Congress Reportedly Advances Broad Proposal for Outbound Screening of US Investments in Identified Countries of Concern, Including China

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Bipartisan, bicameral support is mounting for legislation that would create a mandatory outbound investment screening regime to review U.S. investments in China and other countries identified by Congress as countries of concern to the United States. The proposed outbound screening regime would aim to protect U.S. supply chains and ensure that countries of concern are not able to leverage U.S. technology and capital to enhance their capabilities in key industries and business sectors. The current draft legislation specifically directs the establishment of an interagency federal committee, the Committee on National Critical Capabilities (CNCC), to screen certain overseas investments, information sharing, partnering and offshoring of capabilities by U.S. individuals and firms in relation to countries of concern (including both China and Russia). Quietly released on June 13, 2022, the legislation has not yet been introduced in Congress, and significant revisions remain highly likely given the draft legislation's potential impact on numerous sectors within the U.S. business and investment community as well as the continued debate within the executive branch as to how such authority should be implemented. Nonetheless, according to the House majority leader, the House aims to vote on this bill as soon as July 1, 2022. Should the legislation pass, agency rulemaking will be required and the law — according to current drafts — would take effect 180 days after enactment.

While this program would break ground by making the United States the first major Western economy to implement such an outbound screening process, the concept is not new to Congress. Early drafts of what eventually became the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) reforming the Committee on Foreign Investment in the United States (CFIUS) included language contemplating review of licensing arrangements and provisions related to "countries of special concern." In late 2021, the U.S.-China Economic and Security Review Commission included in its recommendations to Congress that the legislature consider screening the offshoring of critical supply chains and production capabilities, including screening related to outbound investment by U.S. entities.[1] These concepts were ultimately excluded from the 2018 legislation, but now appear to have gained significant support within Congress.

Sens. Bob Casey (D-PA) and John Cornyn (R-TX) first proposed an outbound investment screening mechanism in the National Critical Capabilities Defense Act (NCCDA) in May 2021. The Casey-Cornyn proposal was incorporated into the America Creating Opportunities for Manufacturing, Pre-Eminence in Technology, and Economic Strength Act (America COMPETES), which the House of Representatives passed on February 4, 2022. The screening regime was not incorporated into the U.S. Innovation and Competition Act (USICA), the counterpart to America COMPETES when passed in the Senate in June 2021. Now, in June 2022, a bipartisan group of legislators in conference has agreed on revised text for the USICA that narrows the investment screening regime proposed in America COMPETES and plans to include this provision in a final bill to be considered by both chambers of Congress. The revised screening proposal will apply to specified sectors and technologies that are deemed critical to national security.

The CNCC concept was initially excluded from the USICA in part because the U.S. business community resisted the breadth of the proposal. Critics argue that the outbound regulatory regime would have a negative effect on U.S. economic competitiveness. Proponents of the bill consider it a crucial tool for safeguarding U.S. supply chains from countries of concern.

[1] *See* U.S.-China Economic and Security Review Commission, Comprehensive List of the Commission's Recommendations (Nov. 2021).

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The proposal aligns with the Biden administration's articulated prioritization of the resiliency of U.S. supply chains. In July 2021, national security advisor Jake Sullivan expressed interest in "outbound U.S. investment flows that could circumvent the spirit of export controls or otherwise enhance the technological capacity of … competitors in ways that harm [U.S.] national security."[2] Earlier in 2021, the Biden administration released Executive Order 14017 on America's supply chains, directing federal departments and agencies to identify ways to secure U.S. supply chains for a number of critical products, including several targeted in the June 2022 draft bill.[3]

Reporting indicates that if the proposed legislation is not passed in its current form, some version is expected to be included in a must-pass piece of legislation (following in FIRRMA's footsteps) such as the National Defense Authorization Act or in a broader China-focused bill.

Key provisions of the revised draft legislation include:

Broad scope of covered activities: The draft legislation broadly defines "covered activities" that could come under the CNCC's review because of their potential to impact "national critical capabilities" (NCCs). Covered activities include, among other things, U.S. or foreign persons developing an NCC in a country of concern; sharing technology, design or intellectual property that supports an NCC for an entity or country of concern; investing in or giving guidance to an entity or country of concern regarding an NCC; or seemingly conducting any activity in a country of concern where the U.S. or foreign person receives certain U.S. federal funding or sells certain amounts of goods to a U.S. national security agency. The draft legislation does create a carve-out for certain "ordinary business transactions" such as the sale of a license, the sale of finished products and similar activity that would not lead to enhancing a country of concern's technical capabilities.

Currently, the proposal would extend both to activities by U.S. and non-U.S. persons — creating a potentially unenforceable regime in the case of foreign-to-foreign activities. Specifically, the draft legislation does not require an activity to involve a U.S. person or U.S. business nexus in order to bring covered activity by foreign persons, foreign entities and their affiliates within the scope of CNCC review. We expect narrowing of this provision to ensure it is enforceable.

Mandatory advance notifications: Parties would be required to submit a notification to the CNCC of any "covered activities" by U.S. or foreign persons in countries of concern, including China, Russia, Iran, North Korea, Cuba and Venezuela, for their impact on NCCs 45 days prior to conducting a covered activity. Failure to file a notification could result in civil penalties of up to $250,000 under the draft bill. All materials filed with the CNCC (like those submitted to CFIUS) will be confidential and exempt from Freedom of Information Act requests. Neither the legislation (as drafted or revised) nor regulations are likely to authorize retroactive reviews of investments or other covered activities that have taken place prior to the effective date of the law. It is not yet clear how the legislation, if enacted, would apply to covered activities (*e.g.*, intellectual property or technology transfers) that may be ongoing as of the effective date of the law.

A growing list of national critical capabilities: The list of NCCs is expected to continually evolve. The draft bill requires at least annual reporting to Congress on additional industries, technologies and supply chains considered for inclusion. Initially, the list of NCCs includes sectors identified by the Biden administration and prior administrations as being critical to supply chain stability or identified by the director of National Intelligence Council or the National Science and Technology Council as critical and emerging technologies. These sectors and technologies include supply chains for semiconductor manufacturing and advanced packaging, large-capacity batteries, certain power-related minerals and materials, pharmaceuticals, artificial intelligence, biotechnology and quantum computing technology.

A familiar mitigation model: While the CNCC and CFIUS review different types of activities and the scope of activities over which the CNCC will preside appears to be broader than that of CFIUS (*e.g.*, no specific rights or control are required for CNCC review), the draft legislation provides the CNCC with authorities mirroring CFIUS' mitigation authorities. Like FIRRMA, the draft bill grants the oversight committee the power to enter into mitigation agreements with parties if covered activities are likely to result in an "unacceptable risk" to an NCC. Also in line with CFIUS' post-FIRRMA powers, the CNCC may impose interim mitigation measures prior to the CNCC completing action. And like CFIUS, if the CNCC does not believe that adequate mitigation measures exist to counter the unacceptable risk, the CNCC would recommend that the president mitigate, prohibit or suspend the activity. While presidential actions would be public, the draft legislation does not contemplate public disclosure of CNCC actions in connection with a specific case (as exists in the context of the national security review of foreign investments in holders of Federal Communications Commission licenses, colloquially known as Team Telecom). Finally, as with CFIUS, the CNCC must file annual reports with the appropriate congressional committees.

[2] *See* White House Press Release "Remarks by National Security Advisor Jake Sullivan at the National Security Commission on Artificial Intelligence Global Emerging Technology Summit" (July 13, 2021).

[3] *See* 86 Fed. Reg. 11849 (Feb. 24, 2021).

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Key Takeaways

Were the current bill to become law, its regulatory reach over outbound U.S. investments would be unprecedented and its effects potentially broad — although the novel nature of the law makes predicting its effects with precision difficult, if not impossible. Given this uncertainty and the likelihood of intense lobbying against certain aspects of the bill, we expect that some of the legislation's more far-reaching provisions — such as its proposed application to foreign-to-foreign transactions — will not survive.

However, in light of bipartisan negative sentiment toward China and Russia, combined with pervasive concerns about supply chains and U.S. global technological superiority, we likely will see some version of the law adopted in 2022 and take effect in 2023. We expect that the implemented law will provide the executive branch with significant discretion that aligns with CFIUS' broad authority to define and mitigate national security risk. If enacted, the proposed legislation will center national security considerations as a focus for a range of U.S. investment firms and companies.

Summer associate **Alyssa Domino** contributed to this article.