AMENDMENT NO.       Calendar No.

Purpose: To require reviews of United States investment in foreign countries that may threaten national critical capabilities.


S. 1260

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. CASEY to the amendment (No. 1502) proposed by Mr. SCHUMER

Viz:

1 At the end of title V of division B, the following:

2 SEC. 2528. NATIONAL CRITICAL CAPABILITIES REVIEWS.

3 (a) IN GENERAL.—The Trade Act of 1974 (19

4 U.S.C. 2101 et seq.) is amended by adding at the end

5 the following:
"TITLE X—NATIONAL CRITICAL CAPABILITIES REVIEWS"

"SEC. 1001. DEFINITIONS.

"In this title:

"(1) APPROPRIATE CONGRESSIONAL COMMITTEES.—The term ‘appropriate congressional committees’ means—

"(A) the Committee on Finance, the Committee on Armed Services, the Committee on Banking, Housing, and Urban Affairs, the Committee on Commerce, Science, and Transportation, the Committee on Health, Education, Labor, and Pensions, and the Committee on Homeland Security and Governmental Affairs of the Senate; and

"(B) the Committee on Ways and Means, the Committee on Armed Services, the Committee on Education and Labor, the Committee on Financial Services, the Committee on Homeland Security, and the Committee on Transportation and Infrastructure of the House of Representatives.

"(2) COMMITTEE.—The term ‘Committee’ means the Committee on National Critical Capabilities established under section 1002."
“(3) CONTROL.—The term ‘control’ means the power, direct or indirect, whether exercised or not exercised, to determine, direct, or decide important matters affecting an entity, subject to regulations prescribed by the Committee.

“(4) COUNTRY OF CONCERN.—The term ‘country of concern’—

“(A) has the meaning given the term ‘foreign adversary’ in section 8(c)(2) of the Secure and Trusted Communications Networks Act of 2019 (47 U.S.C. 1607(c)(2)); and

“(B) may include a nonmarket economy country (as defined in section 771(18) of the Tariff Act of 1930 (19 U.S.C. 1677(18))) identified by the Committee for purposes of this paragraph by regulation.

“(5) COVERED TRANSACTION.—

“(A) IN GENERAL.—Except as otherwise provided, the term ‘covered transaction’ means any of the following transactions, proposed or pending on or after the date of the enactment of this title:

“(i) Any transaction by a United States business that—
"(I) shifts or relocates to a country of concern, or transfers to an entity of concern, the design, development, production, manufacture, fabrication, supply, servicing, testing, management, operation, investment, ownership, or any other essential elements involving one or more national critical capabilities identified under subparagraph (B)(ii); or

"(II) could result in an unacceptable risk to a national critical capability.

"(ii) Any other transaction, transfer, agreement, or arrangement, the structure of which is designed or intended to evade or circumvent the application of this title, subject to regulations prescribed by the Committee.

"(B) REGULATIONS.—

"(i) IN GENERAL.—The Committee shall prescribe regulations further defining the term 'covered transaction' in accordance with subchapter II of chapter 5, and chapter 7, of title 5, United States Code
(commonly known as the ‘Administrative Procedure Act’).

“(ii) IDENTIFICATION OF NATIONAL CRITICAL CAPABILITIES.—For purposes of subparagraph (A)(I), the regulations prescribed by the Committee under clause (i) shall—

“(I) identify the national critical capabilities subject to that subparagraph based on criteria intended to limit application of that subparagraph to the subset of national critical capabilities that is likely to pose an unacceptable risk to the national security and crisis preparedness of the United States; and

“(II) enumerate, quantify, prioritize, and set forth sufficient allowances of, specific types and examples of such capabilities.

“(6) CRISIS PREPAREDNESS.—The term ‘crisis preparedness’ means preparedness for—

“(A) a public health emergency declared under section 319 of the Public Health Service Act (42 U.S.C. 247d); or
6

“(B) a major disaster declared under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170).

“(7) CRITICAL INFRASTRUCTURE.—The term ‘critical infrastructure’ means systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.

“(8) ENTITY OF CONCERN.—The term ‘entity of concern’ means an entity—

“(A) the ultimate parent entity of which is domiciled in a country of concern; or

“(B) that is directly or indirectly controlled by, owned by, or subject to the influence of a foreign person that has a substantial nexus with a country of concern.

“(9) FOREIGN ENTITY.—

“(A) IN GENERAL.—Except as provided by subparagraph (B), the term ‘foreign entity’ means any branch, partnership, group or subgroup, association, estate, trust, corporation or
division of a corporation, or organization organ-
ized under the laws of a foreign country if—

"(i) its principal place of business is
outside the United States; or

"(ii) its equity securities are primarily
traded on one or more foreign exchanges.

"(B) EXCEPTION.—The term 'foreign enti-

ty' does not include any entity described in sub-
paragraph (A) that can demonstrate that a ma-

jority of the equity interest in such entity is ul-

timately owned by nationals of the United

States.

"(10) FOREIGN PERSON.—The term 'foreign

person' means—

"(A) any foreign national, foreign govern-

ment, or foreign entity;

"(B) any entity over which control is exer-
cised or exercisable by a foreign national, for-
government, or foreign entity; or

"(C) any entity over which control is exer-
cised or exercisable by a person described in

subparagraph (A) or (B).

"(11) NATIONAL CRITICAL CapABILITIES.—The

term 'national critical capabilities', subject to regula-
tions prescribed by the Committee—
“(A) means 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; and

“(B) includes the following:

“(i) The production, in sufficient quantities, of any of the following articles:

“(I) Medical supplies, medicines, and personal protective equipment.

“(II) Articles essential to the operation, manufacture, supply, service, or maintenance of critical infrastructure.

“(III) Articles critical to infrastructure construction after a natural or manmade disaster.

“(IV) 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.
“(V) Any other articles identified in regulations prescribed under section 1007.

“(ii) Supply chains for the production of articles described in clause (i).

“(iii) Essential supply chains for the Department of Defense.

“(iv) Any other supply chains identified in regulations prescribed under section 1007.

“(v) Services critical to the production of articles described in clause (i) or a supply chain described in clause (ii), (iii), or (iv).

“(vi) Medical services.

“(vii) Services critical to the maintenance of critical infrastructure.

“(viii) Services critical to infrastructure construction after a natural or man-made disaster.

“(ix) Any other services identified in regulations prescribed under section 1007.

“(12) NATIONAL SECURITY.—The term ‘national security’ includes—
“(A) national security, as defined in section 721(a) of the Defense Production Act of 1950 (50 U.S.C. 4565(a));

“(B) national defense, as defined in section 702 of that Act (50 U.S.C. 4552); and

“(C) agricultural security and natural resources security.

“(13) PARTY.—The term ‘party’, with respect to a transaction, has the meaning given that term in regulations prescribed by the Committee.

“(14) UNITED STATES.—The term ‘United States’ means the several States, the District of Columbia, and any territory or possession of the United States.

“(15) UNITED STATES BUSINESS.—The term ‘United States business’ means a person engaged in interstate commerce in the United States.

“SEC. 1002. COMMITTEE ON NATIONAL CRITICAL CAPABILITIES.

“(a) IN GENERAL.—There is established a committee, to be known as the ‘Committee on National Critical Capabilities’, which shall carry out this title and such other assignments as the President may designate.

“(b) MEMBERSHIP.—
"(1) IN GENERAL.—The Committee shall be comprised of the head, or a designee of the head, of each of the following:

"(A) The Office of the United States Trade Representative.

"(B) The Department of Commerce.

"(C) The Office of Science and Technology Policy.

"(D) The Department of the Treasury.


"(F) The Department of Defense.

"(G) The Department of State.

"(H) The Department of Justice.

"(I) The Department of Energy.

"(J) The Department of Health and Human Services.

"(K) The Department of Agriculture.

"(L) The Department of Labor.

"(M) Any other Federal agency the President determines appropriate, generally or on a case-by-case basis.

"(2) EX OFFICIO MEMBERS.—

"(A) IN GENERAL.—In addition to the members of the Committee specified in para-
graph (1), the following shall, except as pro-
vided in subparagraph (B), be nonvoting, ex
officio members of the Committee:

“(i) The Director of National Intel-
ligence.

“(ii) The Administrator of the Fed-
eral Emergency Management Agency.

“(iii) The Director of the National In-
stitute of Standards and Technology.

“(iv) The Director of the Centers for
Disease Control and Prevention.

“(v) The Director of the National In-
stitute of Allergy and Infectious Diseases.

“(vi) The Chairperson of the Federal
Communications Commission.

“(vii) The Chairperson of the Securi-
ties and Exchange Commission.

“(viii) The Chairperson of the Com-
modity Futures Trading Commission.

“(ix) The Administrator of the Fed-
eral Aviation Administration.

“(B) DESIGNATION AS VOTING MEM-
BERS.—The chairperson of the Committee may
designate any of the officials specified in
clauses (ii) through (ix) of subparagraph (A) as voting members of the Committee.

"(c) CHAIRPERSON.—

"(1) IN GENERAL.—The United States Trade Representative shall serve as the chairperson of the Committee.

"(2) CONSULTATIONS WITH SECRETARIES OF DEFENSE AND COMMERCE.—In carrying out the duties of the chairperson of the Committee, the United States Trade Representative shall consult with the Secretary of Defense and the Secretary of Commerce.

"(d) DESIGNATION OF OFFICIALS TO CARRY OUT DUTIES RELATED TO COMMITTEE.—The head of each agency represented on the Committee shall designate an official, at or equivalent to the level of Assistant Secretary in the Department of the Treasury, who is appointed by the President, by and with the advice and consent of the Senate, to carry out such duties related to the Committee as the head of the agency may assign.

"SEC. 1003. REVIEW OF COVERED TRANSACTIONS.

"(a) MANDATORY NOTIFICATION.—A United States business that engages in a covered transaction shall submit a written notification of the transaction to the Committee.
“(b) Review.—

“(1) In general.—Not later than 60 days after receiving written notification under subsection (a) of a covered transaction, the Committee may—

“(A) review the transaction to determine if the transaction is likely to result in an unacceptable risk to one or more national critical capabilities, including by considering factors specified in section 1005; and

“(B) if the Committee determines under subparagraph (A) that the transaction poses a risk described in that subparagraph, make recommendations—

“(i) to the President for appropriate action that may be taken under this title or under other existing authorities to address or mitigate that risk; and

“(ii) to Congress for the establishment or expansion of Federal programs to support the production or supply of articles and services described in section 1001(a)(11)(B) in the United States.

“(2) Unilateral initiation of review.—

The Committee may initiate a review under para-
graph (1) of a covered transaction for which written 
notification is not submitted under subsection (a).

"(3) INITIATION OF REVIEW BY REQUEST FROM 
CONGRESS.—The Committee shall initiate a review 
under paragraph (1) of a covered transaction if the 
chairperson and the ranking member of one of the 
appropriate congressional committees jointly request 
the Committee to review the transaction.

"(c) TREATMENT OF BUSINESS CONFIDENTIAL IN-
FORMATION.—A United States business shall submit each 
notification required by subsection (a) to the Committee—

"(1) in a form that includes business confiden-
tial information; and

"(2) in a form that omits business confidential 
information and is appropriate for disclosure to the 
public.

"SEC. 1004. ACTION BY THE PRESIDENT.

"(a) IN GENERAL.—Subject to subsection (d), the 
President may take such action for such time as the Presi-
dent considers appropriate to address or mitigate any un-
acceptable risk posed by a covered transaction to one or 
more national critical capabilities, including suspending or 
prohibiting the covered transaction.

"(b) ANNOUNCEMENT BY THE PRESIDENT.—The 
President shall announce the decision on whether or not
to take action pursuant to subsection (a) with respect to
a covered transaction not later than 15 days after the date
on which the review of the transaction under section 1003
is completed.

"(c) ENFORCEMENT.—The President may direct the
Attorney General of the United States to seek appropriate
relief, including divestment relief, in the district courts of
the United States, in order to implement and enforce this
section.

"(d) FINDINGS OF THE PRESIDENT.—The President
may exercise the authority conferred by subsection (a) to
suspend or prohibit a covered transaction only if the Presi-
dent finds that—

"(1) there is credible evidence that leads the
President to believe that the transaction poses an
unacceptable risk to one or more national critical ca-
pabilities; and

"(2) provisions of law (other than this section)
do not, in the judgment of the President, provide
adequate and appropriate authority for the Presi-
dent to protect such capabilities.

"(e) FACTORS TO BE CONSIDERED.—For purposes
of determining whether to take action under subsection
(a), the President shall consider, among other factors,
each of the factors described in section 1005, as appro-
priate.

"SEC. 1005. FACTORS TO BE CONSIDERED.

"The Committee, in reviewing and making a deter-
mination with respect to a covered transaction under sec-
tion 1003, and the President, in determining whether to
take action under section 1004 with respect to a covered
transaction, shall consider any factors relating to national
critical capabilities that the Committee or the President
considers relevant, including—

"(1) the long-term strategic economic, national
security, and crisis preparedness interests of the
United States;

"(2) the history of distortive or predatory trade
practices in each country in which a foreign person
that is a party to the transaction is domiciled;

"(3) control and beneficial ownership (as deter-
mained in accordance with section 847 of the Na-
tional Defense Authorization Act for Fiscal Year
2020 (Public Law 116–92; 10 U.S.C. 2509 note)) of
each foreign person that is a party to the trans-
action; and

"(4) impact on the domestic industry and re-
sulting resiliency, including the domestic skills base,
taking into consideration any pattern of foreign investment in the domestic industry.

"SEC. 1006. SUPPLY CHAIN SENSITIVITIES."

"The Committee shall determine the sensitivities and risks for sourcing of articles described in section 1001(a)(11)(B)(i), in accordance with the following:

"(1) The sourcing of least concern shall be articles the supply chains for which are housed in whole within countries that are allies of the United States.

"(2) The sourcing of greater concern shall be articles the supply chains for which are housed in part within countries of concern or from an entity of concern but for which substitute production is available from elsewhere at required scale.

"(3) The sourcing of greatest concern shall be articles the supply chains for which are housed wholly or in part in countries of concern or from an entity of concern and for which substitute production is unavailable elsewhere at required scale.

"SEC. 1007. IDENTIFICATION OF ADDITIONAL NATIONAL CRITICAL CAPABILITIES."

"(a) IN GENERAL.—The Committee should prescribe regulations to identify additional articles, supply chains, and services to recommend for inclusion in the definition
of ‘national critical capabilities’ under section 1001(a)(11).

"(b) REVIEW OF INDUSTRIES.—

"(1) IN GENERAL.—In identifying under sub-
section (a) additional articles, supply chains, and
services to recommend for inclusion in the definition
of ‘national critical capabilities’ under section 1001(a)(11), the Committee should conduct a review
of industries identified by Federal Emergency Man-
agement Agency as carrying out emergency support
functions, including the following industries:

"(A) Energy.

"(B) Medical.

"(C) Communications, including electronic
and communications components.

"(D) Defense.

"(E) Transportation.

"(F) Aerospace, including space launch.

"(G) Robotics.

"(H) Artificial intelligence.

"(I) Semiconductors.

"(J) Shipbuilding.

"(K) Water, including water purification.

"(2) QUANTIFICATION.—In conducting a review
of industries under paragraph (1), the Committee
should specify the quantity of articles, supply chains,
and services, and specific types and examples of
transactions, from each industry sufficient to main-
tain national critical capabilities.

"SEC. 1008. REPORTING REQUIREMENTS.

"(a) Annual Report to Congress.—

"(1) In general.—Not later than 90 days
after the date of the enactment of the United States
Innovation and Competition Act of 2021, and annu-
ally thereafter, the Committee shall submit to the
appropriate congressional committees a report—

"(A) on the determination under section
1006 with respect to sensitivities and risks for
sourcing of articles described in section
1001(a)(11)(B)(i);

"(B) assessing whether identification of
additional national critical capabilities under
section 1007 is necessary; and

"(C) describing, for the year preceding
submission of the report—

"(i) the notifications received under
subsection (a) of section 1003 and reviews
conducted pursuant to such notifications;
"(ii) reviews initiated under paragraph (2) or (3) of subsection (b) of that section;

"(iii) actions recommended by the Committee under subsection (b)(1)(B) of that section as a result of such reviews;

and

"(iv) reviews during which the Committee determined no action was required;

and

"(D) assessing the overall impact of such reviews on national critical capabilities.

"(2) FORM OF REPORT.—The report required by paragraph (1) shall be submitted in unclassified form but may include a classified annex.

"(b) USE OF DEFENSE PRODUCTION ACT OF 1950 AUTHORITIES.—Not later than 180 days after the date of the enactment of the United States Innovation and Competition Act of 2021, the Committee shall submit to Congress a report that includes recommendations relating to use the authorities under title III of the Defense Production Act of 1950 (50 U.S.C. 4531 et seq.) to make investments to enhance national critical capabilities and reduce dependency on materials and services imported from foreign countries.
"SEC. 1009. REQUIREMENT FOR REGULATIONS.

(a) IN GENERAL.—The Committee shall prescribe regulations to carry out this title.

(b) ELEMENTS.—Regulations prescribed to carry out this title shall—

(1) provide for the imposition of civil penalties for any violation of this title, including any mitigation agreement entered into, conditions imposed, or order issued pursuant to this title; and

(2) include specific examples of the types of—

(A) the transactions that will be considered to be covered transactions; and

(B) the articles, supply chains, and services that will be considered to be national critical capabilities.

(c) COORDINATION.—In prescribing regulations to carry out this title, the Committee shall coordinate with the United States Trade Representative, the Under Secretary of Commerce for Industry and Security, and the Committee on Foreign Investment in the United States to avoid duplication of effort.

"SEC. 1010. REQUIREMENTS RELATED TO GOVERNMENT PROCUREMENT.

(a) IN GENERAL.—Not later than 90 days after the date of the enactment of the United States Innovation and Competition Act of 2021, the Federal Acquisition Regu-
tion shall be revised to require each person that is a pro-
spective contractor for an executive agency to disclose the
supply chains the person would use to carry out the con-
tract 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.

"(b) MATERIALITY.—The head of an executive agen-
cy shall consider the failure of a person to make the disclo-
sures required by subsection (a) to be material deter-
minants in awarding a contract to that person.

"(c) APPLICABILITY.—The revisions to the Federal
Acquisition Regulation required under subsection (a) shall
apply with respect to contracts for which solicitations are
issued on or after the date that is 90 days after the date
of the enactment of the United States Innovation and
Competition Act of 2021.

"(d) DEFINITIONS.—In this section:

"(1) EXECUTIVE AGENCY.—The term 'executive
agency' has the meaning given that term in section
133 of title 41, United States Code.

"(2) FEDERAL ACQUISITION REGULATION.—
The term 'Federal Acquisition Regulation' means
the regulation issued pursuant to section 1303(a)(1)
of title 41, United States Code.
"SEC. 1011. MULTILATERAL ENGAGEMENT AND COORDINATION.

"The United States Trade Representative—

"(1) should, in coordination and consultation
with relevant Federal agencies, conduct multilateral
engagement with the governments of countries that
are allies of the United States to secure coordination
of protocols and procedures with respect to covered
transactions with countries of concern; and

"(2) upon adoption of protocols and procedures
described in paragraph (1), shall work with those
governments to establish information sharing re-
gimes.

"SEC. 1012. AUTHORIZATION OF APPROPRIATIONS.

"There are authorized to be appropriated such sums
as may be necessary to carry out this title, including to
provide outreach to industry and persons affected by this
title.

"SEC. 1013. RULE OF CONSTRUCTION WITH RESPECT TO
FREE AND FAIR COMMERCE.

"Nothing in this title may be construed as prohibiting
or limiting the free and fair flow of commerce outside of
the United States that does not pose an unacceptable risk
to a national critical capability."
(b) CLERICAL AMENDMENT.—The table of contents for the Trade Act of 1974 is amended by adding at the end the following:

"TITLE X—NATIONAL CRITICAL CAPABILITIES REVIEWS

"Sec. 1001. Definitions.
"Sec. 1002. Committee on National Critical Capabilities.
"Sec. 1003. Review of covered transactions.
"Sec. 1004. Action by the President.
"Sec. 1005. Factors to be considered.
"Sec. 1006. Supply chain sensitivities.
"Sec. 1007. Identification of additional national critical capabilities.
"Sec. 1008. Reporting requirements.
"Sec. 1009. Requirement for regulations.
"Sec. 1010. Requirements related to government procurement.
"Sec. 1011. Multilateral engagement and coordination.
"Sec. 1012. Authorization of appropriations.
"Sec. 1013. Rule of construction with respect to free and fair commerce."