

ALERT

New Legislation Would Expand CFIUS Mandate, Subject Chinese Investments to Greater Scrutiny, and Could Impact Joint Ventures Abroad



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Today, draft legislation from U.S. Senator John Cornyn (R-TX) and U.S. Representative Robert Pittenger (R-NC) was introduced that could significantly alter the U.S. government's review of foreign investments in the United States. The long-anticipated Foreign Investment Risk Review Modernization Act would significantly expand the jurisdiction and operational mandate of the Committee on Foreign Investment in the United States (CFIUS or the Committee)^[1]. The Cornyn/Pittenger bill would subject transactions involving China and other countries to greater scrutiny, could impact U.S. companies seeking to form joint ventures abroad, and would significantly reform the CFIUS process in a number of important respects. While the timing for the bill's passage is uncertain, it has bipartisan support, and there may be a push for passage to occur this year. Below is a brief summary of the bill's major provisions:

- **Declarations for certain covered transactions.** The Cornyn/Pittenger bill authorizes any party to a covered transaction to submit a voluntary "declaration" in lieu of a written notice. Declarations would function as abbreviated notifications containing basic information regarding the transaction and would generally not exceed five pages in length. Declarations would be mandatory for covered transactions involving the acquisition of a 25 percent or greater voting interest in a U.S. business by any foreign person in which a foreign government holds a voting interest of 25 percent or more. The bill also authorizes the Committee to require the submission of

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declarations for additional types of transactions based on factors such as the sector or industry implicated in the transaction, the difficulty of obtaining information about the transaction by other means, and the difficulty of remedying any harm done to national security through completion of the transaction. Mandatory declarations must be submitted at least 45 days prior to completion of the transaction. Upon receipt, the Committee may either clear the transaction, request that the parties submit a written notice, initiate a unilateral review of the transaction, or inform the parties that it is unable to complete action with respect to the transaction based on the declaration alone. The bill authorizes the Committee to impose civil penalties on parties who fail to comply with these requirements.

- **Expansion of what constitutes a “covered transaction.”** The bill broadens the scope of covered transactions subject to CFIUS review to include (i) any non-passive investment by a foreign person in any U.S. critical technology or critical infrastructure company; (ii) any contribution by a U.S. critical technology company to a foreign person of both intellectual property and associated support through a joint venture or other arrangement; (iii) any change in a foreign investor’s rights in a U.S. business if such change could result in foreign control of the U.S. business or a non-passive investment in a U.S. critical technology or critical infrastructure company; (iv) any transaction or agreement designed or intended to evade or circumvent CFIUS review; and (v) any purchase or lease by a foreign person of real estate located near a military installation or other sensitive U.S. government facility or property.
- **Exemption for transactions from certain countries.** The bill would allow the Committee to adopt regulations exempting transactions involving parties from certain countries from the CFIUS review process. Countries eligible for this exemption would be identified on the basis of criteria such as whether the country has a mutual defense treaty in place with the United States, whether the country has a mutual arrangement with the United States to safeguard national security with respect to foreign investment, and the country’s national security review process for foreign investment.
- **Filing fees.** The bill permits the Committee to assess and collect filing fees for any covered transaction for which a notice is filed. The fees would be capped at one percent of the value of the transaction or \$300,000, whichever is less.
- **Extended review period.** The bill lengthens the initial review period from 30 days to 45 days, which would reduce the need for parties to withdraw and refile notices in cases where the Committee needs additional time to review the transaction. In extraordinary circumstances, the Committee would also be permitted to extend an investigation for an additional 30 days.
- **Information sharing.** The bill allows for the disclosure of information regarding a transaction to any domestic or foreign government to the extent necessary for national security purposes or to any third parties where the parties have consented to the disclosure. This would enhance collaboration with U.S. allies and partners and facilitate greater information sharing.
- **Additional national security factors to be considered.** The bill adds several new factors that the Committee may consider during its review, including whether the transaction could reduce the United States’ technological and industrial advantage relative to any country of “special concern”; the extent to

which the transaction could increase the cost to the U.S. government of acquiring or maintaining equipment and systems necessary for defense, intelligence, or other national security functions; whether the transaction could increase U.S. reliance on foreign suppliers to meet national defense requirements; whether the transaction could expose personally identifiable information, genetic information, or other sensitive data of U.S. citizens; whether the transaction involves a country of special concern seeking to acquire certain critical technologies; and other factors.

- **Mitigation agreements.** The bill prohibits the Committee from entering into any mitigation agreement or imposing any condition on a transaction unless the Committee determines that the agreement or condition resolves any national security concerns raised by the transaction. The bill also requires the Committee to formulate and follow a plan for monitoring compliance with any mitigation agreements or conditions. If any party fails to comply with a mitigation agreement or condition, the Committee would be authorized to negotiate remedial measures, require the parties to submit future covered transactions to CFIUS review for a five-year period, or seek injunctive relief. Additionally, the bill would provide the Committee with new authority to negotiate or impose interim agreements or conditions on already-completed transactions while CFIUS conducts its review. The bill would also authorize CFIUS to negotiate or impose agreements or conditions in cases where parties to a covered transaction have voluntarily chosen to abandon the transaction in order to effectuate such abandonment and mitigate any related national security risks.
- **Judicial review.** Although the CFIUS statute already exempts actions and findings of the President from judicial review, the bill would extend this exemption to most actions and findings of the Committee as well. Petitions regarding Committee actions would be permitted only in cases where the party or parties to a covered transaction allege that the action is contrary to a constitutional right, power, privilege, or immunity. Only parties who initiated the review by filing a notice or declaration would be permitted to file such a petition, and only after the Committee has completed all action with respect to the transaction. The U.S. Court of Appeals for the District of Columbia Circuit would have exclusive jurisdiction over such claims only to affirm the Committee action or remand the case to the Committee for further consideration, and discovery in such cases would be limited to an administrative record provided by the U.S. government. These provisions are designed to clarify parties' rights in the wake of the D.C. Circuit's 2014 decision in *Ralls Corp. v. Committee on Foreign Investment in the United States*.
- **Mechanism for the Committee to receive additional funding.** The bill establishes a "Committee on Foreign Investment in the United States Fund," authorizing Congressional appropriations to fund the newly expanded operations of CFIUS.

The Cornyn/Pittenger bill, as it stands, will likely double the workload of and resources required by the Committee. Due to the broad discretion afforded CFIUS under this bill, the ambit of the Committee's mandate could be broadened much further.

The Cornyn/Pittenger bill is not the only piece of CFIUS reform legislation percolating in the Capitol. On October 18, 2017, U.S. Senators Chuck Grassley (R-IA) and Sherrod Brown (D-OH) introduced the United States Foreign Investment Review Act. The Grassley-Brown bill creates a rather open-ended economic benefits test

intended to operate alongside the traditional CFIUS review process. The bill would authorize the U.S. Department of Commerce to review transactions potentially resulting in the foreign control of a U.S. business based on a number of “economic factors.” In contrast to other CFIUS-related reforms, the Grassley-Brown bill focuses primarily on the economic effects of foreign investments made in the United States rather than their national security implications.

Ultimately, the path forward for the Cornyn/Pittenger bill may be limited given the timing and congestion of the upcoming Congressional calendar. Among the major pieces of legislation likely to garner Congressional attention in the coming months are tax reform, immigration reform, and additional hurricane and disaster relief packages. Congress must also re-address the issue of funding the government and extending the debt limit before December 8, 2017. This crowded agenda may pause consideration of the Cornyn/Pittenger bill and other CFIUS reforms. That said, several administration officials have voiced support for reforming the CFIUS review process, including Treasury Secretary Steven Mnuchin, Defense Secretary James Mattis, and Commerce Secretary Wilbur Ross. This degree of support from the administration could spur leaders of the U.S. House of Representatives and U.S. Senate to take up this legislation more quickly and under regular order.

Wiley Rein has an unparalleled ability to assist clients on investments that raise national security concerns. We have more than two decades of experience handling matters involving CFIUS and the Defense Security Service (DSS) and have counseled clients in transactions that involve nearly every industry sector subject to CFIUS review. Our attorneys and consultants have served in nearly every CFIUS department, including the U.S. Departments of Treasury, Homeland Security, Justice, Defense, State, and Commerce, as well as the National Security Council. Senior Public Policy Advisor Nova J. Daly, who served as the Deputy Assistant Secretary for Investment Security and Policy at Treasury from 2006 to 2009, ran the CFIUS process, oversaw the reviews of over 350 cases, and negotiated the Foreign Investment and National Security Act of 2007 (FINSIA) and implemented its regulations. Partner Daniel B. Pickard is a CFIUS expert and provides comprehensive guidance on multiple trade and investment issues, including compliance with the National Industrial Security Program (NISP) as well as on foreign ownership, control, or influence (FOCI) issues.

To receive full text of the proposed Cornyn and Pittenger bills, please contact one of the authors listed on this alert.

[1] CFIUS is a multi-agency committee, chaired by the U.S. Department of the Treasury, that conducts national security reviews of “covered transactions” that could result in control of a U.S. business by a foreign person.