

US approach to outbound investment screening

On 9 August 2023, US President Joe Biden issued an executive order to regulate certain types of US outbound investment in semiconductors and microelectronics, quantum information technologies and artificial intelligence sectors in 'countries of concern', where this investment may be a threat to US national security. Investment in these technologies or subsets of them will be subject to notification rules, or prohibited. The US Treasury Department, tasked with drafting the implementation rules, concurrently issued a notice soliciting public comment. Many questions remain about the new regime, which follows a contentious policy debate and may come ahead of complementary Congressional legislation. While the US leads the G7 countries on this topic and the EU ponders a similar initiative, China, Japan, South Korea and Taiwan already have comparable rules in place.

Background

Joe Biden's executive order (EO) comes after several years of a controversial but increasingly broadening [policy debate](#) about the need for and potential features of a new regulatory tool for certain types of US outbound investment in advanced technologies and products in 'countries of concern'. The debate has been driven by [concerns](#) that US industry, notably through venture capital flows – [US\\$19 billion](#) in 2018 alone – could be helping advance the [development](#) of Chinese indigenous cutting-edge technologies that have military applications and could be used at the expense of US capabilities. This debate can be traced back at least as far as the 115th US Congress (2017-2018), which [discussed](#) and [passed](#) the Foreign Investment Risk Review Modernization [Act](#) (FIRRMA) of 2018, expanding the jurisdiction of the inter-agency Committee on Foreign Investment in the United States (CFIUS). CFIUS carries out case-by-case reviews of [covered](#) foreign direct investment transactions at the US Treasury Department. With FIRRMA, however, Congress [stopped short](#) of creating what is often referred to as a '[reverse CFIUS](#)' jurisdiction for US outbound investment. Rather, Congress enhanced the protection of US high-end technologies, including under the Export Control Reform [Act](#) ([ECRA](#)) of 2018 and the Export Controls Act of 2018, by imposing stronger restrictions on the transfer to foreign persons of concern of certain US key 'emerging and foundational technologies' deemed critical to US national security. The Bureau of Industry and Security at the Department of Commerce enforces US export controls, including recent [controls](#) on advanced computing and semiconductor manufacturing items that have affected [firms](#) and [policy](#) in Japan and the Netherlands. The argument, [spearheaded](#) by Senators Casey (D-Pennsylvania) and Cornyn (R-Texas), that certain forms of US outbound investment fall into a loophole of the US regulatory toolbox has resurfaced in every Congress since 2018. The Senate [version](#) of the National Critical Capabilities Defense Act ([NCCDA](#)) and the House of Representatives [version](#) of it failed to become part of annual 'must-pass' legislation, e.g. the National Defense Authorization Act (NDAA) and the [Chips and Science Act](#) of 2022, during the 117th Congress (2021-2022). In October 2022, therefore, a bicameral and bipartisan group of Congress members [asked](#) President Biden to issue an EO, while others [asked](#) him to refrain from taking unilateral action.

'Small yard, high fence'

After a [first experience](#) with an outbound investment regime during the Cold War, the US is poised to introduce a new regime, against the backdrop of growing [strategic competition](#) with China. The EO comes after the national security risks of outbound investment featured prominently in the [G7 leaders' statement](#) of May 2023. However, the [EO](#) merely sets the scene for a new regulatory tool along the lines of the US administration's 'small yard, high fence' approach. This term was [coined](#) by policy analyst Samm Sacks in 2018 and taken up by National Security Advisor, Jake Sullivan in his [remarks](#) on the US [national security strategy](#) in October 2022. The EO takes a targeted approach to US outbound investment by limiting the geographical application (so far) to China, Hong Kong and Macau and by restricting the scope of transactions covered to a narrowly defined set of sensitive advanced technologies. These will be further determined by the Treasury Department and will be [subject](#) either to just a notification or to outright



prohibition – in cases of a 'particularly acute national security threat'. The EO will not apply retroactively. It is [surgical](#), as it does not apply to 'passive' investment, e.g. [publicly traded securities](#). The EO does not identify the categories of 'non-passive' investment covered, but it is [expected](#) that the final rules will mainly affect venture capital, private equity, mergers and acquisitions, greenfield investments and joint ventures; the US administration has [stressed](#) that the US long-term commitment to open investment will be maintained. The EO provides for a 'program' rather than for the creation of a new inter-agency committee for 'reverse CFIUS'-style case-by-case reviews. Furthermore, it relies heavily on US companies to notify covered transactions or not to pursue them in the first place, keeping industry's compliance costs as low as possible. Notifications will allow the administration to gather data that are currently not available. Overall, the EO leaves many issues open for the Treasury Department's implementation rules. The latter issued a [notice](#) requesting public feedback, within 45 days, based on a range of questions, to inform the final rules.

Early reactions

Some Congress members have [endorsed](#) the EO's 'thoughtful and targeted approach', while others have [criticised](#) it as too narrowly tailored, and for its [loopholes](#) and 'failure' to include existing technology investments as well as sectors like biotechnology and energy'. Early feedback from US business has been [quite positive](#). China, the EO's prime target, has [criticised](#) it as 'blatant economic coercion and tech bullying'.

Pending US Congress action

In May 2023, Representative Rosa DeLauro (D-Connecticut) [re-introduced](#) a revised [House version](#) of the NCCDA in the House of Representatives. It is [not included](#) in the House version of the NDAA for fiscal year 2024, as it has not gained much traction given its broad scope and CFIUS-style institutional set-up. By contrast, in July 2023, the Senate in a [91-6 vote](#) passed an [amendment](#) to the NDAA, [sponsored](#) by Senators Casey and Cornyn, that is a scaled back version of earlier Senate versions of the NCCDA, and is referred to as the '[Outbound Investment Transparency Act \(OITA\) of 2023](#)'. The OITA captures more countries of concern and sectors than the EO, such as hypersonics, and would cover joint ventures, greenfield investments and 'know-how'. It is not clear whether the amendment will become law after the process of reconciling the House and Senate [NDAA versions](#) in a conference committee. Although the OITA does not include prohibitions of covered investment it appears to be the closest match to Biden's EO that US Congress has advanced so far. A future president could overturn the EO with one stroke, whereas legislation would stand.

EU action on outbound investment

First in its 2023 [work programme](#) and later in its [economic security strategy](#) of June 2023, the European Commission has announced that it is contemplating, in lockstep with EU Member States, an 'initiative' (i.e. not necessarily a legislative proposal) for controls of certain outbound investment, to be published in late 2023. Concerned about the potential use of EU companies' capital, expertise and knowledge 'to enhance the military and intelligence capabilities of those who are also systemic rivals', the Commission is currently [considering](#) 'if and how – Europe should develop a targeted instrument on outbound investment' that 'would relate to a small number of sensitive technologies where investment can lead to the development of military capabilities that pose risks to national security'. Under the [Trade and Technology Council](#), the EU and the US have [committed](#) to aligning their approaches where feasible.

Outbound investment restrictions in China, Japan, South Korea and Taiwan

Four east Asian economies have some form of outbound investment restrictions. China's [regulatory framework](#) is [divided](#) into transactions that [mandate](#) notification for investment below [US\\$300 million](#) in non-sensitive industries or regions and others that require approval. Japan [requires](#) prior notification of outward investment in a small number of industries, including weapons manufacturing, for security reasons. South Korea's [Industrial Technology Protection Committee](#) is authorised to block transactions that could directly or indirectly transfer technologies included on the '[national core technology list](#)' and transactions exporting technologies [funded](#) with government research and development, under the [revised Act on Prevention of Divulgence and Protection of Industrial Technology](#). In Taiwan, all outbound investment below [US\\$50 million](#) must be filed, while above that threshold it is subject to a review. Moreover, the [Act Governing Relations between the People of the Taiwan Area and the Mainland Area of 1992](#) contains [stricter caps](#) and requires all Taiwanese individuals and entities to elicit the [Investment Commission's approval](#) to invest in mainland China. A [negative list](#) sets limits on Taiwanese investment in the mainland and [special rules](#) govern technology cooperation.

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