

New Bill Would Allow CFIUS to Scrutinize Gifts to Higher Education

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Senators Bob Menendez (D-NJ) and Jim Risch (R-ID) recently introduced bipartisan legislation that would further expand the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS or the Committee) to allow the Committee to review transactions involving foreign gifts and contracts with institutions of higher education. The proposal is part of the Strategic Competition Act of 2021, which includes a number of legislative and policy initiatives aimed at curtailing China's global influence more broadly and "assuring that the United States is positioned to compete with China across all dimensions of national and international power." While the bill is likely to undergo significant changes as it moves through the Senate, the CFIUS provisions highlight Congress's continuing interest in leveraging the powerful national security panel to further limit China's access to sensitive U.S. technologies.

The bill would expand the definition of "covered transactions" subject to CFIUS review to include any gift to an institution of higher education from a foreign person, or the entry into a contract by an institution of higher education with a foreign person, if the value of the gift or contract exceeds \$1,000,000 (whether individually or in the aggregate over a two-year period) and the gift or contract either (1) relates to research, development, or production of critical technologies and provides the foreign person with potential access to material nonpublic technical information, or (2) is a restricted or conditional gift or contract that "establishes control."^[1] If CFIUS were to determine that such a foreign gift or contract could threaten to impair U.S. national security, the Committee could impose mitigation or other conditions on the transaction or could recommend that the President suspend or prohibit the transaction altogether.

Authors

Daniel P. Brooks
Partner
202.719.4183
dbrooks@wiley.law

Nova J. Daly
Senior Public Policy Advisor
202.719.3282
ndaly@wiley.law

Practice Areas

Committee on Foreign Investment in the United States (CFIUS)
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Foreign gifts and contracts involving critical technologies with potential foreign access to material nonpublic technical information would be subject to a mandatory CFIUS filing requirement, meaning that parties could become subject to civil penalties for failing to notify the Committee in advance. The new provisions would initially be implemented through a pilot program to allow the Committee to “assess methods for implementing the review of covered transactions” involving foreign gifts and contracts with institutions of higher education. The bill would require CFIUS to include in its annual report to Congress “an evaluation of whether there are foreign malign influence or espionage activities directed or directly assisted by foreign governments against institutions of higher education . . . aimed at obtaining research and development methods or secrets related to critical technologies.” The bill would also require institutions of higher education to file disclosure reports regarding foreign gifts or contracts under Section 117(a) of the Higher Education Act of 1965 with CFIUS in addition to the Secretary of Education.

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Wiley has an unparalleled CFIUS and national security practice that draws on senior government-level experience with CFIUS member agencies and numerous representations of domestic and international companies in complex transactions involving nearly every industry sector subject to CFIUS review. Should you have any questions regarding the Strategic Competition Act of 2021, please contact one of the authors listed on this alert.

[1] A “restricted or conditional gift or contract,” as defined under the Higher Education Act of 1965, refers to any gift that includes provisions regarding the employment, assignment, or termination of faculty; the establishment of departments, centers, research or lecture programs, or new faculty positions; the selection or admission of students; or the award of grants, loans, scholarships, fellowships, or other forms of financial aid restricted to students of a specified country, religion, sex, ethnic origin, or political opinion. The bill would direct CFIUS to publish guidance on the meaning of “control” in the context of covered transactions involving restricted or conditional gifts or contracts.