

How Tech Race Bill Expands CFIUS Purview To Academia

By **Hdeel Abdelhady** (May 21, 2021, 5:52 PM EDT)

The U.S. views China's technological ascendance as a threat to U.S. national and economic security. The prior administration and Congress took steps in the last four years to respond to the threat, including restrictive trade and foreign investment measures aimed at Chinese firms and emerging technologies.

Concerns about the threat to the U.S. sweep the U.S. science and technology continuum from academic research to foreign investment in U.S. technology, to exports of U.S. technology and inputs necessary to develop and manufacture technology abroad.

Today, several pieces of legislation are pending in Congress to further, and more comprehensively, shore up the U.S. position in the U.S.-China technology race. Among the proposed legislation is the Strategic Competition Act of 2021, or SCA. The act illustrates clearly the official U.S. view of academia's role in the U.S.-China technology race, and the links between U.S. policies and legal measures to regulate foreign access to U.S. science and technology within and across the private, public and academic sectors.



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Context: The U.S.-China Technology Race

The Trump administration's four years brought a flood of high-profile trade restrictions targeting emerging technologies and China. Major and rising Chinese technology and telecom firms like ZTE Corp., Huawei Technologies Co. Ltd., Megvii and Hangzhou Hikvision Digital Technology Co. Ltd. were hit with export bans, government contracting exclusions, prosecutions, and record-setting monetary penalties for, among other things, human rights abuses, sanctions violations, and economic and traditional espionage.

Chinese investment in the U.S. came under regulatory, political and public scrutiny, leading to steep declines in transactions within the jurisdiction of the Committee on Foreign Investment in the United States, and compelled divestments and blocked transactions involving the dating apps Grindr,[1] hotel property management software StayNTouch,[2] and semiconductors by Qualcomm and Lattice Semiconductor Corp.[3]

In the final year of the Trump administration, the former president aimed his firepower under the International Emergency Economic Powers Act at social media platforms TikTok and WeChat, and their parent firms, respectively, ByteDance Ltd. and Tencent Holdings Ltd.

These measures were opposed with early — but not conclusive — success in litigation, as was the former president's August 2020 executive order directing ByteDance to divest TikTok[4] — with the litigation now on pause.[5]

With less fanfare, but with equal if not greater import, the U.S. government also took in the last four years actions to protect the U.S.' technological edge, particularly as to emerging technologies like artificial intelligence and 5G.

Among other measures, the U.S. adopted in 2018 the Foreign Investment Risk Review Modernization

Act, or FIRRMA, and the Export Control Reform Act that, respectively and together, expanded CFIUS' jurisdiction and the definition of critical technology to include so-called emerging and foundational technologies that may be subject to CFIUS review and export controls.

The U.S. Department of Justice homed in on foreign, particularly Chinese, influence on U.S. academia, through outreach to academic institutions, scrutiny of Confucius Institutes and prosecutions of academics' undisclosed foreign funding and affiliations, particularly with China's Thousand Talents Plan.[6] In 2018, the DOJ announced its China Initiative to counter Chinese national security threats by targeting a range of activities that the Trump White House earlier labeled economic aggression.[7]

The China Initiative put U.S. colleges, universities, and research institutions on notice of the government's interest in foreign influence on, participation in, and access to their research and platforms. As stated by this author in 2019, a siloed approach to the China Initiative, and the U.S.-China technology race, should be avoided: "academic and research institutions should take steps to understand the China Initiative in the context of broader U.S.-China dynamics." [8]

Strategic Competition Act

The SCA links directly the legal authorities that the U.S. has deployed in the U.S.-China technology race by bringing certain foreign funding of U.S. academic institutions within CFIUS' purview and adopting, albeit not explicitly, elements of the China Initiative and other measures, including the Trump administration's 2017 National Security Strategy of the U.S. [9]

U.S. Senate Foreign Relations Committee Chairman Bob Menendez, D-N.J., introduced the SCA on April 15, as a bill "to address issues involving the People's Republic of China." Co-sponsored by ranking member Jim Risch, R-Idaho, the SCA states as a congressional finding that "the United States must adopt a policy of strategic competition with the PRC to protect and promote our vital interests and values." [10] The Foreign Relations Committee referred the bill to the full Senate on April 21.

The SCA states that China is "close to its goal of becoming the global leader in science and technology" and describes multiple Chinese government actions that threaten U.S. national and economic security, including pertinently global-influence operations, intellectual property theft, and the use of "legal and illegal means to achieve its objective of becoming a manufacturing and technological superpower." [11]

To ensure that the U.S. "leads in the innovation of critical technologies, such as next-generation telecommunications, artificial intelligence, quantum computing, semiconductors, and biotechnology," the SCA sets forth in five titles offensive and defensive measures for strategic competition with China. Among the SCA's defensive measures is securing U.S. academic research and assets related to critical technologies by further regulating foreign funding of U.S. academia through CFIUS.

CFIUS Review of Foreign Funding of U.S. Colleges and Universities, Mandatory Notification to CFIUS, and Reporting to the Department of Education

The SCA would subject certain funding of U.S. institutions of higher education, or IHEs, to CFIUS review, impose a mandatory declaration requirement, and amend the Higher Education Act of 1965 to include foreign funding made newly reportable to CFIUS. [12]

Gifts and Contracts Reviewable by CFIUS

The SCA would amend the Defense Production Act [13] to add a new CFIUS-reviewable covered transaction applicable to foreign gifts to, or foreign contracts with, an IHE where one gift or contract, or more than one gift or contract involving a foreign person in a consecutive two calendar year period, equals or exceeds \$1 million and "relates to research, development, or production of critical technologies and provides the foreign person with potential access to any material nonpublic information" or is a "restricted or conditional gift or contract" as defined by Section 117(h) of the Higher Education Act. [14]

The SCA defines the terms "contract" and "gift" consistently with the Higher Education Act. [15] Two

points are notable here. First, the SCA adopts the Defense Production Act's definition of "material nonpublic technical information," which is information that:

provides knowledge, know-how, or understanding, not available in the public domain, of the design, location, or operation of critical infrastructure [or] is not available in the public domain, and is necessary to design, fabricate, develop, test, produce, or manufacture critical technologies, including processes, techniques, or methods.[16]

Second, the SCA, consistent with the Defense Production Act, captures qualitative access to technology.

Third, it should be noted that the Defense Production Act treats transactions structured to evade or circumvent CFIUS authority as covered transactions subject to CFIUS' jurisdiction.[17] Therefore, should the SCA become law, foreign gifts to and contracts with IHEs may not be structured to avoid its mandatory declaration or reporting provisions, discussed below, such as by spreading gifts or contracts equaling or exceeding \$1 million over more than two consecutive calendar years.

IHEs should be aware that the definition of critical technology for CFIUS — and export control — purposes is evolving.

In 2018, the U.S. Department of Commerce issued an advanced notice of proposed rulemaking listing 14 representative categories of so-called emerging technologies, including artificial intelligence, 3D printing, nano-biotechnology. The emerging technologies notice sought public comment on how the agency should identify emerging technologies having national security significance.[18] The Commerce Department has not followed-up the emerging technologies notice with rulemaking. Relevantly to academia, the emerging technologies notice excluded fundamental research from its purview.

The SCA would potentially bring some fundamental research within the government's line of sight while not directly limiting the scope of the fundamental research exemption from export controls.[19] IHEs and other stakeholders should be aware that by the time the SCA becomes law, if it becomes law, its scope may be altered by any regulatory action defining critical technology as required by the Export Control Reform Act and in follow-up to the Commerce Department's emerging technologies notice.

Mandatory Declaration Requirement, Pilot Program

The SCA would amend the national security reviews and investigations portion of the Defense Production Act by adding language requiring CFIUS to adopt regulations governing the new foreign gifts and contracts covered transaction, and requiring the filing of a mandatory declaration as to such new covered transactions. In other words, foreign gifts and contracts within the scope of the SCA would have to be reported to CFIUS, in the form of a mandatory declaration.[20] Taking a page from FIRRMA, the SCA directs CFIUS to "conduct a pilot program to assess methods for implementing the review of covered transactions" constituting foreign gifts or contracts.[21]

Mandate to Consider Academic Freedom

Under the Defense Production Act, when reviewing a proposed, pending, or concluded foreign investment, the president — or CFIUS — may consider enumerated national security factors, such as the potential effects of a transaction on domestic industry and critical infrastructure, and the foreign investor's national security risk profile — e.g., adherence to nonproliferation regimes and export controls.

The SCA adds a new factor — the importance of academic freedom at U.S. academic institutions — pertinent only to covered foreign gifts to and contracts with IHEs.[22]

Limited Purpose Addition of Education Secretary to CFIUS Membership

Under the SCA, the secretary of U.S. Department of Education would be added to CFIUS' membership solely in relation to reviews of covered foreign gifts and contracts to IHEs.[23]

Addition of CFIUS Reporting and Reporting to Secretary of the Treasury Under the Higher

Education Act

The SCA would alter IHEs' reporting obligations under the Higher Education Act. Disclosures under Section 117 of the Higher Education Act would be made to the secretary of the Treasury, in addition to the secretary of Education.[24]

CFIUS Reports to Congress of Foreign Influence or Espionage

Tracking the China Initiative[25] and widespread concerns about foreign influence and so-called academic espionage, the SCA would amend the Defense Production Act's reporting requirements to add a requirement that the president include information pertaining to IHEs in the annual report to Congress on critical technologies.

The SCA would require such reports to include an evaluation of foreign government assisted so-called malign influence or espionage activities directed at IHEs "aimed at obtaining research and development methods or secrets related to critical technologies." The president's reports would also include "an evaluation of, and recommendation for any changes to, reviews" of foreign influence and espionage based on an analysis of disclosure reports submitted under the Higher Education Act, as amended by the SCA.

Naturally, and significantly, the requirement of reporting to Congress would create direct congressional oversight specific to foreign influence and espionage related to IHEs. This underscores Congress' known interests in further identifying and monitoring foreign influence and academic espionage.

The SCA's reporting provisions also take a page from FIRRMA, by expressly directing the use of disclosure reports as sources of information to inform future regulation and oversight, analogous to FIRRMA's directive that foreign investment filings and reviews be utilized as sources of information to inform future foreign investment reviews and export controls.

Key Takeaways

Whether or not the SCA becomes law, the bill is notable for several reasons. First, and broadly, it reflects the U.S. policy consensus — a bipartisan consensus — that China's technological ascendance is a threat to U.S. national and economic security.

Second, the SCA makes clear that U.S. science and technology capabilities and assets — whether created or housed in the private sector, the public sector or in academic settings — are within scope of policies and laws designed or used to regulate and curb foreign access. Academic institutions, while specially treated in some respects, are not exempt from ongoing policy and legal efforts to press the U.S.-China technology race.

Third, the Trump administration is no more, but some approaches taken or amplified by the administration remain relevant and are, in some cases, expressly endorsed across partisan lines.

Finally, the SCA evinces the view of Congress — or the SCA's proponents — that CFIUS review and oversight are effective, with applicability beyond foreign investment transactions. This is significant, as CFIUS has from 1975 been limited to foreign investment.[26]

Whether the SCA's proposed expansion of CFIUS' authority is sound or practicable remains to be seen, but Congress' endorsement of the CFIUS model should be noted by IHEs and others involved in science and technology research, innovation and commerce.

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[1] Hdeel Abdelhady, Foreign Investment, National Security, and Personal Data: Grindr's Perfect Storm, (May 2, 2019), MassPoint Legal and Strategy Advisory PLLC, at <https://masspointpllc.com/foreign-investment-national-security-and-personal-data-grindr-perfect-storm/>.

[2] See, e.g., David McLaughlin, Trump Blocks Chinese Deal for U.S. Software Firm StayNTouch, Bloomberg (Mar. 6, 2020), at <https://www.bloomberg.com/news/articles/2020-03-06/trump-blocks-chinese-deal-for-hotel-management-software-company>.

[3] See, e.g., Kate O'Keeffe, Trump Orders Broadcom to Cease Attempt to Buy Qualcomm, Wall St. J. (Mar. 13, 2018), at <https://www.wsj.com/articles/in-letter-cfius-suggests-it-may-soon-recommend-against-broadcom-bid-for-qualcomm-1520869867>; Liana B. Baker, Trump bars Chinese-backed firm from buying U.S. chipmaker Lattice, Reuters (Sept. 13, 2017), at <https://www.reuters.com/article/us-lattice-m-a-canyonbridge-trump/trump-bars-chinese-backed-firm-from-buying-u-s-chipmaker-lattice-idUSKCN1BO2ME>.

[4] Hdeel Abdelhady, China's Expanded Export Controls Complicate TikTok Divestment, Potentially Trigger Unprecedented Legal Scenario, MassPoint Legal and Strategy Advisory PLLC (Aug. 31, 2020), at <https://masspointpllc.com/chinas-expanded-export-controls-add-drama-to-tiktok-saga-analysis/>.

[5] See, e.g., Jeanne Whalen, Biden asks for pause in Trump's effort to ban WeChat, Washington Post (Feb. 11, 2021), at <https://www.washingtonpost-com.gwlaw.idm.oclc.org/technology/2021/02/11/wechat-trump-biden-pause/>.

[6] See, e.g., Dept. of Justice, Release, Harvard University Professor and Two Chinese Nationals Charged in Three Separate China Related Cases (Jan. 28, 2020), at <https://www.justice.gov/opa/pr/harvard-university-professor-and-two-chinese-nationals-charged-three-separate-china-related>.

[7] See, e.g., Jacob M. Schlesinger and Vivian Salama, New White House Report, Authored by Trade Hawk, Blasts Chinese 'Economic Aggression', (June 19, 2018), at <https://www.wsj.com/articles/new-white-house-report-authored-by-trade-hawk-blasts-chinese-economic-aggression-1529456401>.

[8] Hdeel Abdelhady, What Academia Must Know About the DOJ's China Initiative, Law360 (Jan. 28, 2019), at <https://masspointpllc.com/wp-content/uploads/What-Academia-Must-Know-About-DOJs-China-Initiative.pdf>

[9] *Id.* (stating that "the China Initiative, according to a DOJ fact sheet, acts on the Trump administration's previous findings 'concerning China's practices' and 'reflects the Department's strategic priority of countering Chinese national security threats and reinforces the President's overall national security strategy'" and noting that the 2017 National Security Strategy "identifies countering academic espionage as a priority."). See also Hdeel Abdelhady, Tech Wars: National Security-Based Restrictions on Foreign Access to U.S. Technology, Law360 (Oct. 19, 2018), at <https://masspointpllc.com/wp-content/uploads/Hdeel-Abdelhady.TechWars.National-Security-Foreign-Access-U.S.-Technology.pdf> (discussing proposed policies to restrict or regulate foreign participation in academic research and Congressional concerns about foreign funding of academic institutions).

[10] SCA § 2(24).

[11] SCA § 2(13).

[12] The SCA incorporates portions of the Higher Education Act's definition of "institution of higher education," and appears to expand the net by including in its multi-pronged definition of an IHE an institution that directly or indirectly receives federal financial assistance, including in the form of "support from the extension of federal financial assistance to any of the institution's subunits." SCA § 138(a)(1)(A).

[13] The SCA amends 50 U.S.C. § 4565, on the President's (and CFIUS') "authority to review certain mergers, acquisitions, and takeovers."

[14] SCA § 138(a)(1)(A). A "restricted or conditional gift or contract "under the Higher Education

Act, 20 U.S.C. § 1011f(h)(5) is:

any endowment, gift, grant, contract, award, present, or property of any kind which includes provisions regarding--(A) the employment, assignment, or termination of faculty; (B) the establishment of departments, centers, research or lecture programs, or new faculty positions; (C) the selection or admission of students; or (D) the award of grants, loans, scholarships, fellowships, or other forms of financial aid restricted to students of a specified country, religion, sex, ethnic origin, or political opinion.

[15] Under the Higher Education Act: a contract is "any agreement for the acquisition by purchase, lease, or barter of property or services by the foreign source, for the direct benefit or use of either of the parties" and a gift is "any gift of money or property." 20 U.S.C. § 1011f(h). The SCA employs both definitions, except it refers to "foreign person" rather than "foreign source" in the definition of "contract." SCA § 138(a)(1)(C) (amending the Defense Production Act).

[16] 50 U.S.C. § 4565(a)(4)(D)(ii)(I).

[17] 50 U.S.C. § 4565(a)(4)(B)(v).

[18] Dept. of Commerce, Review of Controls for Certain Emerging Technologies, at <https://www.govinfo.gov/content/pkg/FR-2018-11-19/pdf/2018-25221.pdf>. In August 2020, the Commerce Department issued an advanced notice of proposed rulemaking on so-called foundational technologies seeking public comment on how the agency should identify and describe those technologies for potential export control purposes. Dept. of Commerce, Identification and Review of Controls for Certain Foundational Technologies, at <https://www.govinfo.gov/content/pkg/FR-2020-08-27/pdf/2020-18910.pdf>.

[19] Technology or "software" that "arises during, or results from, fundamental research and is intended to be published is not subject to" the Export Administration Regulations. 15 C.F.R. § 734.8. Under President Reagan's 1985 National Security Decision Directive 189, it is the policy of the U.S. that "to the maximum extent possible, the products of fundamental research remain unrestricted." NSDD 189 defines fundamental research as "basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons."

[20] As amended by FIRRMA, the Defense Production Act includes as a filing type (in addition to a "notice") a declaration (voluntary or, in some cases, mandatory) that is an abbreviated notice to CFIUS of a foreign investment within or potentially within the scope of CFIUS' review. Under CFIUS' regulations, a declaration is mandatory as to certain foreign investments in U.S. businesses involving critical technology, critical infrastructure, or individual sensitive personal data (known as "TID" businesses) where a foreign government entity has a substantial interest or where other regulatory criteria are met. E.g., 31 C.F.R. § 800.401. The SCA would make mandatory a declaration of a "covered" foreign gift or contract to an IHE.

[21] SCA § 138(e)(1). FIRRMA authorized CFIUS to undertake pilot programs as to new transactions within its authority under FIRRMA. Pub. L. No. 115-232, § 1727(c).

[22] SCA § 138(a)(3)(C).

[23] SCA § 138(a)(4).

[24] SCA §138(b) (amending 20 U.S.C. § 1011f (a) and (d)).

[25] Hdeel Abdelhady, What Academia Must Know About the China Initiative, *supra* n. 8.

[26] President Ford created CFIUS by Executive Order No. 11858 of May 7, 1975, to monitor foreign investment in the U.S. The president's authority to review mergers, acquisitions, and takeovers was codified in 1988, by the Omnibus Trade and Competitiveness Act of 1988 (the "Exon-Florio" amendment to the Defense Production Act). CFIUS, as an entity, was statutorily established by the

Foreign Investment and National Security Act of 2007. For the first time in the over 45 years of CFIUS' existence, the SCA, if enacted, would extend the Committee's purview beyond foreign investment transactions.