

DeLauro Bill Would Dramatically Broaden CFIUS Reviews to Include “Net Benefit” Test

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Congresswoman Rosa DeLauro (D-CT) has introduced legislation that would significantly broaden the mandate of the Committee on Foreign Investment in the United States (CFIUS). Under current U.S. law, CFIUS reviews transactions narrowly for potential national security considerations. The proposed legislation, the “Foreign Investment and Economic Security Act of 2014” (HR 5581), would require a “net benefit” analysis conducted by the U.S. Departments of Commerce, Justice, Labor, and Treasury and the United States Trade Representative of any covered transaction that meets the Hart-Scott-Rodino threshold for review of mergers and acquisitions. The bill would also expand the coverage of CFIUS reviews to include “any construction of a new facility in the United States” by a foreign person.

The net benefit analysis mandated by the bill would consider a broad array of factors related to economic effects, legal and political compatibility, and public health and safety implications of foreign investments. Economically, the analysis would consider, among other factors, “the effect of the proposed or pending transaction on productivity, industrial efficiency, technological development, technology transfers, and product innovation in the United States.” The bill would also require consideration of “the compatibility of the proposed transaction with national industrial, economic, and cultural policies.”

Notably, the bill also includes language targeted at “foreign government-influenced transactions.” For such investments, the bill would require an analysis of the nature of the foreign government’s influence over and support for the industry involved in the transaction and whether the foreign person is likely to operate on a commercial

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basis. Congresswoman DeLauro, a vocal critic of the acquisition of Smithfield Foods by the Chinese company Shuanghui, has also included language that appears to be aimed at Chinese transactions in particular. For example, the bill would require consideration of whether the foreign person is from a country whose government “has adequately engaged with the Securities and Exchange Commission and the Public Company Accounting Oversight Board,” an area of ongoing contention between the United States and China.

While the bill introduces noteworthy political issues that are unaddressed under the current U.S. CFIUS regime, the ‘net benefit’ test could potentially run afoul of World Trade Organization obligations. Further, given the late date of the bill’s introduction, there is little opportunity for its consideration. However, it may set a marker for future political discussion on changes to the current U.S. investment review process.