objectives to be taken by the Secretary of Defense:⁴

1. To increase collaboration and coordination among agencies of the United States government in the identification and prevention of foreign investments that could potentially impair the national security of the United States.
2. To increase collaboration and cooperation among the United States government and governments of United States' allies and partners on investments described in paragraph (1), including through information sharing.
3. To increase collaboration and cooperation among agencies of the United States government to identify and mitigate potential threats to critical United States technologies from foreign state-owned or state-controlled entities.

These plans and recommendations would be based on whether:

- CFIUS needs additional resources;
- CFIUS has enough time to review transactions and are there adequate monitoring mechanisms;
- Other agencies are aware of counterintelligence risks from purchases of federal land;
- Industrial espionage against U.S. corporations is being taken into consideration; and
- Foreign investments are increasing the costs of defense-related equipment, are reducing the technological and industrial advantage of the U.S., and increasing foreign entities' ability to spread false or misleading information.

Efforts under this review would include considerations of the current trends in foreign investment that could impair national security, what strategies foreign government are taking to circumvent investment reviews, and what direct (or indirect) market distortions are being created that might impair U.S. national security.

CFIUS must stay focused on reviewing transactions that solely pose a threat to U.S. national security. The NDAA may assist various departments to better understand how the Secretaries of Defense, State, Treasury, and Director of National Intelligence balance national security threats against maintaining the U.S. as a leading destination for foreign investment. While greater communication between departments in the U.S. government, as well as between the U.S. and its allies, is needed, reform to CFIUS must continue to be maintained through the legislative process. However, the legislative process must also avoid being influence by political motives like that seen during the Dubai Ports incident of 2006.⁵

1. National Defense Authorization Act for Fiscal Year 2018, H.R. 2810, 115th Congress, <https://www.congress.gov/bill/115th-congress/house-bill/2810/text#toc-HB7807DA052CA45869C8A1D10D49C36B8> (accessed December 20, 2017).

2. U.S. Department of the Treasury, Committee on Foreign Investment in the United States, *Covered Transactions, Withdrawals, and Presidential Decisions 2014-2016*, https://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUS_Stats_2014-2016.pdf (accessed December 20, 2017).

3. U.S. Department of the Treasury, Committee on Foreign Investment in the United States, *Annual Report to Congress for CY 2015*, September 2017, [https://www.treasury.gov/resource-center/international/foreign-investment/Documents/Unclassified%20CFIUS%20Annual%20Report%20-%20\(report%20period%20CY%202015\).pdf](https://www.treasury.gov/resource-center/international/foreign-investment/Documents/Unclassified%20CFIUS%20Annual%20Report%20-%20(report%20period%20CY%202015).pdf) (accessed December 20, 2017).

4. National Defense Authorization Act for Fiscal Year 2018, H.R. 2810.

5. Daniella Markheim and James Jay Carafano, "After Dubai Ports: Getting CFIUS Reforms Right," Heritage Foundation *Web Memo* No. 1081, May 17, 2016, <http://www.heritage.org/defense/report/after-dubai-ports-getting-cfius-reforms-right>.

Conclusion

In order to maintain a balance between U.S. national security and maintaining foreign investment in the U.S., Congress and the Administration should:

- **Consider a whole-of-government strategy in response to investments from countries with questionable motives.** The U.S. government should establish a system for better examining how foreign governments use all the means available to them to undermine U.S. interests, and establish a standard of norms that protects the U.S. from all questionable transactions.
- **Outline U.S. government explicit concerns.** The definition of national security is appropriately left undefined. CFIUS needs flexibility in its review process. But to balance national security with keeping the U.S. as a place for investment, the U.S. government should be explicit in the factors CFIUS will review regarding transactions. This includes mentioning the risks transactions pose to U.S. cybersecurity and supply-chain security for electronic devices.
- **Increase resources for the CFIUS.** The increasing number of transactions to review, as well as their growing complexity, requires greater manpower within CFIUS. The Foreign Investment Risk Review Modernization Act (S. 2098) has ideas for how to more efficiently fund CFIUS.⁶
- **Seek greater collaboration with allies.** The U.S. is not the only destination for foreign investment. Countries like Japan, the U.K., and other NATO members also receive their fair share of foreign investment. The U.S. should work with these countries more to share information on similar patterns in investment that might threaten national security.
- **Respect economics.** Proposals to include economic security factors into the CFIUS review process would detract from the emphasis on national security. Congress and CFIUS are not responsible for maintaining U.S. job security, but for protecting an environment where competition can flourish in a secure environment. All resources are scarce and will naturally be allocated towards an efficient use.

The NDAA manages, by and large, to keep CFIUS reform focused on U.S. national security interests. Congress must weigh the future costs to the economy with restricting inward foreign direct investment.

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6. Riley Walters, "FIRRMA: Lighter Touch Needed as Senate Introduces Legislation to Improve Investment Security," Heritage Foundation Issue Brief No. 4785, November 21, 2017, <http://www.heritage.org/sites/default/files/2017-11/IB4785.pdf>.