So you’d like to build a new fabrication facility in China, or just add some capabilities to your existing plant? Well, the U.S. Government may want to have a look at that transaction—and may soon have the authority to stop that transaction.

On June 13, a bipartisan group of U.S. lawmakers issued a new draft of the National Critical Capabilities Defense Act of 2022 (Revised NCCDA) which proposes to establish outbound investments reviews.

The concept of outbound investment reviews—screening U.S. investments abroad!—
may sound novel, but it is not entirely new. The proposal has been introduced several times before in Congress but has not yet come close to passage or implementation. However, this legislation seems to have bipartisan support and contemplates an enormous scope, so it is worth examining what may be coming into effect in the next year or two.

Who conducts the review

Under the proposed Act, the Committee on National Critical Capabilities (CNCC) would review outbound investment transactions and act as reverse version of the Committee on Foreign Investment in the U.S. (CFIUS). The CNCC would be composed of at least the heads of twelve U.S. government agencies and the Committee’s President would serve as the chairperson, a very similar organization to that of CFIUS.

Goal of the review

The aim of the Committee would be to oversee U.S. capital flow to countries and entities considered to be foreign adversaries of U.S. national security interests (e.g., China and Russia), and to implement a screening mechanism for those investments.

Requirements and scope of the review

The proposed legislation would require a mandatory notification 45 days prior to conducting a covered transaction when involving “countries of concern” or “entities of concern.” It targets entities domiciled in a country of concern (China, Russia, Iran, North Korea, Cuba, and Venezuela) as well as entities “affiliated with” or “influenced by” these same countries. The scope of “influenced by” has yet to be determined, but could conceivably give the committee a fairly broad scope for its review.

The measure’s scope is further broadened by the fact that it would not only apply to investment transactions, but it could also cover any activity by a U.S. or non-U.S. entity or its affiliate 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

- provides capital to, consults for, or gives any guidance, facilitating access to financial resources for a national critical capability for an entity of concern or a country of concern.
So large-scale development projects, R&D collaborations, or even foreign manufacturing could all be subject to screening and restriction by the committee.

The following industries are considered as National Critical Capabilities: energy; medical; communications, including electronic and communications components; defense; transportation; aerospace; robotics; artificial intelligence; semiconductors; shipbuilding; water. The draft does not differentiate between types of artificial intelligence.

**Exceptions to the Review**

The Revised NCCDA indicates three types of exceptions: transactions under the Committee’s *de minimis* rule, which has yet to be fully defined; transactions that occurred before the effective date of the legislation; and ordinary business transactions. That last one encompasses the sale, transfer, license, or provision of certain finished items, goods, and services if the U.S. entity generally makes such services available to all its customers; and/or if the transaction usually does not result in a foreign person gaining access to critical technology.

**Powers of the Committee**

In the event that the transaction is considered as a risk to national security, the Committee could require the investing company to enter into a mitigation agreement that addresses the national security concerns, suspend the investment, or prohibit the investment entirely. The President of the committee could also make recommendations to address the identified risks. Certain transactions could be blocked by the Committee while it undertakes transaction review. If the entity did not submit a written notification, the Committee has the authority to review unilaterally the transaction. A civil penalty of up to $250,000 could be imposed in case of failure to comply with the mandatory notification requirement and in case of violation of mitigation agreements.

**What Comes Next**

Many aspects of the legislation are still unclear (definition of the terms, scope of the measures) and significant revisions are likely. On June 23, a coalition letter on the Revised NCCDA was published which strongly criticized the latest draft. The authors of the letter consider the proposal too broad in scope and state that it would lead to “unworkable compliance concerns” as well as a heavy compliance burden both for U.S. entities and the U.S. government.

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