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Despite Setbacks, Strong Support Remains for "Outbound CFIUS" Legislation in the U.S.

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Efforts by a bipartisan group of U.S. lawmakers to establish a national security screening mechanism for investment in "countries of concern" (including the People's Republic of China) were dealt a significant blow recently, as the Senate negotiators failed to include the National Critical Capabilities Defense Act of 2022 ("NCCDA") in a slimmed-down legislative package aimed at providing subsidies for U.S. semiconductor manufacturing and bolstering U.S. competition with China. That compromise package was just passed by the full Senate and sent to the House of Representatives, where Speaker Nancy Pelosi (D-San Francisco) has indicated that she will quickly bring it to a vote.

Despite this setback, the screening mechanism, dubbed "Outbound CFIUS," has attracted strong bipartisan support in both houses and the White House, including an endorsement by National Security Advisor Jake Sullivan, who noted in recent [remarks](#) that the Biden Administration is "looking at the impact of outbound U.S. investment flows that could circumvent the spirit of export controls or otherwise enhance the technological capacity of our competitors in ways that harm our national security." Additional opportunities remain in the current Congress to attach the NCCDA to "must-pass" legislation such as the annual National Defense Authorization Act, so we believe that prospects for its enactment in some form are by no means dead.

Significant opposition by the U.S. business community and by Senator Pat Toomey (R-Pennsylvania), the ranking member of the Senate Banking Committee, likely influenced the decision of Senate Majority Leader Charles Schumer (D-New York) to advance the semiconductor package without the NCCDA. That opposition focused on the sweeping nature of the proposed review mechanism, which would establish a new inter-agency body, much like the current Committee on Foreign Investment in the United States ("CFIUS"), with broad powers to block or mitigate a variety of outbound investment and technology arrangements. According to a [statement](#) by Senator Toomey at a recent hearing on U.S. export controls, "It is not an overstatement to suggest that hundreds of thousands of U.S. companies and tens, if not hundreds, of billions of dollars in commerce could be impacted by outbound CFIUS. . . . Doing outbound CFIUS, and getting it wrong, could impede the national security agencies—such as BIS or CFIUS—that are already doing important work on China. Getting it wrong could also severely harm the United States."

The global supply chain crisis caused by the COVID-19 pandemic underscored the United States' reliance on foreign suppliers for critical products, such as medical supplies and drug ingredients. The proposed outbound investment screening mechanism was proposed as a tool to safeguard U.S. supply chains and to boost America's competitiveness.

An initial version of the outbound review bill, the NCCDA of 2021, was incorporated into the America COMPETES Act, passed by the House of Representatives, but was omitted from Senate's counterpart legislation, eventually called the U.S. Innovation and Competition Act (the "ICA"). In June 2022, proponents agreed to narrow the provisions to address initial concerns of U.S. business interests, and with a strong push by the Biden Administration, the effort to reinstate the bill in the ICA gained steam. However, this revived version, the NCCDA of 2022, ultimately failed to make the final cut. Like its predecessor, the NCCDA of 2022 would establish a Committee on National Critical Capabilities ("CNCC") empowered to review certain covered outbound transactions and activities with the potential to provide "national critical capabilities" to "countries of concern," initially defined to include China, Russia, Iran, North Korea, Cuba, and Venezuela. The term "national critical capabilities" would cover a variety of industries, including semiconductor manufacturing materials, large-capacity batteries, critical minerals, pharmaceuticals, and active pharmaceutical ingredients as well as critical and emerging technologies such as artificial intelligence and quantum technology. The legislation would also give the U.S. President authority to add other industries to the list of national critical capabilities based on the significance of such industry to national security.

"Covered activity" subject to reporting and review would include a spectrum of transactions, including any activity that:

- builds, develops, produces, manufactures, fabricates, refurbishes, expands, shifts, services, manages, operates, utilizes, sells, or relocates a national critical capability to or in a country of concern;
- shares, discloses, contributes, transfers, or licenses to an entity of concern any design, technology, intellectual property, or knowhow, including through open-source technology platforms or research and development, that supports, contributes to, or enables a national critical capability by an entity of concern or in a country of concern; or
- invests in, provides capital to, or consults for, or gives any guidance, related to enhancing the capabilities or facilitating access to financial resources for a national critical capability for an entity of concern or a country of concern.

The CNCC would function as a counterpart to CFIUS, which screens inbound investments into the United States. Parties engaging in covered activity would be required to notify the CNCC at least 45 days before undertaking the activity. In addition, the CNCC would be empowered to review covered activities on its own accord. If the CNCC determined that a covered activity poses an unacceptable risk to a national critical capability, the CNCC could impose mitigation measures, or make a recommendation to the U.S. President to mitigate, prohibit, or suspend the activity.

Because the momentum in the United States behind establishing an outbound investment screening mechanism remains strong, companies would be well advised to consider whether planned transactions might ultimately become subject to this authority. Of particular concern should be the significant number of undefined and unresolved questions raised by the current version of the NCCDA, including:

1. The draft legislation requires a 45-day written notice prior to engaging in a "covered activity," but the definition of "covered activity" includes both proposed and ongoing activities, and it is unclear whether or how activities that are commenced before the effective date but "ongoing" after that date would be treated.

2. The draft legislation would exclude from reporting certain “ordinary business transactions” such as the sale or license of finished items and products or other similar activities that would not lead to a country of concern’s access to critical capabilities. However, the distinction between the license of IP and the license of a finished item can be ambiguous in practice, especially for certain technology-intensive products.
3. The draft legislation defines an “entity of concern” as any entity influenced by or affiliated, directly or indirectly, with a country of concern. This broad definition could provide significant discretion to the CNCC with respect to the entities that fall under its jurisdiction, and conceivably could reach transactions with companies not located in a “country of concern.” And what precisely is meant by the term “entity influenced by . . . a country of concern” is not at all clear.
4. The draft legislation calls for multilateral coordination with U.S.-allied countries to develop similar mechanisms to address covered activities with countries of concern, just as the United States sought to persuade allies to adopt CFIUS-like inbound investment controls, an effort that is bearing fruit with the recent proliferation of “foreign direct investment” screening mechanisms in the EU and other major economies. It remains to be seen whether these allies will also adopt outbound investment screening procedures, and if so, to what extent such a multilateral action would affect global and regional business activities.

For now, “Outbound CFIUS” is not moving forward in the U.S. Congress, but in the current political climate in the United States, the broad bilateral and White House support for the NCCDA of 2022 could see the measure revived for a third time.



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