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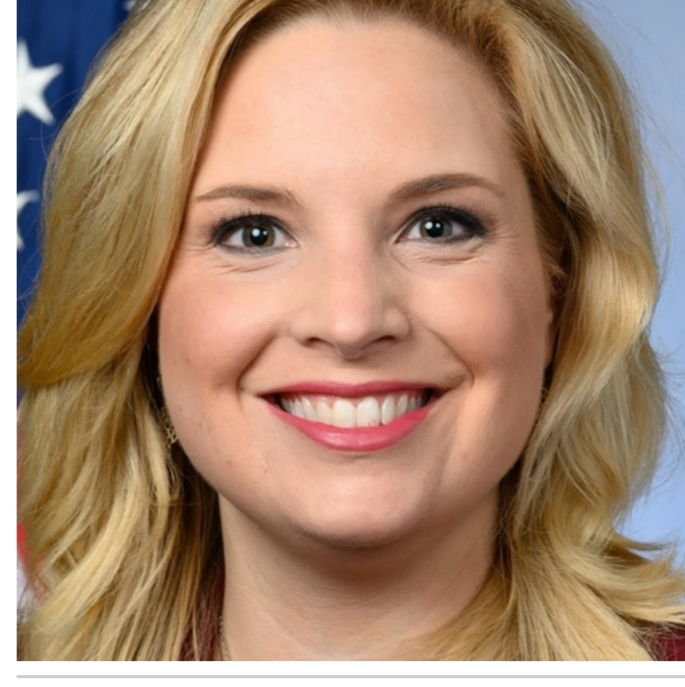
Bill wants CFIUS to presume “non-resolvability” in certain transactions

Congressional proposals related to CFIUS oversight of agriculture and land are not new: We count [ten bills](#) floated in the last few years alone. But the latest bill includes an interesting twist: It wants to establish a “presumption of non-resolvability” by CFIUS related to real estate transactions by foreign adversaries near sensitive sites. In other words, the Committee would have to assume that any national security concerns cannot be resolved.

WHAT HAPPENED

Last week, Rep. Mike Thompson (D-California), Rep. Mike Gallagher (R-Wisconsin), and several other Congressional leaders proposed bipartisan legislation known as [The Protecting U.S. Farmland and Sensitive Sites From Foreign Adversaries Act](#), which – if passed – would have a significant impact on CFIUS decision making and jurisdiction.

According to Rep. Gallagher, who serves as Chairman of the Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party, the bill would expand CFIUS jurisdiction over “foreign adversary real estate transactions,” and “encourages CFIUS to consider food security issues as it evaluates the national security risk of a given transaction.”



U.S. Rep. Ashley Hinson (R-Iowa) helped introduce the legislation, which would give CFIUS jurisdiction over all land purchases by “foreign adversary entities,” and require mandatory CFIUS filings when those entities make land purchases near sensitive sites, including all military facilities.

KEY PROVISIONS

The Protecting U.S. Farmland and Sensitive Sites From Foreign Adversaries Act has several key provisions:

- **JURISDICTION** – In an effort to avoid another [Fufeng jurisdictional issue](#), the proposed bill would give CFIUS jurisdiction over all land purchases – with exceptions for real estate in urban areas and single housing units – by “foreign adversary entities” (basically, entities from China, Russia, Cuba, Iran, North Korea, and Venezuela).
- **PRIORITIZE FOOD** – The bill would authorize CFIUS to consider U.S. food security, including via biotechnology acquisition, as a factor in its national security reviews, and require the Secretary of Agriculture have a vote in CFIUS reviews of transactions that involve farmland or agriculture technology (we’ve seen this before; see “Context,” below).
- **NON-RESOLVABILITY** – Perhaps most importantly, the bill would establish a “presumption of non-resolvability” by CFIUS that “raises the approval threshold for CFIUS transactions by a foreign adversary entity purchasing near sensitive sites,” such as major military sites and intelligence facilities. According to a release from Rep. Gallagher’s office, this means that CFIUS would “be required to review these transactions with the presumption that the national security concerns cannot be resolved.”
- **MANDATORY FILINGS** – The bill would require mandatory CFIUS filings for foreign adversary entities making land purchases near sensitive sites.
- **EXPAND NUMBER OF SITES** – The bill would expand the list of sensitive national security sites designated for CFIUS jurisdiction. This would include all military facilities, certain intelligence sites, national laboratories, defense-funded university research centers, critical telecommunication nodes, and more.

NON-RESOLVABILITY?

The “non-resolvability” provision outlined above might be a first-ever in the federal government; according to experts, there is no federal legislation in the United States that explicitly includes a “non-resolvability” presumption related to national security.

As such, the provision would “stand the [CFIUS] process on its head,” says Stroock & Stroock partner Chris Griner. “Effectively, it would begin at the end,” he says, “and put the petitioners in the position of proving a negative.” Under those circumstances, Griner says, it’s “hard to imagine a target investor going forward with a transaction where disapproval is all but guaranteed.”

Under current law, says Winston & Strawn partner Tyler McGaughey, CFIUS reviews each transaction on a case-by-case basis. “There are no presumptions,” he says. “If a CFIUS member agency wants to block or mitigate a transaction, including a real estate transaction involving Chinese entities, the member agency must draft a risk-based analysis that sets forth ‘credible evidence’ explaining why the particular transaction under review presents a risk to U.S. national security.”



Stroock & Stroock partner Chris Griner says the non-resolvability presumption in the proposed legislation would “stand the [CFIUS] process on its head.”

According to McGaughey, who previously served as Deputy Assistant Secretary for Investment Security at Treasury, this is already a lenient standard. “There is no standard of proof set forth in the statute or regulations,” he says. In other words, says McGaughey, a member agency doesn’t need to show by a “preponderance of the evidence, or clear and convincing evidence,” that a transaction will give rise to a national security risk. “The member agency must simply point to ‘credible evidence’ that a national security risk will ‘reasonably result’ from a transaction,” he says.

For those reasons, McGaughey echoes Griner’s comments that the bill could significantly curtail investments if CFIUS disapproval is the operating assumption. “The bill doesn’t say that it’s banning Chinese real estate transactions,” says McGaughey, “but that’s what it’s doing.” That’s because, if a transaction involves a Chinese entity purchasing real estate near a military base or other location, “the Committee will presume that the transaction creates a risk to U.S. national security and prohibit the transaction.” According to McGaughey, “no member agency is going to dedicate time and resources to prove by clear and convincing evidence that a particular Chinese real estate transaction does not present a risk to U.S. national security.” [See section below titled Additional Provisions for more information on the ‘clear and convincing evidence’ standard referenced by McGaughey.]

While Griner at Stroock says that concerns regarding foreign land purchases near sensitive government facilities may indeed be merited, he says that the U.S. government would start down a “proverbial slippery slope when the deliberative process is short-circuited by statutory presumptions of ‘non-resolvability.’” Once the precedent is set for statutory presumptions of non-resolvability, he says, “there may be great temptation to expand the number of ‘non-resolvable’ transactions – with unintended consequences yet to be understood.”

McGaughey at Winston & Strawn adds that the proposed legislation may be at odds with other federal policies, such as the U.S. open investment policy, which generally allows foreign investment to the extent that doing so is consistent with U.S. national security. “The proposed bill, which would prohibit foreign investment even in circumstances where a member agency doesn’t have ‘credible evidence’ of a national security risk, does not appear consistent with the open investment policy,” he says.

ADDITIONAL PROVISIONS

Three other quick notes:

First, in addition to the presumption of non-resolvability, the bill would create a new category of “elevated risk real estate transactions,” for which the onus is on CFIUS to prove “by clear and convincing evidence” that the transaction is not a risk to national security. That determination would have to be delivered to the China Select Committee and two Agriculture-related committees explaining why.

Second, experts say the expansion of “sensitive sites” outlined in the bill is quite profound, and covers an array of laboratories and private locations that are not U.S. government property. According to the bill, sensitive sites would also include federally funded R&D centers, university research centers affiliated with the Department of Defense, airports, telecom facilities, electric power plants, and more (including certain air space managed by the DoD). “I haven’t dug into this yet, but this could be interpreted as a very significant expansion of CFIUS jurisdiction,” said one former Treasury staffer, “significantly expanding the number of locations the Committee would need to map and consider.”

Interestingly, the proposed bill’s provisions regarding food, biotech and agriculture (second bullet, above) may actually be the softest part of the legislation, as these concepts have either been proposed previously, or they duplicate existing provisions. For example, the Agriculture and Food sectors are already covered under the Homeland Security Act. That Act identified 17 sectors of the economy that were “critical infrastructure/key resources” (cryptically known as CI/KR), and assigned primary responsibility for those sectors to various “Sector-Specific Agencies,” most of which were federal departments. “Food and Agriculture” was one of those sectors.

In addition, biotech is already on the Biden Administration’s updated list of [Critical and Emerging Technologies](#) that are “of particular importance to the national security of the United States.”

Furthermore, CFIUS can already designate the U.S. Department of Agriculture to be part of CFIUS reviews. “Agriculture is already included in relevant reviews whenever warranted,” said one former Treasury official in our prior coverage of this topic. Also, as was reemphasized in a recent Q&A about [CFIUS “co-leads”](#), the Secretary of Agriculture can be brought in as a co-lead for relevant cases.

MORE INFORMATION

The [full text](#) of the proposed legislation is available; if you have any thoughts on this proposal, please contact us at editor@foreigninvestmentwatch.com.

Our extensive coverage of [Agriculture and Land](#) matters is also available.

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Tyler McGaughey, also quoted above, can be reached at tmcgaughey@winston.com.

Policy Note: *This article uses an anonymous source. Since many of our sources are former government officials, or are involved in transactions under CFIUS’s jurisdiction, it is not uncommon that sources ask Foreign Investment Watch to withhold their names from publication. Our policy is to honor those requests when (a) the information involves policy developments of significant interest; (b) the information can be independently verified; and (c) the information does not regard a particular individual.*



Rep. Ed Case (D-Hawaii) said the bill would help “close the gaps in our oversight of foreign purchases and their use of agricultural land, especially near our military bases and training sites.” According to Case, this would help ensure that CFIUS “can fully assess investments that can compromise our security and intelligence sites.”

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