



H.R. 5841 — Foreign Investment Risk Review Modernization Act of 2018, as amended (Rep. Pittenger, R-NC)

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FLOOR SCHEDULE:

Scheduled for consideration on June 26, 2018, under suspension of the rules, which requires 2/3 vote for passage.

TOPLINE SUMMARY:

[H.R. 5841](#) would implement a series of reforms to the Committee on Foreign Investment in the United States (CFIUS), an interagency committee advising the President in overseeing the national security implications of foreign investment. These reforms would specifically relate to regulation of foreign investment, export controls, and day-to-day operations of the committee to include hiring practices and annual reporting requirements.

COST:

No Congressional Budget Office (CBO) estimate is available.

Rule 28(a)(1) of the Rules of the Republican Conference prohibit measures from being scheduled for consideration under suspension of the rules without an accompanying cost estimate. Rule 28(b) provides that the cost estimate requirement may be waived by a majority of the Elected Leadership.

CONSERVATIVE CONCERNS:

- **Expand the Size and Scope of the Federal Government?** No.
- **Encroach into State or Local Authority?** No.
- **Delegate Any Legislative Authority to the Executive Branch?** No.
- **Contain Earmarks/Limited Tax Benefits/Limited Tariff Benefits?** No.

DETAILED SUMMARY AND ANALYSIS:

The [Committee on Foreign Investment in the United States](#) (CFIUS) “is an inter-agency committee authorized to review transactions that could result in control of a U.S. business by a foreign person (“covered transactions”), in order to determine the effect of such transactions on the national security of the United States. CFIUS operates pursuant to section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007 (FINSAs).”

The CIFIUS is composed of the:

1. Department of the Treasury (chair)
2. Department of Justice
3. Department of Homeland Security
4. Department of Commerce
5. Department of Defense
6. Department of State
7. Department of Energy
8. Office of the U.S. Trade Representative
9. Office of Science & Technology Policy

Components of the Executive Office of the President may also participate in CFIUS, including the:

1. Office of Management & Budget
2. Council of Economic Advisors
3. National Security Council
4. National Economic Council
5. Homeland Security Council

A Government Accountability Office (GAO) report (GAO-18-249) on CFIUS workload can be found [here](#). A June 19, 2018, Congressional Research Service report on CFIUS can be found [here](#).

H.R. 5841 would authorize CFIUS to: require a written notice by a party to a covered transaction to include a copy of any partnership agreements, integration agreements, or other side agreements relating to the transaction; to prescribe regulations to permit parties to the transaction to submit a declaration with basic information regarding the transaction, unless the parties submit a written notice; and to prescribe regulations to require the parties to a covered transaction to submit a declaration related to the transaction if it involves an investment that results in the release of critical technologies by an unaffiliated United States business to a foreign person in which a foreign government has, directly or indirectly, a substantial interest. CFIUS may impose a penalty with respect to a party that fails to comply. Upon receiving a declaration, CFIUS may request that the parties to the transaction file a written notice, provided that CFIUS includes an explanation of the reasons for the request. The bill would further set other guidelines for declaring transactions.

H.R. 5841 would mandate that any CFIUS investigation completed within a 45-day period. The bill would require the Director of National Intelligence to expeditiously carry out a thorough analysis of any threat to the national security of the United States posed by any covered transaction, which shall include the identification of any recognized gaps in the collection of intelligence relevant to the analysis. CFIUS would then be required to submit such analysis to Congress.

H.R. 5841 would amend section 721 of the Defense Production Act of 1950 ([50 U.S.C. 4565](#)) by amending the President's authority to suspend or prohibit a transaction by requiring the President to announce an action on a transaction not later than 15 days after the earlier of the date on which the investigation of the transaction is completed; or the date on which CFIUS otherwise refers the transaction to the President.

The President would be required to take certain factors into consideration including the degree to which the covered transaction is likely to threaten the ability of the United States Government to acquire or maintain the equipment and systems that are necessary for defense, intelligence, or other national security functions; the potential national security-related effects of the cumulative control

of any one type of critical infrastructure, energy asset, material, or critical technology by a foreign person; whether any foreign person that would acquire control of a United States business as a result of the covered transaction has a history of complying with United States laws and regulations and prior adherence to any agreement or condition; the extent to which the covered transaction is likely to release, either directly or indirectly, sensitive personal data of United States citizens to a foreign person that may exploit that information in a manner that threatens national security; whether the covered transaction is likely to exacerbate cybersecurity vulnerabilities or is likely to result in a foreign government gaining a significant new capability to engage in malicious cyber-enabled activities against the United States, including such activities designed to affect the outcome of any election for Federal office; and whether the covered transaction is likely to expose any information regarding sensitive national security matters or sensitive procedures or operations of a Federal law enforcement agency with national security responsibilities to a foreign person not authorized to receive that information.

Any CFIUS determination to refer a covered transaction to the President to suspend a covered transaction, or to negotiate, enter into, impose, or enforce any agreement or condition would be based on a risk-based analysis, conducted by CFIUS, of the effects on the national security of the United States of the covered transaction. CFIUS would be required to formulate, adhere to, and keep updated a plan for monitoring compliance with the agreement or condition. CFIUS would also be directed to develop and agree upon methods for evaluating compliance with any agreement entered into or condition imposed with respect to a covered transaction that will allow CFIUS to adequately ensure compliance without unnecessarily diverting resources from assessing any new covered transaction.

Title IV of the bill would modify certain annual reporting requirements to include a list of all notices filed and all reviews or investigations of covered transactions completed during the specified period, with a description of the outcome of each review or investigation, including whether an agreement was entered into or condition was imposed with respect to the transaction being reviewed or investigated, and whether the President took any action; the nature of the business activities or products of the United States business with which the transaction was entered into or intended to be entered into; information about any withdrawal from the process; and the mean and median number of days required to complete reviews and investigations during the period. Each annual report would also include statistics on compliance reviews conducted and actions taken by CFIUS; as well as cumulative and trend information on the number of filed declarations, the actions taken by CFIUS in response to declarations, the business sectors involved in the declarations which have been made, the countries involved in such declarations, and the mean and median number of days required to respond to such declarations; and the number of new hires made since the preceding report through specified authorities along with summary statistics, position titles, and associated pay grades for such hires and a summary of such hires' responsibilities.

CFIUS would be required to submit a report to Congress on investments by foreign persons into the entertainment and information sectors of the United States, which shall include analysis of the extent to which such investments have resulted in or could result in direct or indirect censorship, including self-censorship, within the United States.

If CFIUS recommends that the President suspend or prohibit a covered transaction because such transaction threatens to impair the national security of the United States, CFIUS would, in the classified version of the annual report, notify Congress of each such recommendation and, upon request, provide a classified briefing on the recommendation.

Title V of the bill would authorize the CFIUS chairperson to centralize certain functions of the committee within the Department of the Treasury for the purpose of enhancing interagency coordination and collaboration. The President may include, in the budget of the Department of the Treasury for a fiscal year, a unified request for funding of all operations conducted by all of the departments and agencies represented on CFIUS. A detailed CFIUS spending plan would also be required to be submitted to Congress. The bill would further authorize special hiring authorities to the CFIUS chairperson.

H.R. 5841 would authorize a Committee on Foreign Investment in the United States Fund and \$20,000,000 for each of fiscal years 2019 through 2023 to the fund. CFIUS would be authorized to assess and collect a fee in an amount determined by the committee in regulations. The fee may not exceed an amount equal to the lesser of 1 percent of the value of the transaction; or \$300,000, as such amount is adjusted annually for inflation. The chairperson may transfer any amounts in the fund to any other department or agency represented on the committee for the purpose of addressing emerging needs.

The CFIUS chairperson, in consultation with other members of the committee, would be authorized to lead a formal process for the regular exchange of information with governments of countries that are allies or partners of the United States, in the discretion of the chairperson, to protect the national security of the United States and those countries.

Title VII would delay the rule issued by the National Credit Union Administration titled “Risk-Based Capital” (published at [80 Fed. Reg. 66626](#) (October 29, 2015)) requiring that credit unions to take certain risks and to hold capital commensurate with those risks, to take effect on January 1, 2021.

Title VIII would pertain to export controls, and would determine the President’s authority to control the export, reexport, and transfer of items subject to the jurisdiction of the United States, whether by United States persons or by foreign persons; and the activities of United States persons, wherever located, relating to specific nuclear explosive devices; missiles; chemical or biological weapons; whole plants for chemical weapons precursors; foreign maritime nuclear projects; and foreign military intelligence services. The President would regulate the export, reexport, and transfer of these items; secure the cooperation of other governments and multilateral organizations to impose control systems; maintain the leadership of the United States in science, engineering, technology research and development, manufacturing, and foundational technology that is essential to innovation; protect United States technological advances by prohibiting unauthorized technology transfers to foreign persons in the United States or outside the United States, particularly with respect to countries that may pose a significant threat to the national security of the United States; strengthen the United States industrial base, both with respect to current and future defense requirements; and enforce the controls through means such as regulations, requirements for compliance, lists of controlled items, lists of foreign persons who threaten the national security or foreign policy of the United States, and guidance in a form that facilitates compliance by United States persons and foreign persons, in particular academic institutions, scientific and research establishments, and small- and medium-sized businesses.

The President would be authorized to impose controls over the export, reexport, or transfer of items without regard to the nature of the underlying transaction or any circumstances pertaining to the activity, including whether such export, reexport, or transfer occurs pursuant to a purchase order or other contract requirement, voluntary decision, intercompany arrangement, marketing effort, or during a joint venture, joint development agreement, or similar collaborative agreement.

The President, the Secretary of Commerce, in consultation with the Secretary of State, the Secretary of Defense, the Secretary of Energy, and the heads of other Federal agencies, would be required to establish and maintain a list of items that are controlled; establish and maintain a list of foreign persons and end-uses that are determined to be a threat to the national security and foreign policy of the United States; prohibit unauthorized exports, reexports, and transfers of controlled items, including to foreign persons in the United States or outside the United States; restrict exports, reexports, and transfers of any controlled items; require licenses or other authorizations, as appropriate, for exports, reexports, and transfers of controlled items; establish a process for an assessment to determine whether a foreign item is comparable in quality to a controlled item; require measures for compliance with the established export controls; as well as other specified authorities.

A license would be required for the export, reexport, or transfer of controlled items to a country if the Secretary of State has determined that the government of such country has repeatedly provided support for acts of international terrorism; and the export, reexport, or transfer of such items could make a significant contribution to the military potential of such country, including its military logistics capability, or could enhance the ability of the country to support acts of international terrorism. If a license is granted, both Secretaries would be required to notify Congress. The bill would further impose restrictions and procedures for authorizing the export or transfer of controlled items.

The Secretary of Commerce may inform United States persons that a license from the Bureau of Industry and Security of the Department of Commerce is required to engage in any activity if the activity involves the types of movement, service, or support the design, development, production, use, operation, installation, maintenance, repair, overhaul, or refurbishing of nuclear explosive devices; missiles; chemical or biological weapons; whole plants for chemical weapons precursors; and foreign maritime nuclear projects that would pose a risk to the national security or foreign policy of the United States.

The President may authorize the Secretary of Commerce to establish a system to provide United States persons with assistance in complying with specified controls, which may include a mechanism for providing information, in classified form as appropriate, who are potential customers, suppliers, or business partners. The President may issue appropriate security clearances to persons who are responsible for complying with controls. The President would also be directed to develop and submit to Congress a plan to assist small- and medium-sized United States in export licensing and other processes. The President shall establish, lead a regular, ongoing interagency process to identify emerging and foundational technologies that are essential to the national security of the United States; and are not critical technologies. The Secretary of Commerce would be mandated to establish appropriate controls on the export, reexport, or transfer of certain controlled technology; and specify the level of control to apply with respect to the export of technology.

The Secretary of States shall propose to the relevant multilateral export control regimes in the following year that a technology identified through the interagency process be added to the list of technology controlled by such regimes.

The bill would impose penalties on a person who violates, attempts to violate, conspires to violate, or cause a violation of any regulation, order, license, or other authorization in the title. A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids and abets in the commission of, an unlawful act would be fined not more than \$1,000,000; and in the case of the individual, would be imprisoned for not more than 20 years, or both. The bill would additionally impose civil penalties, and criminal forfeiture of property interest and proceeds. The Secretary of

Commerce, on behalf of the President would exercise, in addition to relevant enforcement authorities of other Federal agencies, the authority to issue orders and guidelines; require, inspect, and obtain books, records, and any other information from any person subject to the provisions; administer oaths or affirmations and by subpoena require any person to appear and testify or to appear and produce books, records, and other writings, or both; conduct investigations; as well as other authorities. Any tangible items seized by designated officers or employees would be subject to forfeiture to the United States in accordance with applicable law, except that property seized shall be returned if the property owner is not found guilty of a civil or criminal violation.

The President shall review and evaluate the interagency export license referral, review, and escalation processes for dual-use items and munitions under the licensing jurisdiction of the Department of Commerce or any other Federal agency, as appropriate, to determine whether current practices and procedures are consistent with established national security and foreign policy objectives.

The President shall submit to Congress a report on the implementation of the bill during the preceding fiscal year by December 31 of each year. The report would include a review of the effect of controls on exports, reexports, and transfers of items in addressing threats to the national security or foreign policy of the United States, including a description of licensing processing times; the impact of such controls on the scientific and technological leadership of the United States; as well as other items.

H.R. 5841 would include the Anti-Boycott Act of 2018 declaring that it is the policy of the United States to oppose restrictive trade practices or boycotts fostered or imposed by any foreign country against other countries friendly to the United States or against any United States person; to encourage and, in specified cases, require United States persons engaged in the export of goods or technology or other information to refuse to take actions, including furnishing information or entering into or implementing agreements, which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against a country friendly to the United States or any United States person; and to foster international cooperation and the development of international rules and institutions to assure reasonable access to world supplies.

The President shall issue regulations prohibiting any United States person, with respect to that person's activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by any foreign country, against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation: refusing, or requiring any other person to refuse, to do business with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, pursuant to an agreement with, a requirement of, or a request from or on behalf of the boycotting country; refusing, or requiring any other person to refuse, to employ or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person or of any owner, officer, director, or employee of such person; furnishing information with respect to the race, religion, sex, or national origin of any United States person or of any owner, officer, director, or employee of such person; as well as other measures. The bill would provide a series of exceptions. The bill would further impose criminal penalties to those who violate measures in the section to include a fine not more than \$1,000,000; or imprisonment for not more than 20 years, or both. The bill would additionally impose civil penalties.

The bill would direct the President to impose sanctions if a person has violated the [Arms Export Control Act](#) to include the transfer of missile equipment or technology under the [Missile Technology Control Regime](#); as well as against efforts by any foreign country, project, or entity to use, develop, produce, stockpile, or otherwise acquire chemical or biological weapons.

The President would be granted the authority to appoint, by and with the advice and consent of the Senate, an Under Secretary of Commerce for Industry and Security who would carry out all the functions of the Secretary of Commerce that relate to the implementation of the dual-use export system.

COMMITTEE ACTION:

H.R. 5841 was introduced on May 16, 2018, and was referred to the House Committee on Financial Services, the House Committee on Foreign Affairs, the House Committee on Energy and Commerce, the House Intelligence (Permanent Select) Committee, and the House Oversight and Government Reform. On [May 22, 2018](#), the bill was ordered to be reported (amended) by the yeas and nays: [53-0](#) by the House Committee on Financial Services.

ADMINISTRATION POSITION:

A Statement of Administration Policy is not available.

On January 24, 2018, the White House [issued a release](#) stating: “Tomorrow, the U.S. Senate Committee on Banking, Housing, and Urban Affairs is scheduled to hold a hearing entitled “CFIUS Reform: Administration Perspectives on the Essential Elements.” The Administration supports House and Senate passage of S. 2098/H.R. 4311, the Foreign Investment Risk Review Modernization Act (FIRRMA). Modernizing the Committee on Foreign Investment in the United States (CFIUS) in line with FIRRMA would achieve the twin aims of protecting national security and preserving the longstanding United States open investment policy.”

CONSTITUTIONAL AUTHORITY:

According to the sponsor: “Congress has the power to enact this legislation pursuant to the following: Article I, Section 8: to regulate commerce with foreign nations.”

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