

ALERT

America COMPETES Act Would Stand Up a Committee to Review Certain Outbound Investment and Offshoring Transactions

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On February 4, 2022, the House of Representatives passed the America COMPETES Act of 2022, which is the House's long-awaited counterpart to the U.S. Innovation and Competition Act (USICA) that passed the Senate with bipartisan support in June 2021. Both bills are designed to strengthen U.S. economic and national security and support American manufacturing, supply chains, scientific research, and technological leadership.

The America COMPETES Act includes the language of the National Critical Capabilities Defense Act (NCCDA), which would establish a review process for outbound transactions related to the offshoring of certain supply chains and other "national critical capabilities" in order for the U.S. Government to protect domestic manufacturing capacity.

Specifically, the legislation would establish a Committee on National Critical Capabilities (Committee) similar to the Committee on Foreign Investment in the United States (CFIUS). The interagency Committee would be staffed by the heads of several Cabinet-level executive departments and led by the United States Trade Representative (USTR) in consultation with the Secretary of Commerce and the Secretary of Defense.

The Committee would have the authority to review any "covered transaction" that would shift or relocate to a "country of concern" – or that would transfer to an "entity of concern" – any essential elements involving one or more national critical capabilities, or that could otherwise "result in an unacceptable risk to a national critical

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capability.” The legislation broadly defines “national critical capabilities” as “systems and assets, whether physical or virtual, so vital to the United States that the inability to develop such systems and assets or the incapacity or destruction of such systems or assets would have a debilitating impact on national security or crisis preparedness.”

These capabilities would ultimately be identified by the Committee in promulgating regulations but would include items such as:

- medical supplies, medicines, and personal protective equipment;
- articles essential to critical infrastructure;
- articles critical to infrastructure construction after a natural or manmade disaster;
- articles that are components of systems critical to the operation of weapons systems, intelligence collection systems, or items critical to the conduct of military or intelligence operations; and
- supply chains and services related to any of the foregoing.

Importantly, the legislation would require any U.S. business that engages in a covered transaction to submit a written notification of the transaction to the Committee. Within 60 days of receiving notification of a covered transaction, the Committee could review the transaction to determine whether it is likely to result in an unacceptable risk to one or more national critical capabilities.

If the Committee determines that the transaction could pose such a risk, it could recommend that the President take action to address or mitigate the risk, including by suspending or prohibiting the transaction. The Committee would be further empowered to unilaterally initiate a review of any covered transaction for which a written notification is not submitted and would be required to initiate a review of a covered transaction upon the joint request of the chairperson and the ranking member of an appropriate Congressional committee.

The legislation would place additional burdens on prospective U.S. government contractors by requiring them “to disclose the supply chains the person would use to carry out the contract and the extent to which the person would depend on articles and services imported from foreign countries, including the percentage of such materials and services imported from countries of concern.” Failure to make the required disclosures would be considered material determinants in awarding U.S. government contracts to such persons.

The NCCDA was previously introduced with bipartisan support in both the Senate (S.1854) and the House (H. R.6329) but was not incorporated into USICA due to opposition from the business community. In particular, it’s unclear how the Committee’s expansive mandate would be implemented, and the legislation would place U.S. companies in a somewhat untenable position of having to determine whether any given transaction could “result in an unacceptable risk to a national critical capability.”

In terms of next steps, the House and Senate will form a conference committee to work out the differences between the America COMPETES Act and USICA. It is unclear whether the NCCDA will emerge from the conference committee as part of the consensus bill, but its placement in the America COMPETES Act marks

significant progress towards becoming law.

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