



National Security, International Transactions, Technology, and Terminology

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Eakinomics: National Security, International Transactions, Technology, and Terminology

What do CFIUS, EAR, ECRA, and FIRRMA have in common? All are part of the alphabet soup regarding the intersection of national security and international transactions. As nicely [laid out](#) by AAF's Jackie Varas, rising concern over the global economic behavior of China, in particular, has prompted a wave of reform discussions.

It would seem unwise, for example, to permit a company from China — or Russia, or any foreign power — to take control of those companies that manufacture the means by which the United States defends itself. That is pretty straightforward. But should we permit foreign control of a firm that has only slight business with the Defense Department? Where should the line be drawn? In practice, the line is drawn by the Committee on Foreign Investment in the United States (CFIUS). CFIUS is an interagency committee headed by the Secretary of Treasury that is tasked with reviewing foreign mergers, acquisitions, and other foreign investments through the lens of preserving national security. The committee is made up of the heads of eight government agencies, including the Departments of Justice, Homeland Security, Defense, and Commerce.

Specifically, CFIUS is authorized to review “covered transactions” – any transaction between U.S. and foreign companies that results in the foreign company having a controlling interest. Firms are encouraged to undertake a CFIUS review voluntarily. If they do not, CFIUS could examine the transaction at any time — even years after the fact — and force it to be unwound. CFIUS reviews are not “all or nothing”; it is quite possible for CFIUS to ask for a division to be spun off or otherwise to insulate the transaction from national security concerns.

But what happens if a Chinese firm takes a minority stake — not a controlling interest — in a U.S. firm simply to gain access to a critical technology? This, among other issues, has prompted Senator John Cornyn and Congressman Robert Pittenger to introduce Foreign Investment Risk Review Modernization Act ([FIRRMA](#)), a [reform](#) of the CFIUS process that would include the review of foreign investments that have national security implications but do not involve generating a controlling interest or ownership.

Still, couldn't the Chinese instead enter into a joint venture with the same U.S. firm in China, and gain access to the technology in that way? Yes — and that example makes it clear that in some cases the national security issue is about the technology and not a particular financial transaction. Those kinds of concerns are familiar from the risks of nuclear proliferation and the efforts to prevent weapons technologies from falling into the hands of U.S. enemies. Traditionally, these issues are the domain of export controls. The U.S. Department of Commerce administers the Export Administration Regulations (EAR), which control exports, re-exports, and in-country transfers of commercial, dual-use, and certain military-related technology. Any transaction that has the potential of allowing that technology to be transferred is controlled. Corresponding to the CFIUS reform debate has been a proposed reform to the EAR: the Export Control Reform Act (ECRA), intended to strengthen the capacity of the federal government to control the transfer of valuable U.S. technologies.

The trick is to get the balance right between those activities for which CFIUS will be responsible, and those for which the export control regime (EAR) is the most effective control. Simultaneously, it is important that neither reform overreach and use national security as a pretext for damaging economic protectionism that undercuts valuable competitive pressure and international contributions to U.S. growth. Accordingly, these are among the most important legislative agenda items for 2018.