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Not To Be Outpaced: How The 2024 NDAA Addresses China

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The U.S. House of Representatives and U.S. Senate versions of the National Defense Authorization Act for the 2024 fiscal year include numerous provisions — leveraging all elements of national power — intended to address what the National Defense Strategy brands as China's pacing challenge.

These provisions should come as no surprise to those who track these issues. The U.S. Department of Defense's focus on strengthening U.S. deterrence and competitive positioning vis-à-vis China features prominently in recent national security discourse.

This focus is shared by the House Select Committee on Strategic Competition Between the United States and the Chinese Communist Party, chaired by Rep. Mike Gallagher, R-Wisc., with Ranking Member Raja Krishnamoorthi, D-Ill.

Because the NDAA is viewed as must-pass legislation, it has served in past years as a vehicle through which other bills not directly related to the DOD are enacted in law. In one respect, this year is no different — the Senate version of the NDAA incorporates both the U.S. Department of State and the 2024 intelligence authorization bills, each of which includes provisions related to China.

To get a flavor of the approach to China in this year's NDAA, look no further than the Ending China's Developing Nation Status Act in Section 1399L of the Senate bill, which would require U.S. opposition to granting China developing-nation status in treaties under negotiation and by international organizations of which the U.S. and China are members, such as the World Trade Organization.

Classification as a developing nation affords China access to preferential loans and other economic benefits intended to increase trading opportunities, notwithstanding its current status as an upper-middle income country, as determined by the World Bank, and the world's second-largest economy, trailing only the U.S.

Not to be outdone, Section 155 of the House bill contains a provision mandating expedited deployment of advanced radars to track high-altitude balloons and other potential threats to the U.S., in direct response to the incident earlier this year in which a Chinese balloon flew across the U.S. before being shot down by the U.S. Air Force.

Given these provisions and many more, some of which we discuss below, this year's NDAA strikes us as different because it incorporates more China-related provisions than in previous years, and many of these would impose greater obligations on government contractors to limit their interactions with China and entities affiliated with the Chinese government.

Further, many of these provisions appear to have garnered strong bipartisan support.

Highlights of the NDAA's China Provisions

With this backdrop, we explore five themes of particular relevance to companies that conduct business with the U.S. government or that may engage in business with, or have operations in China: (1) supply chain and sourcing prohibitions; (2) guarding against sensitive technology transfer; (3) ownership or investment restrictions; (4) monitoring Chinese military and economic power using annual reports; and (5) enhancing the U.S.' relationship with Taiwan.

Supply Chain and Sourcing Prohibitions

Procurement from Certain Chinese Military Companies

Sections 811 and 1311 of the House bill incorporate a Select Committee recommendation to secure defense supply chains by prohibiting the DOD from contracting or procuring goods, services or technology from Chinese military companies identified on the DOD's so-called 1260H list.

Section 1260H of the NDAA for fiscal year 2021 required the secretary of defense to publish and regularly update a list of companies controlled by the People's Liberation Army or identified as "military-civil fusion contributors" for the Chinese defense industrial base and operating in the U.S.

Section 1103 of the Senate bill further includes a provision that would authorize the secretary of state to work with Federated States of Micronesia, Palau and the Marshall Islands to ensure that their governing bodies do not procure or use systems from Chinese companies on the 1260H list, with a view to enabling interoperability with U.S. systems and minimizing risks of cyberattack or espionage.

Genetic Sequencing Equipment from Beijing Genomics Institute

Section 1880 of the House NDAA would prohibit the U.S. government and government contractors from acquiring biotechnology equipment or services from the Beijing Genomics Institute and its subsidiaries, and would require the secretary of defense to evaluate whether biotechnology acquisitions from other companies headquartered in or organized under the laws of China should be similarly barred.

EcoHealth Alliance and Wuhan Institute of Virology

Section 1313 of the House bill and Section 1364 of the Senate bill would prohibit the DOD from contracting with EcoHealth Alliance Inc. for any research supported by the CCP. Section 1882 of the House bill and Section 1362 of the Senate bill would defund the Wuhan Institute of Virology.

Consulting with PLA or Affiliated Entities

Although they adopt different approaches, both the House and Senate address DOD's use of consulting services from firms that purportedly engage in so-called double-dipping by also consulting with the

People's Liberation Army or affiliated entities.

Section 808 of the House NDAA would impose a direct ban on DOD contracts with such consulting firms, whereas Section 819 of the Senate NDAA would require a firm to self-certify either that it does not hold a contract with any covered entities — including entities affiliated with China's government — or that it maintains an actionable conflict of interest mitigation surveillance plan, and will notify DOD contract-oversight authorities within 15 days of determining an unmitigated conflict of interest has arisen.

LOGILINK and U.S. Seaports

Both chambers prohibit the DOD from contracting with any entity that uses or shares data with LOGILINK, the CCP-backed transportation logistics software. Section 866 of the House bill would go a step further than Senate bill Sections 1371 to 1373 by imposing the same prohibition on U.S. seaports that accept federal grants.

Further, Section 406 of the Intelligence Authorization Act, incorporated in the Senate version of the NDAA, requires an intelligence assessment of the threat posed to U.S. ports by cranes manufactured by or in countries of concern, including Chinese commercial entities such as Shanghai Zhenhua Heavy Industries Co.

Petroleum Products

Both House Section 1867 and Senate Section 3143 would prohibit the export or sale of petroleum products drawn from the Strategic Petroleum Reserve to the PRC government, the CCP, or any entity owned, controlled or influenced by either.

PRC or CCP-Manufactured Drones

The Senate bill, in Sections 1091-1099D, would expand the current ban on the DOD's use of federal funds to procure or operate drones manufactured by any entity domiciled in the PRC, or otherwise subject to the influence or control of the PRC government or the CCP, to all executive branch departments and agencies.

PRC-Manufactured Computers or Printers

Section 832 of the House NDAA would prohibit the DOD from acquiring computers or printers if the manufacturer or bidder is an entity owned, controlled, directed or subcontracted by, affiliated with, or otherwise connected to the PRC government.

The Biden administration signaled its opposition to this provision in its statement of administration policy, citing the burden it would impose on the DOD.

Films and Entertainment

House Section 1248 and Senate Section 1361, respectively, would prohibit DOD support to the production of films that are subject to conditions on content or altered for screening in the PRC or at the request of the CCP, and prohibit the use of taxpayer dollars to support entertainment projects with ties to the PRC government.

Battery Technologies

Section 183 of the House NDAA would prohibit the DOD from procuring battery technology produced by six named China-connected companies, or their subsidiaries or affiliates.

Guarding Against Sensitive Technology Transfer

Together, the House and Senate bills include a host of overlapping provisions to guard against sensitive technology transfer in the domains of education and research, as outlined below.

Ban on PRC or CCP Research Funding

Section 1879 of the House NDAA would establish a governmentwide prohibition on funding grants, contracts and cooperative agreements for research to be conducted by the PRC government, the CCP or any entity they own or control.

Confucius Institutes

Together, House Sections 1041 and 1042, and Senate Section 1079 would close loopholes that enabled DOD funds to go to U.S. universities operating so-called Confucius Institutes — cultural institutes funded by the PRC government or the CCP — and the House bill would specifically require that all such institutes close by September 30, 2026.

Report on Gifts and Grants to U.S. Institutions

Section 1369 of the Senate NDAA would mandate a report to Congress from the secretary of the treasury listing and describing all gifts and grants to U.S. institutions of higher education from entities on the Non-SDN Chinese Military-Industrial Complex Companies List maintained by the Office of Foreign Assets Control.

Chinese Research Labs

House Section 230 and Senate Section 6243 would both require an inspector-general audit to identify the diversion of DOD funding to Chinese research labs.

Fundamental Research

Section 229 of the House NDAA would restrict DOD-funded fundamental research from contributing to higher-education research collaborations with China. As a condition of receiving DOD funds, an institution of higher education must certify that the principal investigator of the project to which DOD funds would be applied is not and will not conduct fundamental research in collaboration with Chinese academic institutions or PLA-affiliated entities during the period in which the project receives DOD funding.

Benefits of U.S.-Funded Research

Section 1810 of the House NDAA would require a federal interagency report to Congress on the extent to which China has benefited from research funded by U.S. taxpayers.

Ownership or Investment Restrictions

The House and Senate bills contain numerous provisions focused on restricting both inbound and outbound investment involving China:

Foreign Ownership of Agricultural Land

Section 1868 of the House bill would require the DOD to identify and assess the threat, if any, posed by foreign ownership of agricultural land within 50 miles of a military installation, while Section 1086 of the Senate bill would require review by the Committee on Foreign Investment in the United States of transactions involving the purchase or lease of U.S. agricultural land by a foreign person.

More generally, Section 2869 of the House bill would require the secretary of defense to establish guidelines to identify and mitigate so-called encroachment, that is, activities conducted in proximity to military installations or U.S. government property — including by foreign investors — that may pose a national security risk.

CCP or Other Ownership of Military Fuel Providers

Section 828 of the House NDAA would require the DOD to ensure military fuel providers are not owned or infiltrated by the CCP or other adversaries.

DOD Investment in PRC Companies

Section 872 of the House bill would prohibit DOD Office of Strategic Capital investments in companies incorporated under the laws of the PRC, or companies more than 50% owned by citizens of China or entities incorporated under the laws of the PRC.

The Office of Strategic Capital is the DOD office intended to connect companies developing critical technologies vital to national security with private capital, to bridge the so-called valley of death between the laboratory and full-scale production.

Outbound Investment in Critical Technology Providers

In July, the Senate voted 91-6 to include in the NDAA an amendment offered by Sens. John Cornyn, R-Texas, and Bob Casey, D-Penn., that would require covered U.S. persons to provide notice to the Treasury Department of certain transactions with covered foreign persons — including persons from China or any other country of concern — involving a number of industries, including advanced semiconductors or microelectronics, artificial intelligence, quantum technology, hypersonics and other critical technologies.

The amendment, incorporated as Section 1085 of the Senate bill, would require the Treasury Department to provide Congress annually with a list of notifications received and an assessment of the national security risks of the notified activities.

The Senate version of the NDAA passed before President Biden issued his Aug. 9 executive order on outbound investment. The release of the order, given its partial overlap with the Senate Section 1085 in both timing and substance, complicates the debate over outbound investment screening more generally.

It is unclear whether Congress will seek to codify the president's order, negotiate new language addressing perceived gaps in the order, or take some other tack. The Treasury Department has already requested public comment on an advanced notice of proposed rulemaking issued in parallel with the order, and the formal rulemaking process will continue in the coming months.

The final rule, which is not expected to be published until late 2024, will impose prohibitions and notice requirements on U.S. outbound investments in entities engaged in particular technology sectors — including semiconductors and microelectronics, quantum information technologies and artificial intelligence systems — in China, Hong Kong and Macau, and entities related thereto.

Monitoring Chinese Military and Economic Power Using Annual Reports

Both chambers appear to be intent on monitoring the evolution of Chinese military and economic power via reports and briefings, including the following:

Assess Critical and Emerging Technologies

Section 1317 of the House bill would require the DOD's annual China Military Power report to provide an assessment of the PRC's development of critical and emerging technologies, and identify key PRC entities — including entities domiciled in the PRC, or controlled or directed by the PRC government and its affiliates — involved in each technology sector.

Assess Overall PRC Defense Spending

Both House Section 1315 and Senate Section 1357 would require an independent "building block"-based assessment of the PRC government's defense budget to accurately assess overall PRC government defense spending.

Evaluate Space-Related Activities

Section 1614 of the House bill would mandate a DOD report to Congress evaluating the space-related activities of the Russian Federation and the PRC, including satellites, space stations, moon exploration and the acquisition of minerals from the moon, while House Section 1609 would require the U.S. Space Force to share information about threats from China with commercial space operators.

Assess PLA Military Readiness

Section 1360 of the Senate bill would require the secretary of defense to brief Congress semi-annually on military activities of the PRC relating to any possible Taiwan or South China Sea contingency, including PRC weapons purchases and the readiness of the PLA to potentially conduct aggressive military action against Taiwan, as well as efforts by the DOD to engage with the PLA.

Enhancing the U.S. Relationship with Taiwan

No discussion of China would be complete without consideration of Taiwan. Both the House and Senate versions of the NDAA reflect a commitment to enhancing the relationship between the U.S. and Taiwan.

Military Coordination Efforts

House Section 1505 and Sections 1342 and 1352 of the Senate bills would support greater military coordination between the U.S. and Taiwan, including conducting exercises; developing joint concepts of operation and tactics, techniques, and procedures; strengthening military cybersecurity cooperation; and other security measures to help Taiwan meet its self-defense needs.

FMS Backlog

Section 1310N of the House NDAA would address the current Foreign Military Sales backlog to Taiwan by directing the secretaries of defense and state to submit to Congress a plan through which the U.S. would provide Taiwan with the defense articles, services and training it has requested.

Strategic Trade Eligibility

Section 6242 of the Senate NDAA would render Taiwan eligible for the strategic trade authorization exception to certain export control licensing requirements.

Improving Bilateral Relationships

Section 1368 of the Senate bill would encourage the expansion of local military acquisition agreements with neighboring Pacific island nations to improve bilateral relationships, and counter the CCP's increased presence and activity in the region. It also lauds the U.S. network of security alliances and partnerships in the Pacific as our "single greatest asymmetric strength."

Whether the laundry list of China-related provisions in the current NDAA will survive, and in what form, will be determined by the conference process currently underway. But these provisions have the potential to impose significant near-term burdens on contractors — requiring them to assess their obligations and make adjustments to ensure compliance.

Indeed, these provisions may be far more disruptive than China-related NDAA requirements imposed in prior years, which contractors have navigated by reassessing supply chains and increasing due diligence. All government contractors and suppliers to government contractors with any connection to China would be well advised to monitor how the NDAA conference approaches resolution of this legislation over the coming months.

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