



Insight

Outbound Investment Screening Proposals Should Be Narrow and Targeted

TORI SMITH | OCTOBER 6, 2022

Executive Summary

- Congress has debated the merits of creating an outbound investment screening mechanism for more than a year, but members have not reached a consensus and the Biden Administration is considering unilateral action.
- Proponents of establishing a system to screen outbound investment ostensibly seek to prevent U.S. capital from funding or materially supporting the Chinese Communist Party, as well as to prevent the kind of investment that is viewed as offshoring American jobs and factories—but these are two fundamentally different goals.
- A new proposal by Senator Pat Toomey (R-PA) would create a notification requirement for investments in areas already covered by export controls; while this is a significantly scaled-down approach to outbound investment screening, Congress should ensure that any mechanism to monitor or restrict outbound investments would protect Americans' ability to move capital as freely as possible.

Introduction

While Congress has debated the merits of establishing a system for screening outbound investment—or U.S. capital meant for investment in other countries—for more than a year, members have not reached a consensus on the best way to proceed. On September 29, the Senate Committee on Banking, Housing, and Urban Affairs held a hearing on the issue, but members disagreed on the scope of a prospective system, or even the precise problem one would be set to address. In the meantime, the Biden Administration is also considering unilateral action to establish a screening process for outbound investment via an expansive use of the International Emergency Economic Powers Act; it should avoid doing so, however, as it would undercut Congress's constitutional authority over trade.

Proponents of an outbound investment screening mechanism tend to focus on one of two objectives. The first is to address concerns that investment by U.S. entities in China is both funding and materially supporting the Chinese Communist Party and the People's Liberation Army, thereby negatively affecting U.S. national security. The second is to mitigate concerns that U.S. investment abroad is used to offshore U.S. jobs and factories, thus harming American workers and the economy. Ostensibly, a broad share of proponents views outbound investment screening as a means to address both concerns.

To address these concerns, legislation, such as the National Critical Capabilities Defense Act (NCCDA), would establish an entirely new bureaucracy to review a wide range of investments. Senator Pat Toomey (R-PA) recently proposed a different approach, however, in a new amendment to the National Defense Authorization Act. Senator Toomey’s plan would utilize and work within existing export control structures to determine critical sectors in China and require U.S. entities to notify the federal government of investments in those sectors.

While Senator Toomey’s amendment represents a clearer and more targeted approach than previous legislation to screen outbound investment, Congress should carefully consider the implications of any attempt to step up screening or further restrict Americans’ rights to move their capital as freely as possible. Moreover, Congress must ensure it has a clear understanding of the circumstances under which outbound investment may harm national security and if capital controls of this kind would reduce or eliminate that threat.

Background

In May 2021, Senators Bob Casey (D-PA) and John Cornyn (R-TX) introduced the [National Critical Capabilities Defense Act](#) (NCCDA). This legislation would establish an interagency committee to review outbound investment. The bill would give the committee broad authority to review investment meant for a “country of concern,” and specifically notes the examples of “foreign adversary” and “non-market economy.” There is bipartisan support for a mechanism to screen outbound investment that is similar to how the Committee on Foreign Investment in the United States (CFIUS) screens inbound investment of concern to national security. There is a lack of consensus on the scope of such a mechanism, however.

The House companion to the NCCDA was included in the House-passed America Creating Opportunities for Manufacturing, Pre-Eminence in Technology, and Economic Strength (COMPETES) Act, but it was left out of the Senate-passed United States Innovation and Competition Act (USICA). These bills remain in a conference committee, where outbound investment screening is just one of many issues to be reconciled. (The American Action Forum reviewed the top trade-related issues for this conference committee [here](#).)

A Narrower Approach to Outbound Investment

The Senate Committee on Banking, Housing and Urban Affairs (the Senate Banking Committee) held a [hearing](#) on September 29, 2022, to facilitate further debate on the merits of the NCCDA. During the hearing, the potential for unilateral executive action to establish an outbound investment mechanism was raised. In a [recent letter](#) to President Biden, a group of eight senators and representatives “urge [the administration] to move forward with executive action—which can then be bolstered by statutory provisions.” The signatories went on to note, “This is how oversight of inbound foreign investment was initially established—Executive Order.” The committee to which the letter refers, CFIUS, was established via [executive action](#) in 1975, but that does not mean the executive branch should also unilaterally create a system for reviewing outbound investment. The Constitution gives Congress the power to regulate trade, which includes the movement of capital into and out of the country. Congress should be concerned with the prospect of an executive order that would preempt congressional action and jurisdiction over trade.

Senator Pat Toomey (R-PA), a skeptic of instituting an outbound investment screening process, [suggested](#) during the Senate Banking Committee hearing that “a notification regime for outbound American investments in China should, at a maximum, only be applicable to direct U.S. investments in Chinese entities that are manufacturing, producing, developing, or testing technology, for which a U.S. exporter would otherwise be required to seek a license under current law to export.” Senator Toomey is referring to U.S. export control laws and regulations that restrict how goods, technology, technical data and services can flow to foreign nations,

especially for items with both commercial and military applications. Should a U.S. company wish to export a product found on the export control list, it must seek out a license from the federal government. On the same day as the hearing, Senator Toomey filed an [amendment](#) to the NDAA for Fiscal Year 2023 to establish a notification system for U.S. outbound investments into China in critical technology sectors. The proposal focuses primarily on U.S. investment in China in critical sectors covered by existing U.S. export controls.

This new outbound investment screening proposal is more limited than previous iterations, however, questions about the need for such a program remain. An outbound investment notification system or CFIUS-like body would infringe upon Americans' ability to move their capital as freely as possible. Additionally, such a mechanism would be largely duplicative of existing Treasury Department authorities to prevent investment by U.S. firms into companies supplying China's People's Liberation Army or other foreign entities deemed a threat to national security. As noted during the Senate Banking Committee hearing, there would also be substantial overlap between the intent of U.S. export controls and an outbound investment screening system.

Matching the Problem and Solution

The Senate Banking Committee hearing also made clear that proponents of an outbound investment mechanism see it as a solution to achieve two very different goals. Some supporters of screening outbound investment ostensibly see such investment by U.S. companies abroad as part of a broader attempt to offshore domestic jobs and factories. Others view America's technological edge as under threat by China and perceive U.S. companies' investment in critical Chinese technologies as funding or materially supporting the Chinese Communist Party and the People's Liberation Army, and thereby threatening U.S. national security. There are also some in Congress who view both as issues that could be addressed through outbound investment limits. For example, in his [opening statement](#), the Committee Chairman Sherrod Brown (D-OH) stated that the U.S. must "ensure that we are not investing in technologies that harm our national security" while also claiming that some investments abroad "undermined our national security and hollowed out our middle class."

Before implementing any kind of outbound investment mechanism, it is critical for Congress to clearly identify the problem they're attempting to solve. It should also ensure there is evidence that U.S. outbound investment in critical technologies poses a threat to national security. Further, before Congress—or the Biden Administration—acts, there must be agreement on the specific objective any action is meant to achieve. Whatever the outcome of these discussions, policymakers would be wise to adopt an incremental and targeted approach that protects Americans' ability to move capital as freely as possible.