

# International Trade Alert

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## New Legislation Could Impose CFIUS Requirements on Higher Education

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### Key Points:

- The Strategic Competition Act of 2021 (S. 1169), a new bipartisan bill that passed the Senate Foreign Relations Committee on April 21, 2021, is aimed at enabling the U.S. government to better understand and address China's global influence with the aim of enhancing U.S. competitiveness and notably includes a provision that could have significant ramifications for colleges, universities and other institutions of higher education.
- For the first time, certain gifts made to, and contracts made with, U.S. institutions of higher education involving foreign persons – not just Chinese parties – would be subject to review by CFIUS and possible prohibition or mitigation.
- Furthermore, a subset of such gifts or contracts related to the research, development or production of critical technologies would require institutions of higher education to make mandatory filings with CFIUS.
- This expansion of CFIUS could have significant consequences for higher education, including added compliance burdens and complications for research and fundraising efforts.

### Background

The Committee on Foreign Investment in the United States (CFIUS) is the interagency mechanism through which the U.S. government monitors and reviews foreign investment in the United States for possible national security concerns. CFIUS has the authority to initiate reviews of transactions and, if necessary, suspend them; impose mitigation measures; and/or recommend that the President block pending transactions or order divestitures of completed transactions when national security concerns cannot be mitigated.

Under current rules, in addition to certain real estate transactions, CFIUS essentially has jurisdiction to review transactions that would (i) result in control of a U.S. business by a foreign person (e.g., a merger or acquisition); or (ii) afford a foreign person specific "non-control" rights (e.g., the right to appoint a board member) in certain U.S.

### Contact Information

**Akin Gump will continue to track this and related legislation. If you have any questions concerning this update, please contact:**

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technology, infrastructure and data (TID) businesses (collectively, these transactions are referred to as “covered transactions”).<sup>1</sup>

Parties to covered transactions may choose to voluntarily file with CFIUS to obtain clearance to address the risk that CFIUS will intervene in a pending or completed transaction, which could potentially result in, among other things, a post-closing ordered divestiture or the imposition of mitigation measures. And, in certain cases, filing with CFIUS is mandatory prior to closing the transaction, and the failure to make such a filing could result in civil penalties.<sup>2</sup>

### **Expansion of CFIUS Jurisdiction to Higher Education Gifts and Contracts**

The current version of the Strategic Competition Act would significantly expand CFIUS’s jurisdiction to allow for and, in certain cases, require the review of high-value foreign gifts to, and contracts with, institutions of higher education. In particular, the bill would allow CFIUS to review any gift to an institution of higher education from a foreign person, or the entry into a contract by such an institution with a foreign person, if:

1. The value of the gift or contract (or the aggregate value of multiple gifts or contracts from the same foreign person for the same purpose over a period of two years) equals or exceeds 1 one million dollars; and
2. The gift or contract (a) relates to research, development or production of critical technologies (i.e., essentially any item controlled under U.S. export controls) and provides the foreign person potential access to any material nonpublic technical information in the possession of the institution; or (b) is a “restricted or conditional gift or contract” that “establishes control.”<sup>3</sup>

The terms “gift” and “contract” are defined broadly under the bill, meaning “any gift of money or property” and “any agreement for the acquisition by purchase, lease, or barter of property or services by a foreign person, for the direct benefit or use of either of the parties,” respectively. Notably, the legislation establishes a specific definition of an “Institution of Higher Education” that focuses on whether the institution provides post-secondary education, the nature of the degree(s) granted, accreditation and whether the institution receives (directly or indirectly) federal financial assistance.

The term “restricted or conditional gift or contract” is defined by reference to the Higher Education Act of 1965 and means:

“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.”<sup>4</sup>

Importantly, a “restricted or conditional” gift by a foreign person would need to establish “control” in order for such gifts to be subject to CFIUS jurisdiction. While

control is a fundamental concept under existing CFIUS rules, it is unclear how that term would apply in this context.<sup>5</sup> Along those lines, the legislation directs CFIUS to provide guidance on the meaning of “control” as applied here as part of its implementing regulations.

### **Mandatory Filing for Higher Education Gifts and Contracts**

In addition to the expansion of CFIUS jurisdiction, the bill would make filing mandatory for gifts or contracts related to the research, development, or production of critical technologies and that also provides the foreign person potential access to any material nonpublic technical information.

As failure to make a mandatory filing could result in parties to a covered transaction being subject to civil penalties up to the value of the transaction, this development could have substantial consequences for institutions of higher education. If enacted, prior to accepting any gifts or entering into any contract above the threshold, institutions of higher education would need, to understand and assess, among other issues, whether the gift or contract involves: (i) a foreign person, (ii) critical technologies and/or (iii) provides the foreign person potential access to material nonpublic technical information. Note that “foreign person” includes not just foreign governments, foreign nationals or entities organized under the laws of a foreign state with a principal place of business outside the United States, but also entities controlled by a foreign person.<sup>6</sup>

### **Implementing Regulations and Timeline**

Once enacted, the bill requires CFIUS to implement an 18-month pilot program as an initial implementation step. CFIUS review of higher education foreign gifts and contracts under that pilot program would commence within 300 days following the bill’s enactment and last for 570 days after which CFIUS is directed to publish a final rule based on lessons learned from the pilot program.

The bill would require CFIUS (in consultation with the Secretary of Education) to promulgate regulations, and specifically directs CFIUS to consider (1) structuring penalties and filing fees to reduce the burden on institutions of higher education and protecting academic freedom and (2) guidance with respect to the meaning of “control” as that term would apply to the revised definition of covered transaction.

### **Takeaways for Institutions of Higher Education**

These requirements would apply to any gift from or contract with a foreign person that meets the requisite jurisdictional thresholds. In other words, the bill does not differentiate, for instance, between gifts from foreign nationals of close allies or Chinese nationals so long as the gift or contract exceeds the monetary thresholds and meets the other substantive requirements related to critical technologies or restricted or conditional gifts or contracts.

From the perspective of U.S. colleges and universities, the proposed bill raises numerous concerns, including but not limited to the following.

- First, the CFIUS process is one that not many universities deal with on a regular basis. If enacted, the legislation would require them to participate (and in the case

of some institutions, perhaps frequently) in what can be a challenging and resource intensive regulatory process.

- Second, the legislation may have a chilling effect on U.S. universities' research missions. For example, the CFIUS process can take time to complete and the results are not necessarily predictable. This inherent uncertainty may drive research support away from U.S. universities due to timeline and privacy concerns or even whether the transaction will be rejected.
- Third, it may not always be clear whether a particular gift would be subject to CFIUS review. This could have a potentially negative impact on giving in general as it could open up potential liability for this charitable activity, thereby undermining a university's philanthropic efforts.
- Fourth, institutions of higher education already have reporting requirements for foreign-sourced gifts and contracts under Section 117 of the Higher Education Act. It is unclear how, or if, this legislation would interact with that existing obligation.
- Finally, if enacted, the new requirements could strain relationships with long-standing donors as it will compel probing of their ownership structure to assess whether they would qualify as a "foreign person."

From a non-U.S. company perspective, this proposed bill could add, among other things, compliance burdens and constraints on ongoing and future research projects involving U.S. colleges and universities.

<sup>1</sup> A TID U.S. business is one that (1) produces, designs, tests, manufactures, fabricates, or develops critical **technologies** (i.e., export-controlled items); (2) owns or operates critical **infrastructure**; or (3) maintains or collects sensitive personal **data** of U.S. citizens. 31 C.F.R. § 800.248.

<sup>2</sup> Under current rules, mandatory filing requirements apply in two circumstances:

- I .If a foreign government holds at least a 49 percent interest in the foreign person that is acquiring at least a 25 percent interest in a TID U.S. business; or
- II .If the target is a TID U.S. business that produces, designs, tests, manufactures, fabricates, or develops one or more "critical technologies" that would require a U.S. regulatory authorization to export, reexport, transfer (in-country) or retransfer such critical technologies to foreign persons involved in the transaction.

<sup>3</sup> Under current rules, "critical technologies" are items that are: (i) included on the United States Munitions List (USML) set forth in the International Traffic in Arms Regulations (ITAR); (ii) identified on the Commerce Control List (CCL) set forth in the Export Administration Regulations (EAR) and controlled pursuant to multilateral regimes or for reasons relating to regional stability or surreptitious listening; (iii) subject to certain nuclear controls set forth in 10 C.F.R. Part 110 and 10 C.F.R. Part 810; (iv) select agents and toxins covered by 7 C.F.R. Part 331, 9 C.F.R. Part 121 and 42 C.F.R. Part 73; and (v) emerging and foundational technologies identified pursuant to Section 1758 of the Export Control Reform Act of 2018 (to date, no such technologies have been identified).

<sup>4</sup> 20 U.S.C. 1011f(h)(5).

<sup>5</sup> 31 C.F.R. 800.208.

<sup>6</sup> 31 C.F.R. § 800.224.

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