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# The Committee on Foreign Investment in the United States

## Overview

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee that is chaired by the Secretary of the Treasury and serves the President in overseeing the national security risks of certain foreign direct investment (FDI) in the U.S. economy. CFIUS jurisdiction includes the review of mergers, acquisitions, and takeovers that could result in foreign control of a U.S. business; certain non-passive, non-controlling investments in U.S. businesses involved in critical technologies, critical infrastructure, or sensitive personal data (so-called “TID businesses”); and certain real estate transactions. At the recommendation of CFIUS, the President has the authority to suspend or prohibit transactions that threaten to impair U.S. national security.

The United States is both the world’s largest recipient of foreign investment and largest foreign investor. The United States traditionally has supported a rules-based and open investment environment domestically and internationally to promote U.S. economic growth and other policy objectives, such as ensuring that the United States remains a premier destination for FDI. The Biden Administration has stated that the United States is committed to open investment, while ensuring the CFIUS review process “remains responsive to an evolving national security landscape and the nature of the investments that pose related risks.”

Congressional and stakeholder debate over CFIUS activities has intensified amid growing concern that certain foreign investments by firms directed, controlled, or funded by a foreign government, notably the People’s Republic of China (PRC), raise additional national security risks. These debates involve oversight of CFIUS reforms mandated by Congress in 2018. The 118<sup>th</sup> Congress is considering various legislation to address perceived jurisdiction gaps and evolving priorities.

**Source of CFIUS Authority.** CFIUS derives its authorities from Section 721 of the Defense Production Act (DPA), as amended (50 U.S.C. § 4565), and implementing regulations (31 C.F.R. Chapter VIII). CFIUS initially was created and operated through a series of Executive Orders. In 1988, Congress passed the “Exon-Florio” amendment to the DPA (50 U.S.C. App sect. 2170), which codified the foreign investment review process, at the time largely driven by concerns over Japanese acquisitions of U.S. defense-related firms. In 2007, amid concerns over the proposed foreign purchase of commercial operations of six U.S. ports, Congress passed the Foreign Investment and National Security Act of 2007 (P.L. 110-49), which formally gave CFIUS statutory authority. In 2018, Congress passed the Foreign Investment Risk Review Modernization Act (FIRRMA, Title XVII, P.L. 115-232), which expanded CFIUS’ jurisdiction and review process in key ways. FIRRMA was intended to “strengthen and modernize” CFIUS and enhance its ability in particular to address

concerns involving non-controlling investments in TID businesses and real estate transactions in proximity to military installations, or part of maritime ports or airports.

**Membership of CFIUS.** The committee consists of nine members, including the Secretary of the Treasury (chair), the Secretaries of State, Defense, Homeland Security, Commerce, and Energy; Attorney General; U.S. Trade Representative; and Director of the Office of Science and Technology Policy. The Secretary of Labor and Director of National Intelligence (DNI) serve as ex-officio members. Five White House offices are observers or participate in CFIUS, as appropriate, e.g., the Council of Economic Advisers and National Security Council. The President can appoint other officials to serve on a case-by-case basis.

## CFIUS Review Process

The notification process is a voluntary system, except in certain cases, of notification by the parties to a transaction. Even when notification is not mandatory, firms have an incentive to do so to receive potential “safe harbor” from CFIUS, which limits future action after a transaction is cleared. In other words, non-notified transactions remain subject indefinitely to future CFIUS review and possible divestment or other actions mandated by the President. As directed by FIRRMA, CFIUS has increased attention and resources to monitoring non-notified transactions of concern. CFIUS may also unilaterally initiate a review.

The President can exercise authority to suspend or prohibit a foreign investment, subject to a CFIUS review, if he/she finds that (1) credible evidence exists that the foreign person might take action that threatens to impair national security; and (2) no other laws provide “adequate and appropriate authority” to protect the national security risks.

**Notification.** A party’s notification of a transaction to CFIUS can follow two-tracks: a declaration, an abbreviated, short-form filing (30-day assessment); or a traditional written notice (45-day review). Declarations and notices are generally distinguished by: submission length, timeline for CFIUS’ consideration, and CFIUS’ options for disposition of the submission. A declaration is mandatory in two cases: (1) where a foreign government is acquiring a “substantial interest” in U.S. TID businesses; and (2) where a covered transaction involves a U.S. TID business that produces, designs, manufactures, develops, etc. a critical technology subject to export licensing/controls.

**National Security Review.** Treasury and a co-lead agency conduct a 45-day review to determine the effects of the transaction on U.S. national security, informed by a DNI threat analysis. CFIUS’ “risk-based assessment” considers the threat, vulnerabilities, and consequences to national security related to the transaction. In its assessment, CFIUS is to consider an illustrative list of national security factors. Factors include: the domestic production needed for

projected national defense requirements; the control of domestic industries and commercial activity by foreign citizens; effects on potential sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; U.S. technological leadership in areas affecting national security; and effects on U.S. critical infrastructure, including major energy assets, and critical technologies. In September 2022, amid an evolving national security landscape, President Biden issued E.O. 14083 to elaborate and expand on the factors in statute. These include the transaction's effect on resilience of U.S. critical supply chains and technological leadership; aggregate industry investment trends; cybersecurity risks; and risks to U.S. person's sensitive data.

**National Security Investigation.** The transaction proceeds to a 45-day investigation if CFIUS finds the transaction: threatens to impair U.S. national security and the risk has not been mitigated; is foreign-government controlled; or would result in foreign control of any U.S. critical infrastructure. A 15-day extension is permitted in the event of "extraordinary circumstances." CFIUS can negotiate and impose mitigation agreements or conditions on the parties to address concerns identified; a lead agency is tasked with monitoring compliance. In October 2022, Treasury issued its first Enforcement and Penalty Guidelines, emphasizing compliance with mitigation measures as a priority.

**Presidential Decision.** If CFIUS determines the transaction poses unresolved concerns, it may recommend to the President that the transaction be suspended or prohibited, unless the parties choose to abandon the transaction. The President has 15 days to take action. Presidents have prohibited seven transactions to date, the majority in the past decade (**Table 1**). In the latest action, President Trump ordered PRC ByteDance Ltd. to divest from Musical.ly, a social media firm. This 2017 acquisition formed the basis of U.S. operations of TikTok. The Justice Department has not defended the divestment order in court in response to a legal challenge by TikTok, and instead has sought a national security agreement with the firm, despite CFIUS' determination in referring the case to the President that mitigation was not feasible.

**Table 1. Presidential Blocks of Foreign Transactions**

Year	U.S. Business	Acquirer	Sector
1990	MAMCO	CATIC	Aerospace
2012	4 wind farms	Ralls Corp. (Sany Group)	Renewables
2016	Aitron SE	Grand Chip (China IC Fund)	Semiconductor
2017	Lattice	Canyon Bridge Capital Partners	Semiconductor
2018	Qualcomm	Broadcom	Semiconductor
2020	StayNTouch	Shiji Information Technology Co.	Software
2020	Musical.ly	ByteDance	Digital platform

**Source:** Presidential Orders.

## Recent Activity

CFIUS must report annually to Congress on its activities (**Table 2**). In most years since FIRRMA's enactment, there has been a steady increase in transactions reviewed. In 2021, CFIUS reviewed 436 transactions (164 declarations,

272 notices). CFIUS cleared most declarations (120), and requested parties submit a subsequent written notice in 18% of cases. Nearly half of total notices proceeded to an investigation. In more than 70 cases, parties withdrew the notice during the investigation to address issues, and the majority refiled with CFIUS. In 2021, CFIUS adopted mitigation measures with respect to 31 notices (or 11% of total notices). In nine cases, parties abandoned the transaction after CFIUS informed it was unable to identify mitigation measures that would resolve its concerns, or after proposed measures were not accepted by the parties.

**Table 2. Transactions Reviewed by CFIUS, 2017-2021**

	2017	2018	2019	2020	2021	Total
<b>Declarations</b>	n.a.	20	94	126	164	240
<b>Notices</b>	237	229	231	187	272	1,156
<b>Investigations</b>	172	158	113	88	130	661
<b>Notices</b>	70	64	30	28	72	264
<b>Withdrawn</b>						
<b>Presidential Decision</b>	1	1	1	1	0	4

**Source:** CFIUS Annual Report to Congress, August 2022.

## Issues for Congress

Congress remains engaged in oversight of FIRRMA implementation and CFIUS activities. Some Members say that, despite FIRRMA, PRC state-directed investments require a more proactive and strategic approach. Some are concerned that PRC investments, particularly in emerging technologies and new operations, may evade or fall outside current oversight authorities. Legislation proposed in the 118<sup>th</sup> Congress would authorize CFIUS to review and potentially prohibit foreign purchases of U.S. agricultural land, and add the Department of Agriculture as a full CFIUS member. These efforts stem in part from Treasury's determination in early 2023 that it did not find jurisdiction to review a PRC firm's purchase of land in North Dakota in proximity to a U.S. Air Force facility. Other issues include:

- How well is CFIUS balancing an open U.S. investment posture with the aim to protect national security? How should CFIUS protect critical technologies in ways that promote competitiveness and a market-driven economy?
- Five years post FIRRMA, how sufficient are CFIUS' current authorities to achieve policy objectives? How has E.O. 14083 affected CFIUS reviews in practice?
- There appear to be incentives for parties to a transaction to use declarations, which are shorter and have fast turnaround relative to notices. To what extent is Treasury clearing transactions based on declarations and in what instances should full filing notices be required?
- How is the Commerce Department's process of identifying "emerging and foundational technologies" for export controls facilitating or hindering CFIUS reviews of transactions related to such technologies?
- In what ways has CFIUS improved coordination with allies and partners in information sharing and in investment screening efforts as mandated by FIRRMA?

For more, see CRS Report RL33388, *The Committee on Foreign Investment in the United States (CFIUS)*.

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