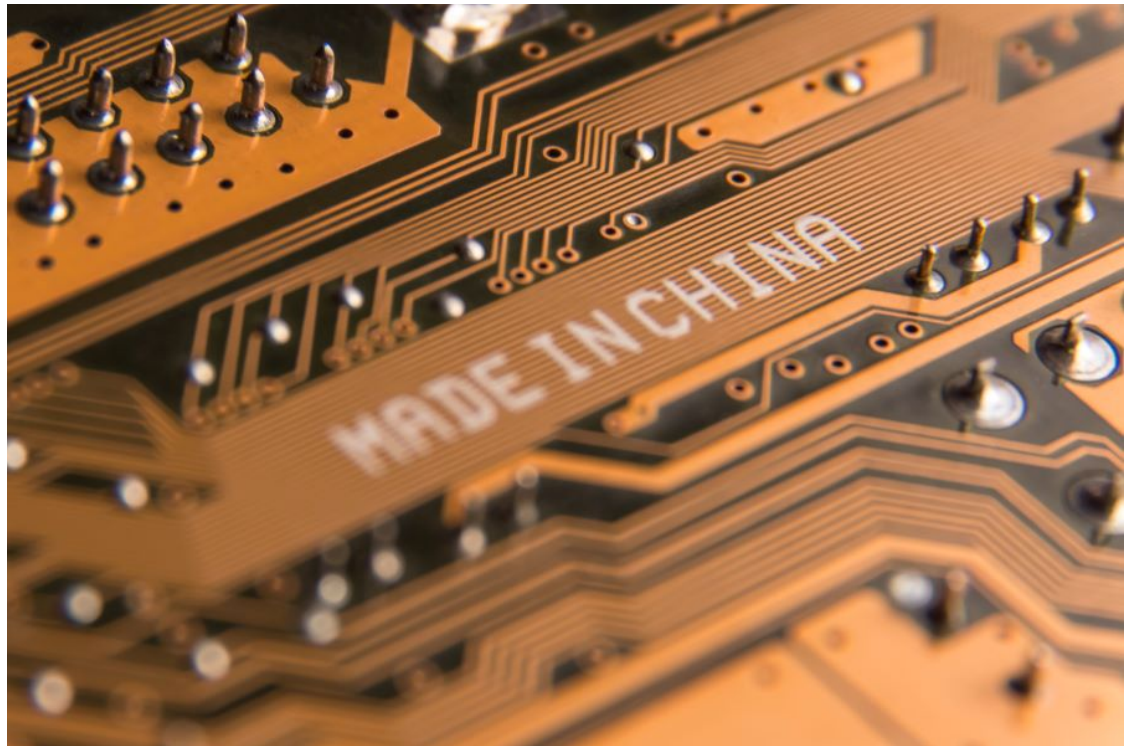


“Outbound-CFIUS” could change US national security landscape

If passed, the America Competes Act could introduce a CFIUS type body that judges outbound M&A transactions on their potential threat to US security and capabilities

By John Crabb

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The US government is looking to introduce legislation that would allow it to review outbound investments on national security grounds. The move, which would in effect instate an outbound version of the Committee on Foreign Investment in the United States (CFIUS), would be the first such attempt by the US to monitor M&A transactions with targets outside of its jurisdiction.

Packaged as part of the 109-page [America Competes Act of 2022](#), title iv of the Act “establishes a statutory process under the Trade Act of 1974 for the US government to review transactions that may impact national critical capabilities”.

The America Competes Act was passed by the House on February 4 but has yet to reach the Senate.

A new approach

That the US government is looking to introduce outbound provisions comes as no surprise, given heightened tensions with certain countries of concern, namely China and Russia. It is clear that there is general interest in either expanding CFIUS’ jurisdiction to reach new kinds of threats or cases or using CFIUS as a model to potentially develop new authorities.

Devin DeBacker, chief of the foreign investment review section in the national security division at the US Department of Justice (DoJ), told IFLR that this signals the success of the robust and careful body that CFIUS has matured into and how the threat environment has evolved.

“Risks to supply chains and data security span sectors that may not have previously been associated with national security risks,” he said.

The DoJ has a particular interest in cases involving telecommunications, law enforcement, counterintelligence, and in particular, data protection and privacy. Data protection and privacy spans many sectors where there are companies and transactions that don't heavily involve technological development, or cutting-edge technology, AI or semiconductors, for example.

"In that sense, any industry that has significant data on US persons is an industry where some of those national security concerns could be present," he added.

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Although conceived as an outbound CFIUS, the Act does not suggest expanding the existing committee's mandate any further than was already done by the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), but rather suggests forming a similar, but separate, committee. The committee would be chaired by the US Trade Representative and review outbound transactions, not just investments but certain licences and joint ventures too, that have the potential to undermine US capabilities in certain key areas.

"The impetus for this, in a world that's more fragmented and dangerous, is that the United States, has to ensure national resiliency in certain key capabilities," said Mario Mancuso, partner and leader of the CFIUS practice at Kirkland & Ellis. "There might be transactions, for example technology transactions where the investor might be either contributing to the capabilities of other countries, i.e., China, or undermining our own resilience in these capabilities."

The concept of outbound reviews has been around in the US since at least 2017, although it has always – until now – been on the backburner. Outbound reviews were initially introduced in the first revision of CFIUS but did not pass due to strong industry opposition. Despite the fact that the America Competes Act was passed on partisan lines by the House, sources suggest that title iv has bipartisan support and if it was carved out, would very likely pass the Senate.

It is likely that an outbound CFIUS-type review would face serious opposition from some US corporates, especially those that operate extensively in the international arena. According to Harry Broadman, chair of the CFIUS practice at Berkeley Research Group and one time member of the Committee, "controlling outbound investment into China or other foreign locales and how that affects national security in the US would be a very different animal to what members of CFIUS are used to assessing".

"Some important people are absolutely hostile towards China, and for some time now have been flagging the notion that the US should not allow its firms to invest seed money there because it will only come back to bite us," he said. "This raises the age-old question of how patriotic multinational corporations are, and how patriotic should they be. While they may be incorporated in a country, or headquartered under a certain flag, their shareholders and ownership are likely to be from all over the world and at the end of the day, they are working to enhance the value of their owners' capital investment."

[See also: CFIUS annual report reveals a maturing agency with increased agility](#)

The America Competes Act has been widely viewed as particularly aggressive towards China, and title iv is no different. Introducing a bill to review outbound investment shows the sharply changing nature of the US/China relationship during the last handful of years.

On top of that, the Covid-19 pandemic has exposed the fragility of supply chains in multiple industries across the world.

"Covid-19 has revealed that China would be willing, in certain instances, to weaponise trade and economics," said Kirkland's Mancuso, citing reports where China was withholding a shipment of certain basic pharmaceutical ingredients and personal protective equipment during the height of the pandemic.

"Between the intense strategic competition that US and China are already engaged in, and the very vivid example of Covid and China's weaponisation of perceived US and European supply chain vulnerabilities, national security minds in Washington are focused on other tools that the US might employ to enhance its resilience in a world that's a more tumultuous, dangerous, and less reliable," he added.

[See also: CFIUS report reveals impact of FIRRMA](#)

This step would only further antagonise US corporations, according to Broadman.

“It is one thing to regulate inbound US investment, where there is a sound rationale, but when the US government starts mandating companies where and where not their supply chains should be located, which is where the latest discussion seems to be headed, that is a wholly different matter,” he said. “Ironically, perhaps, this gives the impression that such proponents want the US to be more like China than the other way around,” he continued.

Same same, but different

While the proposals for the outbound review committee are similar in nature to CFIUS, it is important to note that any committee would be a separate entity, and that there are in fact several legislative differences in the way that CFIUS operates and the way this new committee has been drafted. The Act would set up a process that is similar in many ways but with key difference, according to sources. CFIUS has a voluntary and mandatory component to any filing for notifications to the Committee, whereas the current language of the Americas Competes Act suggests that those types of filings could potentially be mandatory.

“Like CFIUS, this committee would have the unilateral authority if it believed a transaction or investment, or however a covered transaction is ultimately defined, falls within its purview which will give it unilateral authority to initiate its own reviews similar to CFIUS,” said Ama Adams, partner at Ropes & Gray. “The ultimate lever is if there is a transaction that the committee thinks raises significant concerns that perhaps can't be mitigated, it can make a recommendation to the president to suspend or prohibit the transaction from going forward.”

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Instead of putting this committee under the umbrella of the CFIUS regime, it is expected that it would be a separate committee. There would however be some cross elements, likely in terms of staffing, given that it would be a similar interagency committee. “The expectation is that it would be staffed by heads of various executive agencies within the US government, so commerce, defense, USTR and several of the agencies that have representatives on CFIUS would be involved,” continued Ama. “Despite this, it is likely that there would be separate regimes looking at distinct issues, with CFIUS very much focused on inbound investments and this new committee on outbound covered transactions.”

The additional due diligence that this would impose on US companies could be great, with any entity looking to make foreign investments having to consider an entire new workstream. If this bill does pass, US companies looking at outbound investment opportunities may have to accept that part of their liability requires the relocation of certain critical elements to other countries.

Of course, the ramifications for a drastic change in policy like this would have serious implications outside of the US – not the least those countries that are deemed a “foreign adversary” under the new legislation. Samson Lo, Asia's head of M&A for Swiss bank UBS, believes the prospect of outbound security reviews may open up fresh opportunities.

“It is always interesting when there are new regulatory reviews, initially it seems quite daunting or like it could become an insurmountable hurdle, but then it turns out that market participants, so clients and other bankers, are actually very good at adapting,” he said. “Usually, changes like this actually create more opportunities: if there are heightened restrictions on outbound M&A, then deal makers can start looking at more domestic deals.”

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At the same time, he continued, people will also start revisiting past outbound US acquisitions, so who knows whether there will be the need for retroactive adjustments. “That also creates more opportunities, because when people look at previous US acquisitions they may want to engage in proactive action, which creates a divestment M&A opportunity,” added Lo. “These regulatory reviews always sound a lot more daunting initially, but market participants adapt very quickly.”

