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Proposed Legislation Seeks to Further Expand CFIUS to Address National Security Threats to Agriculture

17 August 2020

On July 21, 2020, Senators Thom Tillis (R-NC) and Jim Inhofe (R-OK) introduced the [Agricultural Security Risk Review Act](#), which would add the U.S. Department of Agriculture (“USDA”) Secretary as the newest permanent member of the Committee on Foreign Investment in the United States (“CFIUS”). Representatives Frank Lucas (R-OK) and Marcia Fudge (D-OH) introduced the House’s [version](#) on April 17, 2020. CFIUS currently consists of nine permanent members, chaired by the Secretary of the Treasury and includes the Attorney General (representing the Department of Justice), the Director of the Office of Science and Technology Policy, the Secretaries of Commerce, Defense, Energy, Homeland Security, and State, and the U.S. Trade Representative.

These proposed bills demonstrate Congress’ continued bipartisan interest in further protecting the U.S. food supply and agricultural industry from perceived threats to U.S. national security arising from foreign investment in food and agricultural businesses. While CFIUS already possesses the legal authority to review foreign investment in the food and agricultural sectors, the bills’ sponsors believe that CFIUS currently lacks sufficient agricultural expertise to review such transactions effectively, and thereby ensure the safety and resiliency of the U.S. food supply.

We summarize below five key things to know about the proposed bills.

1. **This is not the first time that members of Congress have considered adding USDA to CFIUS.** This proposal should sound familiar and Congressional concern over foreign investment in agricultural transactions is neither random nor new.¹ In the wake of several high-profile foreign investments in U.S. agricultural companies, Senators Debbie Stabenow (D-MI) and Chuck Grassley (R-IA)

introduced a bill in 2017, the [Food Security is National Security Act](#), to add the USDA and U.S. Department of Health and Human Services (“HHS”) to CFIUS. That bill also sought an express direction for CFIUS to consider U.S. food and agriculture systems when determining whether to approve foreign investment in U.S. companies. While the Food Security is National Security Act died quietly in committee as calls for broader CFIUS reform grew louder, CFIUS’ active and contentious reviews of several high-profile agricultural acquisitions demonstrate that CFIUS is not reluctant to review and address the national security aspects of foreign investment into U.S. food and agricultural companies. It is interesting to consider whether each of these deals, which CFIUS approved, would receive similar treatment in today’s political environment, but having the USDA as an experienced permanent member could increase its leverage within CFIUS deliberations.

2. **Adding the USDA as a member agency of CFIUS would likely not impact CFIUS’ review for most cases.** Adding the USDA to CFIUS may be a largely symbolic change, the burdens of which may outweigh any perceived benefits. As a matter of day-to-day practice, CFIUS invites non-member agencies to participate in the review of any transaction that implicates their respective equities. Thus, agencies like the USDA, NASA, EPA, etc., have historically participated in CFIUS reviews where appropriate. In our experience, this process has worked reasonably well for decades. Conversely, forcing non-member agencies like the USDA to participate in CFIUS as a full-time member could be burdensome in light of the many transactions CFIUS reviews each year and how few of those actually touch upon agricultural issues. Each permanent CFIUS member must maintain their own dedicated CFIUS staff with national security risk assessment expertise and applicable national security clearances; adding the USDA to CFIUS as a permanent member agency would require it to do the same. For a comparison, the Department of Justice’s [Budget Request for FY 2020](#) for its CFIUS operations included \$5 million and 21 positions, which is increased from the current \$3.7 million and 13 positions that are dedicated to CFIUS-related functions. Presumably, this is why Congress considered and rejected these changes as part of the fulsome debate that culminated with the much broader CFIUS reforms effectuated by the [Foreign Investment Risk Review Modernization Act](#) (“FIRRMA”), which was enacted on August 13, 2018. Notably, FIRRMA did not expand CFIUS’ agency membership at all.

3. **It remains unclear whether the bills will pass.** The Agricultural Security Risk Review Act may well meet the same fate as the preceding Food Security is National Security Act. While CFIUS reform proposals are relatively common, they

are rarely successful. Before FIRRMA, it had been more than a decade since the last successful reform. One of the reasons that FIRRMA garnered such sweeping bipartisan Congressional support (i.e., the Senate approved it with a vote of 85-10 and the House approved it with a vote of 400-2) is attributable to the close and detailed involvement of CFIUS in the drafting process. This involvement helped convince Congress to remove certain aspects of the initially proposed reforms that would have been overly burdensome or not sufficiently beneficial. We suspect that neither CFIUS nor the USDA is advocating that the addition of the USDA is either necessary or beneficial. If true, this would limit the bill's prospects for passage.

4. Irrespective of whether the bills become law, agriculture deals are clearly on CFIUS' – and Congress' – radar. Should the bills pass and the Department of Agriculture become a permanent member of CFIUS, the Committee would be better equipped to identify non-notified agriculture transactions, which might present national security concerns. Therefore, the bills' success could have important practical impacts on how transaction parties assess and execute agriculture transactions.

- First, it would alter the risk calculation that transaction parties must make to determine whether to submit a transaction voluntarily for CFIUS review. Transaction parties would need to weigh and assess more explicitly any direct or indirect nexus that their transactions have to the U.S. agriculture sector.
- Second, as a permanent member of CFIUS, the USDA would be responsible for monitoring non-notified transactions that have an agricultural nexus, and such transactions would face an increased risk of post-closing CFIUS inquiries and potential adverse action. This, in turn, likely would drive transacting parties to file more agricultural-related transactions each year for CFIUS review. This is essentially what happened when Congress added the last permanent member, the Department of Energy ("DOE"), in 2007. Before DOE joined CFIUS, an energy-related transaction involving foreign investment would need to pose an extraordinary fact pattern (e.g., in scope and scale) for CFIUS to raise a potential national security concern. Now, 13 years later, energy transactions involving foreign investment are themselves a potential red flag for CFIUS concerns that warrant a much deeper analysis to determine whether a voluntary filing is warranted. We would anticipate a similar impact from the addition of the USDA, or any new permanent member.

5. The bills echo concerns raised by non-U.S. national security regulators.

Other countries are increasingly scrutinizing inbound foreign investment in agricultural and food businesses. For example, France recently modified its list of “strategic sectors” subject to foreign investment reviews to include companies engaged in certain activities that contribute to national food supply security. We anticipate that countries will continue to pay close attention to foreign investment in companies operating in the agricultural sector in connection with responding to COVID-19 concerns.

1. The USDA also has been tracking foreign investment in agricultural land independently of CFIUS for decades. The Agricultural Foreign Investment Disclosure Act of 1978 and its associated regulations require foreign investors who acquire, transfer or hold an interest in U.S. agricultural land to report such holdings and transactions to the USDA so it can monitor the effect of such holdings on family farms and rural communities. ↩

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