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Client Alert Commentary

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Ready for a "Reverse" CFIUS? Four Takeaways From New Bipartisan Bill

If enacted, the bill would establish an interagency committee in the US to review certain outbound investment and other activity affecting supply chain security, domestic production, and manufacturing capacities.

Key Points:

- The bill significantly expands the scope of the proposed regime from previous bills and clarifies aspects of the review process.
- If enacted, the bill would require both US persons and foreign entities to notify an interagency committee prior to engaging in certain "covered activities."
- The bill would authorize the US government to impose conditions to mitigate national security risks posed by the proposed activity.

In June 2022, a bipartisan group of US lawmakers released the National Critical Capabilities Defense Act of 2022, a reworked bill that would create a review process for certain outbound investment from the US and certain other activities involving so-called "countries of concern."

The review process would complement the reviews undertaken by the Committee on Foreign Investment in the United States (CFIUS) of certain foreign investments in US businesses and real estate transactions. (For more on CFIUS, see Key Questions Answered.)

The White House recently signaled support for this legislative effort, focusing on the need for "greater transparency on US investment into China and other countries of concern."

This Client Alert highlights four takeaways from the bill.

1. A New Interagency Committee Would Oversee the Review Process

The bill would establish the 12-member interagency Committee on National Critical Capabilities, which would be responsible for specifying which activities are subject to review and conducting reviews of those activities. The Committee would consist of the heads of 12 federal agencies (or their designees), including the Departments of Agriculture, Commerce, Defense, Energy, Health and Human Services,

Homeland Security, Justice, Labor, State, and the Treasury as well as the Office of the United States Trade Representative and the Office of Science and Technology Policy.

The bill also identifies additional members of the Committee that would not vote. The President of the United States (or the President's designee) would serve as the chairperson of the Committee. This represents a change from a prior version of the bill that listed the US Trade Representative as the chairperson.

2. The Committee Would Review "Covered Activities" Involving "Countries of Concern"

The National Critical Capabilities Defense Act identifies a broad range of covered activities subject to the Committee's review. The bill defines a "**covered activity**" more expansively than the traditional understanding of "investment" to include activity that:

- builds, develops, produces, 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 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, consults for, or gives any guidance relating to enhancing the capabilities of, or facilitating access to financial resources for, a national critical capability for an entity of concern or a country of concern.

A "**national critical capability**" includes: (1) supply chains involving semiconductors, large-capacity batteries, critical minerals and materials, and pharmaceuticals; (2) technologies identified by the Director of National Intelligence as critical and emerging technologies, including artificial intelligence, bioeconomy, and quantum information science and technology; and (3) manufacturing necessary to produce critical goods and materials. Although the Committee may also identify additional supply chains, technologies, and industries as national critical capabilities, the Director of National Intelligence's role to identify critical and emerging technologies represents a change from the approach Congress took in 2018, when it directed the Commerce Department to impose controls on emerging and foundational technologies.

The bill defines "**country of concern**" using the list of "foreign adversaries" created pursuant to the Secure and Trusted Communications Networks Act. The list currently includes China, Cuba, Iran, North Korea, Russia, and Venezuela. With potentially more far-reaching consequences, an "**entity of concern**" is one that is "influenced by" or "directly or indirectly affiliated with" a country of concern. The bill broadly defines "affiliated with a country of concern" to include entities "influenced by" a country of concern that own 5% or more of the outstanding voting stock of a company. The term "influenced by" remains undefined.

Notably, the definition of "covered activity" is not limited to actions taken by US persons, but instead encompasses activity undertaken by either US persons or foreign entities. The bill defines "**US persons**" to include US nationals, US lawful permanent residents, and entities organized under US law. The bill defines "**foreign entities**" to include entities that are primarily traded on foreign exchanges or whose principal place of business is outside the United States, excluding entities that are ultimately owned by US nationals (so long as they are not entities of concern). As currently drafted, whether the bill would

authorize the Committee to review entirely extraterritorial activity by foreign entities (*i.e.*, activities with no US person involvement) is unclear.

The bill provides that some activities would not be covered. For example, transactions below a *de minimis* monetary threshold to be determined by the Committee, ordinary business transactions (a defined term that the Committee may further expand), and transactions that occurred prior to the bill's enactment would not qualify as covered activities.

3. The Bill Would Establish a Notification Requirement and 45-Day Review Period

If enacted in its present form, the bill would require US persons or foreign entities that intend to engage in a covered activity to submit a written notification to the Committee 45 calendar days before engaging in the covered activity. The Committee would also have authority to conduct a unilateral review when the parties to a covered activity fail to submit a notification and to impose civil penalties up to US$250,000 for failure to submit a required notification. The bill does not describe what would need to be included in a notification. This level of detail would likely be added through regulations issued if the bill becomes law. Upon receipt of a notification, the Committee would determine within 45 days whether the activity poses a risk to a national critical capability.

4. The Committee Would Have Authority to Impose Mitigation

After review of a notification, if the Committee determined that a covered activity posed an unacceptable risk to national critical capabilities, the Committee would be empowered to make recommendations to the President or Congress to mitigate the risk. The Committee would also be able to negotiate a mitigation agreement with the parties itself before the President or Congress took action. (This appears to be a similar process to negotiating mitigation with CFIUS in the foreign investment context.) Although the bill does not describe the types of mitigation measures the Committee could impose, in the CFIUS context, mitigation instruments can range from assurance letters between CFIUS and the parties (whereby the parties commit to taking steps to address national security concerns) to complex agreements that can impose burdensome operational restrictions or even require restructuring aspects of the transaction itself.

The bill lists a series of factors for the Committee to consider when reviewing covered activities, including the economic, national security, intelligence, military, health, and agricultural interests of the US; the history of distortive or predatory trade practices in each country in which a covered activity occurs; control and beneficial ownership of each foreign person that is a party to the transaction; impact on domestic industry; and whether the activity could, directly or indirectly, support, enhance, or enable the capabilities of a country of concern or entity of concern.

Conclusion

The bill sponsors appear ready to try and attach it to a legislative vehicle for passage into law. Although the bill has drawn opposition from the business community, its bipartisan support within Congress and the White House suggests that some version of "reverse" CFIUS may well become the law of the land in the near future.

Latham & Watkins will continue to monitor and report on developments related to the bill.

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