# Biden Administration Plans for Outbound Investment Regulation Coming into Focus

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The Departments of the Treasury and Commerce recently provided reports to Congress describing plans under consideration to regulate outbound investment, as required by the 2023 Consolidated Appropriations Act. Key highlights of such plans based on these official reports, as well as other statements and reporting, include the following:

- The Biden administration will likely prohibit some investments into China and other countries of concern while also collecting information on other investments through a notification process in order to inform future action. By contrast, the administration is not expected to establish a thorough review process (a "reverse CFIUS") for specific investments.
- The current focus is on investments into a subset of key advanced technologies that could enhance the capabilities of countries of concern in ways that threaten U.S. national security. Although Treasury and Commerce did not identify specific technology sectors in their written reports, other reporting indicates that the administration will almost certainly cover semiconductors and quantum computing, while some subset of artificial intelligence is also under consideration.
- The administration appears to be still debating whether to cover any forms of passive investment or to cover only investment that includes some form of "know how" transfer or support. Remarks by Commerce Secretary Raimondo, however, suggest that the emphasis may be on the latter type of investment, such as non-passive private equity and venture capital investments.
- Although the exact timing is unclear, an Executive Order is expected in the coming weeks to months, followed by regulations with a public notice and comment period.
- The administration is engaging with and encouraging allied countries to take action to address risks arising from outbound investment.
- Congress also continues to debate the issue. Among the leading legislative proposals that could see momentum in 2023 are the Chinese Military and Surveillance Company Sanctions Act of 2023 or a revised and more narrowly scoped version of the NCCDA.

## Background

The U.S. government has been considering regulating outbound investment for several years. During the debate concerning reform of inbound foreign investment review and export controls in 2017 and 2018, Congress considered adding provisions for the review of certain outbound investments. These provisions were dropped in the final versions of the legislation (the Foreign Investment Risk Review Modernization Act of 2018 and the Export

Control Reform Act), which strengthened the authority of the Committee on Foreign Investment in the United States (CFIUS) and authorized enhanced export controls to address concerns relating to U.S. companies aiding China in the development of critical technologies, including "emerging and foundational technologies." Subsequently, through Executive Orders, the Trump and Biden administrations did, however, prohibit investment in publicly traded securities of certain identified Chinese Military Industrial Complex Companies.

Congressional and executive branch interest in taking broader action to restrict outbound investment has increased during the Biden Administration. In September 2022, National Security Advisor Jake Sullivan highlighted the progress the Biden administration has made in formulating outbound investment measures, particularly on investments that are not captured by export controls and could enhance the technological capabilities of adversaries. Last year, Congress also introduced legislation, the National Critical Capabilities Defense Act (NCCDA), to establish outbound investment screening, as further discussed below.

Overall, while it appears that there is growing consensus that the U.S. government should address national security risks associated with outbound investment—in particular, the risk of supporting China in developing sensitive technology with military applications—some members of Congress also want any new authority to address economic competitiveness and supply chain issues in a broad range of sectors, as reflected by last year's NCCDA. Proposals for an outbound investment screening program have included (1) a notification requirement, which would allow the government to collect additional information before taking more targeted action; (2) a case-by-case review process similar to review of inbound foreign investment by CFIUS (a "reverse CFIUS"); and/or (3) additional prohibitions on certain outbound investment.

As further discussed below, Congress has not passed legislation to address risks to U.S. national security caused by outbound U.S. investment due to a divergence of opinions on (i) the specific risks that need to be addressed through an outbound investment mechanism and (ii) the correct approach to addressing those risks. Even so, under the fiscal year (FY) 2023 Consolidated Appropriations Act, Congress directed Treasury and Commerce to report back on what steps each department was taking "to consider establishing a program to address national security threats emanating from outbound investments from the United States in certain sectors that are critical for U.S. national security" and the resources required to establish and implement such a program.

**Executive Branch Action**

On March 3, 2023, Treasury and Commerce submitted reports to Congress, which were substantially identical.

*Objective and Approach*: These reports explain that "the Administration is considering the establishment of a program to address national security concerns arising from outbound investments from the United States into sensitive technologies that could enhance the technological capabilities of countries of concern in ways that threaten U.S. national security." The administration's focus is on investments that "could result in the advancement of military and dual-use technologies by countries of concern" and are not presently captured by export controls, sanctions or other related authorities.

*Type of Program*: As noted above, the written reports state that action may include prohibiting certain investments and/or collecting information about other investments to inform potential future action. Other reporting indicates that the primary focus in the near term may be more on notification. Either or both of these types of programs could be established by Executive Order.

*Sectors*: Administration officials previously stated that a "handful" of "extremely sensitive" sectors should be covered and appear focused on semiconductors, quantum computing and some subset of artificial intelligence, which are the same areas targeted with a recent export control action. The reports note that work is ongoing to ensure clear definitions and scoping to prevent U.S. capital from being exploited in ways that threaten national security while not unduly burdening U.S. investors.

*Initial Breadth and Types of Transactions*: Together, the points above suggest that any executive action may be reasonably narrowly scoped in the near term. In fact, Commerce Secretary Raimondo recently stated that the administration is considering a pilot program to address risks related to outbound investment to China and expressed a view that restrictions on U.S. persons investing in China should not be overly broad, which could hurt American workers and the economy. Secretary Raimondo stated, "There are a lot of U.S. pension funds invested in China and people's retirement money. You certainly don't want to do anything that has an unintended consequence." This in turn suggests that purely passive investments, for example, including the passive approach pursued by major U.S. pension funds, may not be caught in a near-term prohibition.

*Resourcing and Timing*: The reports state that Treasury will run the program, with support from Commerce and other agencies, and the Treasury estimates the cost of developing and implementing the program will be $10 million cost in FY 2023. Of this, $6.5 million is designated for "IT System Development," while $2.5 million is designated for labor costs, including the drafting of regulations and conducting international engagement. This could indicate that there will be a greater focus on developing a system for the intake of notifications than enforcement of prohibitions in FY 2023. A notice and comment process for regulations typically takes several months, which would mean that some or all of the provisions of an Executive Order may not come into effect until later in 2023. The FY 2024 President's Budget includes an additional $16.5 million to implement and administer the program.

*International Engagement*: The administration continues to consult with allied countries, including the G7, to encourage coordinated action and presumably to prevent backfilling by foreign investors. Currently, a limited number of countries have authority to screen outbound investment, including Taiwan, which has broad authority with respect to investments in China, and South Korea, which has authority more narrowly focused on sensitive technology. The European Commission's 2023 work program calls for an examination of "whether additional tools are necessary in response of outbound strategic investment controls." A draft German China Strategy prepared by the German foreign ministry provides that Germany will also "examine" the possibility of creating a legal authority to scrutinize "security-critical" foreign investments by German or European companies in China.

**Continuing Congressional Debate**

Congress continues to debate regulation of outbound investment as well. There are, however, a broad range of views, even within the political parties, that would need to be resolved before any legislation is passed. If the administration moves forward as expected, the Executive Order is likely to disappoint those policymakers who have been advocating for a more robust outbound mechanism, while other members of Congress will be concerned that the administration is taking action without a statutory mandate.

*Prior Proposal*: For nearly two years, Congress has been debating the NCCDA, which would establish a new interagency Committee on National Critical Capabilities with robust authority to review transactions that pose an "unacceptable risk" to "national critical capabilities." The House passed a broad version of this legislation in the context of a party-line vote on the America COMPETES Act in 2022, but the bill was never voted on in the Senate. The House-passed version of the bill would have set up an interagency committee to review outbound investment in a broad range of sectors that the Rhodium Group projected could cover over 40% of U.S. investment into China. According to the bill's sponsors, the purpose of the legislation was not only to address concerns about China's development of national security-sensitive indigenous technologies, but also to reduce U.S. reliance on China for key supply chains. The bill would have empowered the committee to recommend that the President mitigate or prohibit activity that would result in an unacceptable risk to one or more national critical capabilities, including both national security and economic risks.

*Continuing Debate*: Moving forward, proposals most likely to gain traction in Congress include:

(1) Rep. Andy Barr's (R-KY) Chinese Military and Surveillance Company Sanctions Act of 2023, which would direct the President to impose full economic blocking sanctions on companies listed on the Department of Defense's Section 1260H List and Treasury's Chinese Military Industrial Complex Companies (CMIC) list, limiting their access to U.S. capital, along with other consequences.

(2) A revised NCCDA, which could cover a narrower set of key sectors, such as semiconductors, artificial intelligence, quantum computing, batteries for electric vehicles and critical minerals.

## Conclusion

An Executive Order will be only the first step in regulating outbound investment. Information collected through a notification program established under an Executive Order will inform future action, and the list of technologies covered by any program are likely to be expanded in the future