

ISSUE BRIEF

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The Trump Administration Should Strengthen the Committee on Foreign Investment in the U.S.

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More extensive foreign control of U.S. firms, particularly those that produce defense-related material, may put U.S. national security interests at risk. The Committee on Foreign Investment in the U.S. (CFIUS) reviews the national security implications of a foreign firm attempting to acquire control of an American firm.

The Trump Administration and Congress should robustly expand and support the CFIUS for the sake of U.S. national security, and refrain from reforms that are economic in nature. Reforms should not misdirect or subvert the CFIUS's sole focus on the national security implications of foreign investment.

The Committee

CFIUS is a multi-agency body that reviews investment in American firms if the transaction, merger, or acquisition would give control to a foreign entity. The committee is tasked with reviewing whether the transaction may create a risk to U.S. homeland and national security.

Created by executive order in 1975, the committee has since been updated and expanded to reflect a change in U.S. national interests. CFIUS was last updated in 2007 under the Foreign Investment and National Security Act.

The committee is comprised of nine voting members from the Departments of Treasury, Justice, Defense, Homeland Security, State, Commerce, Energy, the U.S. Trade Representative Office, and the Office of Science and Technology Policy. There are two additional non-voting members and five observing members, and the committee may consult with any government agency for additional expertise. The Secretary of the Treasury is the chair and lead coordinator of the committee.

The review process for transactions includes an informal communication between the foreign entity and CFIUS, followed by a 30-day review process and possibly a 45-day investigation. Transactions may either clear the review process, be assigned mitigation agreements to address national security concerns of the committee, be withdrawn from the CFIUS process, be rejected by CFIUS, or be prohibited by presidential action. (Over the past 30 years, the President has only prohibited three transactions.)¹

The Department of the Treasury releases an annual report on CFIUS and the types of transactions it has reviewed.² While the report's release is often delayed, it sheds light on the investment types coming into the U.S. that CFIUS reviews. The annual number of reviews between 2010 and 2014 has remained between 90 and 150, but the number of investigations undertaken has continued to increase.³

Updating the Committee

Foreign investment in the U.S. has continued to rise for decades. For the past 30 years, foreign direct investment into the U.S. has increased more than 10-fold, with over \$3 trillion invested in 2015.⁴

This paper, in its entirety, can be found at <http://report.heritage.org/ib4678>

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Emerging technologies and access to new markets has brought growth to the United States. An increase in technology reliance and change in geopolitics abroad has led to an increase in the security concerns surrounding foreign investment in the U.S., and whether U.S. national interests may be susceptible to foreign manipulation.

In particular, growing Chinese investment in the U.S. has increased demands for CFIUS action. In its annual report, the congressional U.S.-China Economic and Security Review Commission recommended that CFIUS bar all Chinese state-owned enterprises (SOEs) from acquiring control of any U.S. company.⁵ Beijing has shown itself to be a prolific thief of intellectual property (IP) and malicious actor within cyberspace. CFIUS already investigates any transaction that involves foreign government control, but stopping Chinese SOE investment in the U.S. will not mitigate IP theft.

Additionally, the voting membership of CFIUS is comprised of nine members. There are concerns that the interests of industries without federal representation within CFIUS are not being taken into consideration.⁶ And, that perhaps the IP of those unrepresented sectors is more at risk of transfer to a foreign entity. However, the lawful transfer of IP is not against U.S. national interests. Nor should CFIUS membership necessarily increase to include a representative from every federal agency when reviewing a transaction. While CFIUS does and should continue to seek the expertise of all rele-

vant agencies regarding a transaction, the decisions regarding national security should continue to be handled by such Departments as that of Treasury, Defense, Homeland Security, and State.

CFIUS reviews transactions of foreign entities seeking access to the U.S. market. American firms want access to foreign markets. The President's 2017 Trade Policy Agenda calls for an aggressive approach to open foreign markets.⁷ This approach includes reciprocal action and possibly increased scrutiny from CFIUS for firms from countries with limited access—such as China. It is difficult to determine whether restricting access to U.S. markets will lead to greater access to foreign markets. But restricting investment into the U.S. will certainly have a negative impact on the future of U.S. economic growth. It also takes away from the focus of reviewing transactions for national security concerns.

Instead, CFIUS could be expanded by legislation to include greenfield investments or transactions that involve no American firms. While he was nominee for Secretary of the Treasury, Steve Mnuchin noted that he will ensure that CFIUS is authorized to review transactions when that review is deemed “necessary and appropriate.”⁸ If a foreign entity's investment in an American company can be denied based on its proximity to a military base, then it is appropriate to suggest that a foreign entity that wishes to build in the U.S. from the ground up be subject to CFIUS review.

1. 1990 acquisition of Mamco Manufacturing, Inc., by China National Aero-Technology Import and Export Corporation; 2012 acquisition of Project Companies' Oregon Windfarms by the Ralls Corporation; and 2016 acquisition of Aixtron SE by Grand Chip Investment GmbH.
2. Examples of CFIUS review: 2011 acquisition review of computer technology firm 3Leaf Systems by Huawei Technologies; 2013 review of U.S. pork producer Smithfield Foods, Inc., acquired by Shuanghui International Holdings, Ltd.; and 2016 acquisition review of seed and chemical company Syngenta by ChemChina.
3. U.S. Department of the Treasury, “Resource Center: Reports and Tables,” 2010–2014, <https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-reports.aspx> (accessed April 4, 2016).
4. Bureau of Economic Analysis, “International Data: Direct Investment and MNEs,” April 3, 2017, <https://www.bea.gov/iTable/iTable.cfm?ReqID=2&step=1#reqid=2&step=1&isuri=1&202=1&203=22&204=99&205=1,2&200=2&201=1&207=11,12,13,14,15,16,17,18,19,20,21,22,23,24,25,26,27,28,29,30-31,32,33,34,35,36,37,38,39,40,41,42,43,48,49,52&208=2&209=2> (accessed April 4, 2017).
5. U.S.-China Economic and Security Review Commission, “Comprehensive List of the Commission's Recommendations,” 2016, https://www.uscc.gov/sites/default/files/annual_reports/Comprehensive%20List%20of%20Recommendations_1.pdf (accessed April 4, 2017).
6. Patrick Woodall, “Chinese Investment in the United States: Impacts and Issues for Policy Makers,” testimony before the U.S.-China Economic and Security Review Commission, January 26, 2017, https://www.uscc.gov/sites/default/files/Woodall_USCC%20Hearing%20Testimony012617.pdf (accessed March 22, 2017).
7. Office of the Trade Representative, *2017 Trade Policy Agenda and 2016 Annual Report*, 2017, <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf> (accessed March 22, 2017).
8. Hearing, *Questions for the Record*, Nomination of Steve Mnuchin to be Secretary of the Treasury, Senate Finance Committee, transcript, January 2017, <http://online.wsj.com/media/MNUCHINQFR.pdf> (accessed March 22, 2017).

The Difference Between Control and Influence

U.S. national security is imperative. But before the risks of a transaction can be assessed, the CFIUS must determine who controls what. A foreign entity's ability to control a U.S. company must be distinguished from its ability to influence it. Ultimately, the decisions of U.S. companies are made by their controlling owners and not by those who influence them.⁹

It is important that Congress and the Administration continue to highlight the benefits of investing in America. And, it is important to balance national security interests with an increase of foreign investment in the United States. Actions must be taken to assist CFIUS in processing the growing number of transactions more quickly, while maintaining U.S. national interests. To do this, Congress and the Administration should:

- **Ensure that CFIUS is adequately funded and staffed.** Increased foreign investment will demand greater CFIUS reviews. Increased complications in determining foreign ownership, such as companies' routing of transactions through third parties, will also demand more from CFIUS in determining ownership of a foreign entity. CFIUS must have adequate resources to review each transaction in a timely fashion, if not for the sake of national security then for the sake of lost economic opportunity.
- **Avoid using CFIUS as a means for reciprocity or protectionism.** The committee is a means to protect national security. Any shift away from that will subvert the committee's role in reviewing investments. The committee is meant for only those transactions that transfer control and should not include all investments, especially those with no bearing on national security.
- **Expand CFIUS review to include other types of transactions,** such as greenfield investments. The focus of the committee is on the national security risks of foreign entities' access to the U.S. This should include other transactions, as well, not just those that involve an American firm.
- **Increase transparency of CFIUS review metrics.** Company information on transactions is not publically released by CFIUS. In its annual report, the Treasury Department should include metrics of its review process to help foreign and American firms better understand the timeliness of CFIUS review.

The U.S. will likely continue to see increasing foreign investment. It is important that mechanisms for reviewing investments in the U.S. are able to keep up with this growth. It is important to protect the freedom of Americans to do business and attract investment without government interference, except in rare cases where there is a direct threat to national security.

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9. An example to highlight the difference between influence and control: Firm A gives money to Firm B in the hopes that Firm B approves Project X instead of Project Y. Firm A has no control in the decisions of Firm B. Firm B maintains discretion whether to invest in Project X or Y, regardless of Firm A's influence. Thus, Firm A holds no control over Firm B, though Firm A's money could influence Firm B's decision.