

A Potential New Hurdle For Foreign Investments

By **Kenneth Nunnenkamp, Giovanna Cinelli and Katelyn Hilferty**

November 27, 2017, 3:38 PM EST

Congress has expressed renewed interest in a number of cross-border investments attempted and/or completed over the last few years, often focusing on proposed Chinese investments and acquisitions. This interest has generated congressional hearings as well as proposed legislation. On Oct. 18, U.S. Sens. Sherrod Brown, D-Ohio, and Chuck Grassley, R-Iowa, introduced the United States Foreign Investment Review Act of 2017 (S. 1983) to establish a new process for reviews of proposed foreign investments in the United States.

The bill proposes that the Commerce Department undertake a new form of review of foreign investments in and acquisitions of U.S. businesses, which would be separate from, but complementary to, national security reviews conducted by the Committee on Foreign Investment in the United States. The legislation would require the secretary of commerce to review certain transactions to determine the effect of the proposed foreign investment on U.S. economic interests and domestic industry. The bill provides the Department of Commerce with authority — based on the results of its review — to approve, prohibit or require modification of a transaction.

Proposed Review Process

The bill's review process evokes many aspects of national security reviews of foreign investments undertaken by CFIUS under Section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007 (FINSA). The bill requires Commerce review for transactions that could result in foreign "control" of a "covered transaction" (as those terms are defined in the proposed legislation) and empowers the secretary of commerce to block or modify the foreign investment if it is deemed not to be in the "economic interests" of the United States. Notably, placing this authority at the cabinet level is a significant distinction from CFIUS, which places authority for the final decision with the U.S. president, rather than a cabinet secretary.

Unlike CFIUS, which limits action to situations where there is a determination that the investment will harm national security or critical infrastructure, the Commerce



Kenneth
Nunnenkamp



Giovanna Cinelli



Katelyn Hilferty

review would weigh the following when deciding whether to take action:

- The long-term strategic economic interests of the United States
- The history of distortive trade practices in each country in which a foreign party to the transaction is domiciled, as informed by a report of the Office of the U.S. Trade Representative (USTR) that is required under the act
- Control and ownership of each foreign person that is a party to the transaction
- Impact on the domestic industry, taking into consideration any pattern of foreign investment in the domestic industry
- Any other factors the secretary of commerce considers appropriate

The new economic assessment would be subject to notice, public comment and publication of the actions taken, and would therefore address concerns regarding the lack of transparency in the CFIUS review process. The bill, if made law, would require not only that all written notifications of covered transactions be made available to the public, but that when such transactions require additional time for review, public comments must be permitted, and those comments that are received must be considered in a manner similar to the notice-and-comment process required by the Administrative Procedures Act. In addition, the bill mandates publication of all decisions to approve, prohibit or modify a transaction — as well as the justification for each decision.

This bill is similar to CFIUS in that it establishes a regime for reviews of foreign direct investments, but the bill also creates a noticeably different structure than CFIUS on several fronts.

First, it identifies a category of transactions that are subject to mandatory review based on dollar value. These reviewed transactions require a 15-day period for initial review instead of the 30-day period allotted to CFIUS. Mandatory reviews of foreign investments applies to those transactions valued at \$50 million or more for transactions involving a state-owned enterprise, or \$1 billion or more for any other transaction.[1]

If the secretary requires additional time, the bill would allow for 45 more days, followed by a final extension of 15 days. During this time, Commerce must consult with, and receive a report from, the USTR that addresses at least the following:

- The history of and current issues affecting the trading relationship between the United States and the country where the investing/buying entity is domiciled
- The extent to which the trading relationship between that country and the United States is reciprocal
- Information relevant to the buyer's home country from annual reports of the USTR

Unlike CFIUS, which counts about a dozen agencies as members, only the U.S. Department of Commerce would review transactions under this legislation. The secretary of commerce may, at his/her discretion, "consult" with any other agency deemed necessary and may "coordinate" with CFIUS, although CFIUS retains sole jurisdiction to review the transaction for national security concerns. The bill specifically provides that review of a transaction by the secretary for U.S. economic impact may be conducted in parallel to, but not in lieu of, any review by CFIUS for national security concerns.

Implications

Foreign investors, U.S. sellers and other concerned parties may soon be required to consider both the national security implications and the U.S. domestic economic impact of their proposed transactions and, where concerns arise, determine how to mitigate those concerns or risk the blocking of the proposed transaction by the U.S. government using this new process.

This bill comes at a time when CFIUS reform is gaining additional attention, especially since the introduction of bipartisan legislation that proposes to substantially change the CFIUS process.

The level of interest in amending and/or modifying CFIUS means that no legislation that adds to the conversation can be dismissed. Moreover, this bill, if enacted, would address (and obviate the need for) adding an economic interest test to CFIUS reviews, leaving the “purity” of the CFIUS national security review process intact while providing a separate process for economic impact review.

As a bill that appears to have at least some bipartisan support, the United States Foreign Investment Review Act of 2017 may have a chance to be included in the likely CFIUS reform that lies ahead — or it may influence that debate toward a more flexible and expansive authority for CFIUS itself.

Kenneth J. Nunnenkamp and Giovanna M. Cinelli are partners, and Katelyn M. Hilferty is an associate, at Morgan Lewis & Bockius LLP in the firm's Washington, D.C., office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Transactions valued below these thresholds must nonetheless be reviewed by the secretary upon specific request by the Senate Finance Committee or the House Committee on Ways and Means.