

CLIENT ALERT

“Reverse CFIUS” On The Way: U.S. Government Developing Outbound Investment Review Regime Aimed At Protecting National Security

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As fears over supply chain vulnerabilities and China’s ascendancy in technology deemed critical to U.S. national security have risen, increased calls from Congress and the Biden Administration have signaled the imminent creation of a committee to review outbound investments for national security purposes. Currently, the United States reviews certain *inbound* investments made by foreign persons into U.S. businesses under the auspices of the Committee on Foreign Investment in the United States, or CFIUS, to ensure that there are no unresolved national security concerns that arise from such investments. However, no method or mechanism for reviewing *outbound* investments to foreign countries or entities currently exists. Several members of Congress have mounted a bipartisan effort to close the perceived gap in protection, stating that such a mechanism is needed in order to “safeguard [the United States] national security and supply chain resiliency on outbound investments to foreign adversaries.”¹ In addition, or as an alternative, to the congressional effort, the Biden Administration has made clear that it is considering executive action to implement

¹ Letter from Robert P. Casey, Jr., et al to President Joseph R. Biden (September 27, 2022), available at: https://www.casey.senate.gov/imo/media/doc/letter_to_president_biden_on_outbound_investment_executive_action2.pdf.

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outbound investment screening to “prevent strategic competitors from exploiting investments and expertise in ways that threaten our national security.”²

This alert will first cover the proposed bipartisan legislation that would establish a committee to review outbound investments, followed by a discussion of potential executive action to establish an outbound review mechanism while the proposed legislation is being negotiated. Finally, this alert will discuss the likelihood of such a mechanism being implemented and the effect that an outbound investment review may have on businesses.

I. POTENTIAL LEGISLATION ON OUTBOUND INVESTMENT

Originally introduced in the U.S. Senate on May 26, 2021 and in the House of Representatives on December 12, 2021, the National Critical Capabilities Defense Act of 2021 initially failed to gain traction in either the House or the Senate. Efforts to include the Act in the Senate’s U.S. Innovation and Competition Act ultimately failed, but House representatives did manage to include it in the House’s America Creating Opportunities for Manufacturing, Pre-Eminence in Technology, and Economic Strength Act of 2022 (“**America COMPETES Act**”) before it was passed by the House in February of 2022. However, there has been no movement on the America COMPETES Act as House and Senate negotiators continue to work to reconcile the two bills. Since then, a bipartisan group of senators and representatives have circulated a draft bill revising the National Critical Capabilities Defense Act of 2021, which is broader than its predecessor and has drawn criticism from both the business community and members of Congress.³

The National Critical Capabilities Defense Act of 2022 (the “**NCCDA 2022**”), a revised version of the originally proposed legislation that was circulated on June 13, 2022, would create an interagency Committee on National Critical Capabilities (“**CNCC**”) responsible for reviewing covered activities, significantly expanding the scope of the bill from the previous version which focused on transactions involving countries of concern. The CNCC would be comprised of representatives from the following government agencies: The Departments of Commerce, State, Treasury, Homeland Security, Defense, Justice, Energy, Health and Human Services, Agriculture, and Labor; The Office of the United States Trade Representative; and The Office of Science and Technology Policy.

² The White House, National Security Strategy (October 12, 2022) at 33, available at: <https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf>.

³ Discussion Draft of The National Critical Capabilities Defense Act of 2022, ROS22860 HKG. While not as comprehensive or expansive as the more recently proposed outbound investment review mechanism, Congress has previously flirted with including an outbound investment review mechanism in early versions of the Foreign Investment Risk Review Modernization Act (“**FIRRMA**”). The relevant provision in FIRRMA would have granted the CFIUS, which is the interagency committee charged with reviewing inbound investments for national security concerns, jurisdiction to review transactions that would result in the contribution of intellectual property and associated support related to critical technologies to a foreign person through any type of arrangement, such as a joint venture, other than through an ordinary customer relationship. H.R. 4311 FIRRMA Section 3(a)(5)(B)(v). This provision was ultimately removed from the final version of FIRRMA.

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a. Covered Activities

The NCCDA 2022 defines “**covered activities**” as any activity by a U.S. person or a foreign entity or an affiliate of that either:

- 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 know-how, 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.

One key takeaway from the definition of covered activity is that the review process also applies to **foreign entities**, defined as an entity whose securities are primarily traded on one or more foreign exchanges and has its principal place of business outside of the United States, so long as the entity is not majority owned by a U.S. national and is not an entity of concern. As written, this would grant the CNCC extraterritorial jurisdiction by authorizing the review of covered activities conducted by foreign entities without any U.S. nexus.

“**National critical capability**” is also defined broadly, encompassing supply chains identified by the Biden Administration in [Executive Order 14017](#), including semiconductor manufacturing, large capacity batteries, critical minerals and materials, pharmaceuticals, AI, bioeconomy, and quantum information science and technology. The definition also extends to the manufacturing and other capabilities necessary to produce such goods and materials as well as to any additional supply chains the CNCC identifies as national critical capabilities.

The NCCDA 2022 defines a “**country of concern**” as any foreign government or foreign nongovernment person engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or security and safety of U.S. persons.⁴ The list of countries of concern currently includes Cuba, Iran, North Korea, the People’s Republic of China, Russia, and Venezuela.⁵

⁴ “Country of concern” is given the same definition as “foreign adversary” in section 8(c)(2) of the Secure and Trusted Communications Networks Act of 2019. 47 U.S.C. 1607(c)(2).

⁵ The NCDAA 2022 states that the list of countries of concern is based on Section 8(c)(2) of the Secure and Trusted Communications Networks Act of 2019.

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Another factor that should be considered is that an “**entity of concern**” is defined as an entity influenced by a country of concern or is directly or indirectly affiliated with a country of concern. The method of determining affiliation is extremely broad, including, but not limited to, a country of concern holding, directly or indirectly, 5 percent or more of the outstanding voting stock or shares of an entity, having the ability to exercise substantial influence on an entity, and having the power to direct or decide matters affecting an entity’s management or operations in a manner that could materially affect the commercial decisions or business interests or any important matter of that entity.

Former Assistant Secretary of the Treasury for Investment Security, Thomas Feddo, commented on the breadth of these definitions during the September 29, 2022 Senate Committee on Banking, Housing, and Urban Affairs’ hearing examining outbound investment. In his prepared statement, he noted that, in both the original and revised legislation, several key terms remained either broad or undefined and that additional work to narrow those definitions was still needed.⁶

b. Mandatory Notifications and 45-Day Review Period

The NCCDA 2022 contains a mandatory notification provision, requiring that U.S. persons or foreign entities engaging in or planning to engage in covered activities submit a written notification to the CNCC 45 days before engaging in the covered activities. The CNCC will then have 45 days to review the notification and either approve the activities recommended or, if the CNCC determines that the activities pose an “unacceptable risk” to critical capabilities, make a recommendation to the President of the United States to mitigate the identified risks. This includes recommending that the President mitigate the risk using existing authorities for the imposition of export control restrictions and sanctions. The CNCC can also negotiate, enter into or impose, and enforce agreements or conditions to mitigate the risks posed by the covered activities.

If the parties fail to notify the CNCC, the committee can initiate a review of a covered activity under its own discretion or by request from Congress.

II. Potential Executive Action on Outbound Investment

In the National Security Strategy published on October 12, 2022, the Administration underscored the importance of modernizing and strengthening U.S. export control and investment screening mechanisms, and pursuing targeted new

⁶ Statement of the Honorable Thomas P. Feddo Before the United States Senate Committee on Banking, Housing, and Urban Affairs, available at: <https://www.banking.senate.gov/imo/media/doc/Feddo%20Testimony%209-29-22.pdf> (“Many key terms were broad and undefined, and left substantial latitude to the Executive branch to expand the ‘critical’ sectors within its purview and to designate the cabinet secretary accountable for leading it. Virtually every U.S. business, private or public investment fund, and bank engaged in international business could have been impacted if a transaction implicated the “influence” of a country of concern, and could have been compelled to share confidential deal details and obtain the government’s permission to proceed. Even foreign entities in third countries transacting with, or influenced by, such a country could have been impacted. Subsequent proposals were narrowed, but I believe more homework is still necessary.”).

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approaches, such as screening of outbound investment, to protect national security.⁷ In addition, National Security Advisor Jake Sullivan recently advised that the United States is “making progress in formulating an approach to address outbound investments in sensitive technologies, particularly investments that would not be captured by export controls and could enhance the technological capabilities of our competitors in the most sensitive areas.”⁸ The Administration seems likely to support congressional action to establish the CNCC – or take action itself. Various reports indicate that the Biden Administration is actively working on an Executive Order aimed at creating an outbound investment review mechanism.⁹ In fact, a bipartisan group of senators and representatives have published a letter to the Biden Administration urging executive action as deliberations over the draft legislation continue, stating that the executive action can then be bolstered by statute.¹⁰

Also worth considering is the Biden Administration’s imposition of harsh export control restrictions directly targeting China’s ability to access the components necessary to manufacture semiconductors, covered by our previous client alert [[New Far-Reaching Export Controls on Semiconductors and Advanced Computing Adopted to Slow China’s Technological Rise](#)], and the publication of the historic [Executive Order 14083](#), providing guidance to CFIUS on examining national security risks, covered by our previous client alert [[President Biden Sharpens CFIUS Reviews by Issuing First Ever Presidential Directive on Investment Risk Factors](#)]. These actions indicate that the Biden Administration may bypass Congress by mandating the establishment of a committee to review outbound investments by way of an Executive Order. As discussed below, current legislation creating such a committee has stalled as the House and Senate continue to negotiate both the specific legislation and the broader legislative packages in which it is carried, making an Executive Order-driven outbound investment review mechanism the more likely outcome.

III. Likely Outcomes for an Outbound Investment Review Mechanism

As noted above, the NCCDA 2022 is an unIntroduced draft representing a bipartisan effort to drive legislation to address the perceived gap left by a lack of a mechanism to review outbound investments to the United States’ competitors and

⁷ The White House, National Security Strategy, p. 15, Oct. 12, 2022, available at <https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf>.

⁸ Remarks by National Security Advisor Jake Sullivan at the Special Competitive Studies Project Global Emerging Technologies Summit, The White House Briefing Room, Speeches and Remarks, Sept. 16, 2022, available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/16/remarks-by-national-security-advisor-jake-sullivan-at-the-special-competitive-studies-project-global-emerging-technologies-summit/>.

⁹ See, e.g., Edgerton, Anna et al, U.S. Eyes Expanding China Tech Ban to Quantum Computing and AI, Bloomberg Law, Oct. 20, 2022, available at https://www.bloomberglaw.com/product/blaw/bloomberglawnews/international-trade/BNA%200000183-f7b2-d6b7-a197-ffba09b90006?bwid=00000183-f7b2-d6b7-a197-ffba09b90006&cti=LFVL&emc=bitnw_n%3A4&et=NEWSLETTER&isAlert=false&item=read-text&qid=7370987®ion=digest&source=newsletter&uc=1320000045&udvType=Alert&usertype=External, (“The Biden administration is also working on an executive order for an outbound investment review mechanism that would scrutinize money heading to certain Chinese technologies, and the quantum computing and artificial intelligence controls could be included, one of the people said. That could incorporate some aspects similar to a measure pushed by senators Bob Casey, a Pennsylvania Democrat, and John Cornyn, a Texas Republican.”).

¹⁰ Letter from Robert P. Casey, Jr. et al to President Joseph R. Biden, *supra* note 1.

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adversaries for national security concerns. That said, the broad provisions of the NCCDA 2022 have drawn strong criticism from the U.S. business community and calls for caution from some members of Congress. These include Senator Pat Toomey (R-PA), whose opening remarks in the September 29, 2022 Senate Banking Committee hearing Examining Outbound Investment warned against the establishment of a flawed outbound investment regime,¹¹ and a joint letter by the U.S. Chamber of Commerce and several other business associations and councils firmly opposing the NCCDA 2022.¹² If the NCCDA is passed as is, it would place a significant burden on companies who would likely need to conduct a review of their entire supply chain and all agreements and transactions with foreign counterparties and customers to ensure that they are in compliance with the NCCDA 2022’s requirements.

While the NCCDA 2022 has yet to be introduced, and the original act has stalled in Congress, it is unlikely that the specter of an outbound investment review mechanism will be banished in the near future. It is increasingly likely that such a mechanism will be implemented through either legislative or executive action. Unlike the NCCDA 2022 (or the language included in the America COMPETES Act), which has been circulated and reviewed by various interested parties, the contents of the Biden Administration’s Executive Order remain under wraps. It is possible that the Executive Order creating an outbound investment review mechanism draws from the NCCDA 2022 or the original bill, but, until additional details regarding the Executive Order are released or published, we can only speculate as to the final contents. While the final form of an outbound investment review mechanism remains unclear, companies should ensure that they are closely monitoring this regulatory space in order to ensure they are able to react to any new requirements imposed on outbound investments.

We believe that an outbound investment review mechanism will ultimately be created either by Congress or Executive Order. Both the focus on the national security concerns raised by U.S. businesses’ investments in adversarial and competitive countries and the shared goal of reestablishing the United States at the forefront of technological innovation make it unlikely that either Congress or the executive branch will choose to forgo such a potentially valuable foreign policy tool.

¹¹ Toomey Warns Against Establishing a Flawed Outbound Investment Regime, United States Senate Committee on Banking, Housing, and Urban Affairs, Sept. 29, 2022, available at <https://www.banking.senate.gov/newsroom/minority/toomey-warns-against-establishing-a-flawed-outbound-investment-regime>.

¹² Coalition Letter on the National Critical Capabilities Defense Act, U.S. Chamber of Commerce, June 23, 2022, available at <https://www.uschamber.com/international/coalition-letter-on-the-national-critical-capabilities-defense-act>.

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