

anticipates being able to follow the provisions set out in the Bill.⁴⁹ After the president signed the bill, Senator Wyden commented: “Despite the White House statement, I look forward to working with Ambassador Tai to ensure any agreements negotiated by this administration provide high standard trading rules that bulldozer barriers and create a level playing field for U.S. exporters.”⁵⁰ Senator Crapo said that “Congress will ensure the Administration fully complies with the Act.”⁵¹ A second round of Taiwan Initiative negotiations, focusing on agriculture, labor, and the environment, began a week after President Biden signed the Implementation Act into law.⁵²

President Biden Issues Executive Order Restricting Outbound Investment in National Security Technologies and Products

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President Joseph R. Biden, Jr. has issued an executive order that will restrict outbound investment in national security technologies and products. The order directs the Treasury Department to prohibit U.S. persons from “engaging in . . . transactions involving” foreign persons from “countries of concern” that relate to “sensitive technologies and products in the semiconductors and microelectronics, quantum information technologies, and artificial intelligence sectors that are critical for the military, intelligence, surveillance, or cyber-enabled capabilities of a country of concern.”¹ While the order is written generically, its annex names only one “country of concern”:² the People’s Republic of China.³ The order’s prohibition on outbound transactions involving sensitive technologies and products, and its notification requirement for other such transactions, supplement three initiatives previously taken by the United States to counter China’s acquisition of U.S. high-tech: the tightening of the Committee on Foreign Investment in the United States’s (CFIUS) review of inbound foreign investment; the placement of restrictions on the export of semiconductors and semiconductor manufacturing equipment; and the increased focus of U.S. law enforcement and counterintelligence authorities on Chinese economic espionage.⁴ Together, these four mechanisms

⁴⁹ Margaret Spiegelman, *Taiwan Bill Marks New Test in Long Tussle Over Trade Authority*, INSIDE U.S. TRADE (Aug. 14, 2023), at <https://insidetrade.com/daily-news/taiwan-bill-marks-new-test-long-tussle-over-trade-authority>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Office of the U.S. Trade Representative Press Release, United States and Taiwan Hold Second Negotiating Round for the U.S.-Taiwan Initiative on 21st Century Trade (Aug. 18, 2023), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/august/united-states-and-taiwan-hold-second-negotiating-round-us-taiwan-initiative-21st-century-trade-1> [<https://perma.cc/5Y7U-84AH>].

¹ Exec. Order 14,105, Secs. 1(a), 9(c), 88 Fed. Reg. 54,867 (Aug. 9, 2023) [hereinafter Executive Order].

² The order defines a “country of concern” as “a country or territory listed in the Annex to this order that the President has identified to be engaging in a comprehensive, long-term strategy that directs, facilitates, or otherwise supports advancements in sensitive technologies and products that are critical to such country’s military, intelligence, surveillance, or cyber-enabled capabilities to counter United States capabilities in a way that threatens the national security of the United States.” *Id.*, Sec. 9(a).

³ See *id.*, Annex. The Special Administrative Region of Hong Kong and the Special Administrative Region of Macau are specifically included.

⁴ See Jacob Katz Cogan, *Contemporary Practice of the United States*, 117 AJIL 128, 144 (2023) (reviewing new export controls on high-end semiconductors and semiconductor manufacturing equipment); Jacob Katz Cogan,

establish a comprehensive system for implementing the administration's policy of constraining China's development of advanced technologies that enhance and strengthen national security capabilities.⁵

The executive order controls outbound investment, a topic long debated within the executive branch and in Congress, and the subject of much lobbying by business interests.⁶ The order's scope is unprecedented yet narrower than some had advocated. It targets investments that raise national security concerns but not those pertaining to human rights or supply chain resilience; it omits the biotechnology and energy sectors from its national security focus; and it concentrates (at least for now) only on China and not other countries, such as Iran and Russia.⁷ Wishing to emphasize the U.S. commitment to open investment that might be called into question by the order, administration officials stressed that it was "a national security action, not an economic one," and "narrowly targeted."⁸ "[W]e are for de-risking and diversifying, not decoupling," said National Security Adviser Jake Sullivan in April, referring to measures taken and planned to restrict trade and investment between the United States and China.⁹ The order's precise coverage is still to be determined, however, as it provides only a general framework, directing and empowering the Treasury Department to establish the requirements of an outbound investment program and elaborate its details through

Contemporary Practice of the United States, 117 AJIL 330, 340 (2023) (discussing executive order on Committee on Foreign Investment in the United States) [hereafter Cogan, Contemporary Practice]; Yudhijit Bhattacharjee, *The Daring Ruse That Exposed China's Campaign to Steal American Secrets*, N.Y. TIMES (Mar. 7, 2023), at <https://www.nytimes.com/2023/03/07/magazine/china-spying-intellectual-property.html>; Julian E. Barnes, *Intelligence Agencies Warn Foreign Spies Are Targeting U.S. Space Companies*, N.Y. TIMES (Aug. 18, 2023), at <https://www.nytimes.com/2023/08/18/us/politics/cyberattacks-russia-china-space-companies.html>.

⁵ The Treasury Department noted the connections: "The United States already prohibits or restricts the export to the PRC of many of the technologies and products under consideration for the new program. This new program would prevent U.S. investments from helping accelerate the indigenization of these technologies in the PRC, which undermines the effectiveness of our existing export controls and inbound investment screening programs which also seek to protect U.S. national security." U.S. Dep't of the Treasury Press Release, Fact Sheet: President Biden Issues Executive Order Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern; Treasury Department Issues Advance Notice of Proposed Rulemaking to Enhance Transparency and Clarity and Solicit Comments on Scope of New Program (Aug. 9, 2023), at <https://home.treasury.gov/system/files/206/Outbound-Fact-Sheet.pdf> [<https://perma.cc/M2TV-TSE8>] [hereinafter Treasury Fact Sheet].

⁶ See Jenny Leonard, *Biden Narrows China Investment Order as US Seeks Better Ties*, BLOOMBERG (Aug. 9, 2023), at <https://news.bloomberglaw.com/international-trade/biden-signs-narrow-china-investing-rules-as-us-seeks-better-ties>; Sarah McBride & Lizette Chapman, *American VCs Fought Back Strict Biden Rules on China Investments. But More May Be Coming*, BLOOMBERG (Aug. 9, 2023), at <https://www.bloomberg.com/news/articles/2023-08-10/us-investors-that-fought-china-curbs-brace-for-tighter-rules>.

⁷ Prior executive orders targeted investments in designated entities that were identified because they operated in certain specified sectors, such as the "defense and related materiel sector or the surveillance technology sector of the economy of the PRC." See Exec. Order 14,032, Sec. 1, 86 Fed. Reg. 30,145 (June 3, 2021) (superseding Exec. Order 13,959, 85 Fed. Reg. 73,185 (Nov. 12, 2020)). An agreement to eschew certain transactions with foreign countries of concern has also been made a condition for the receipt of federal funds. See, e.g., CHIPS Act, Pub. L. 117-167, Sec. 103(b)(5), 136 Stat. 1366, 1382 (Aug. 9, 2022) (amending 15 U.S.C. § 4652).

⁸ White House Press Release, Background Press Call by Senior Administration Officials Previewing Executive Order on Addressing U.S. Investments in Certain National Security Technologies and Products in Countries of Concern (Aug. 10, 2023), at <https://www.whitehouse.gov/briefing-room/press-briefings/2023/08/10/background-press-call-by-senior-administration-officials-previewing-executive-order-on-addressing-u-s-investments-in-certain-national-security-technologies-and-products-in-countries-of-concern> [<https://perma.cc/4NVF-36RJ>].

⁹ White House Press Release, Remarks by National Security Advisor Jake Sullivan on Renewing American Economic Leadership at the Brookings Institution (Apr. 27, 2023), at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/04/27/remarks-by-national-security-advisor-jake-sullivan-on-renewing-american-economic-leadership-at-the-brookings-institution> [<https://perma.cc/GMH6-CSMK>].

forthcoming regulations. Congress too may yet enact legislation that provides a statutory basis for, and expands the purview of, the program outlined in the president's order.

The executive order is legally and factually premised on the president's determination that an emergency exists under the International Emergency Economic Powers Act (IEEPA).¹⁰ The order posits that "advancement by countries of concern in sensitive technologies and products critical for the[ir] military, intelligence, surveillance, or cyber-enabled capabilities [such as semiconductors and microelectronics, quantum information technologies, and artificial intelligence] . . . constitutes an unusual and extraordinary threat to the national security of the United States."¹¹ This is because such advancement "accelerate[s] the development of advanced computational capabilities that will enable . . . more sophisticated weapons systems, breaking of cryptographic codes, and other applications that could provide these countries with military advantages."¹² The order explains that, as part of a "strategy of advancing the[ir] development of these sensitive technologies and products, countries of concern are exploiting or have the ability to exploit certain United States outbound investments."¹³ These foreign investments provide capital to countries of concern. They also provide those countries with "certain intangible benefits . . . that help companies succeed, such as enhanced standing and prominence, managerial assistance, investment and talent networks, market access, and enhanced access to additional financing."¹⁴ Consequently, the order concludes, "certain United States investments risk exacerbating th[e] [national security] threat" posed by countries of concern.¹⁵

To counter this threat, the order directs the secretary of the treasury, in consultation with the secretary of commerce (and other department and agency heads, as necessary) to issue regulations requiring United States persons to report of information about "transactions involving covered foreign persons (notifiable transactions)" and prohibiting "other transactions involving covered foreign persons (prohibited transactions)."¹⁶ These regulations will "identify categories of . . . transactions that involve covered national security technologies and products" that, in the case of notifiable transactions, "may contribute to the threat to the national security" and, in the case of prohibited transactions, "pose a particularly acute national security threat."¹⁷ The treasury secretary may also: "investigate and make requests for information" from parties to the covered transactions or other relevant persons, including by civil administrative subpoena; "nullify, void, or otherwise compel the divestment of any prohibited transaction"; and "refer potential criminal violations" to the attorney general.¹⁸

In accordance with the order, the Treasury Department published an advance notice of proposed rulemaking (ANPR) that outlined the Department's expectations for the outbound investment program's coverage.¹⁹ Though it has been characterized as a "reverse CFIUS," the

¹⁰ See International Emergency Economic Powers Act, 50 U.S.C. § 1701 et seq.

¹¹ Executive Order, *supra* note 1.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*, Sec. 1(a).

¹⁷ *Id.*, Secs. 1(b)–(c).

¹⁸ *Id.*, Sec. 10(a).

¹⁹ See Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 88 Fed. Reg. 54,961 (Aug. 14, 2023). Issuing an ANPR, which is not a necessary

notice anticipates that, unlike CFIUS, “the program will [not] entail a case-by-case review of U.S. outbound investments.”²⁰ Instead, the parties to a transaction will “have the obligation to determine whether a given transaction is prohibited, subject to notification, or permissible without notification.”²¹ Covered transactions “would include certain acquisitions of equity interests (e.g., mergers and acquisitions, private equity, and venture capital), greenfield, joint ventures, and certain debt financing transactions” but not include “certain investments into publicly-traded securities or into exchange-traded funds” (passive investments).²² The ANPR also provides details about specific technologies and products likely to fall within the three covered categories.²³ Pursuant to the executive order, final regulations will be issued following notice and comment.

Reaction in Congress to the executive order was tepid due to its relatively narrow focus. Some wanted the program to cover additional sectors, such as biotechnology and energy. Representative Michael McCaul, chair of the House Committee on Foreign Affairs, stated that “[t]he administration scaling back—at a time where aggressive action is needed more than ever—continues the trend of appeasing industry at the cost of national security.”²⁴ “We need to stop the flow of American dollars and know-how supporting the [Chinese Communist Party’s] military and surveillance technology,” he continued, “rather than solely pursuing half measures that are taking too long to develop and go into effect.”²⁵ Senator Bob Casey, who with Senator John Cornyn has proposed multiple bills on the topic over the past few years, “applauded” the order, but said: “[n]ow we need to pass strong bipartisan legislation to protect our national and economic security for decades to come.”²⁶ Congress has been considering legislation restricting outbound investment since 2017 and 2018 when it debated the Foreign Investment Risk Review Modernization Act (FIRRMA).²⁷ Inclusion of an outbound review mechanism in that law and in the CHIPS Act was proposed but rejected. The 2023 Consolidated Appropriations Act “encouraged [the Commerce and Treasury Departments] to consider establishing a program to address the national security threats emanating from outbound investments from the United States in certain sectors that are critical for U.S. national security” and required the submission of “a report describing such a program including the resources

notice-and-comment step, suggests that the Treasury Department is especially interested in receiving, and taking account of, broad input.

²⁰ *Id.* at 54,963.

²¹ *Id.*

²² *Id.*

²³ *See id.* at 54,966–54,969.

²⁴ Ellen Nakashima & David J. Lynch, *Biden Order Proposes New Restrictions on China Tech Investment*, WASH. POST (Aug. 9, 2023), at <https://www.washingtonpost.com/national-security/2023/08/09/china-ban-technology-biden-military/>; *see also* Rep. Mike Gallagher, Letter to President Biden on Restrictions on US Investments to China (Aug. 3, 2023), at <https://selectcommitteeontheccp.house.gov/media/letters/letter-president-biden-restrictions-us-investments-china> [<https://perma.cc/W5JP-SER6>].

²⁵ Nakashima & Lynch, *supra* note 24.

²⁶ Office of Sen. Bob Casey Press Release, At Casey’s Urging, White House Issues Executive Order to Safeguard National Security Investments from China (Aug. 9, 2023), at <https://www.casey.senate.gov/news/releases/at-caseys-urging-white-house-issues-executive-order-to-safeguard-national-security-investments-from-china> [<https://perma.cc/KX83-ZGRH>].

²⁷ *See, e.g.*, National Critical Capabilities Defense Act of 2021, S. 1854/H.R. 6329, 117th Cong., 1st Sess. (2021); National Critical Capabilities Defense Act of 2023, H.R. 3136, 118th Cong., 1st Sess. (2023). On FIRRMA, *see* Cogan, *Contemporary Practice*, *supra* note 4, at 342–43.

required over the next three years to establish and implement it.”²⁸ Two weeks before the executive order, Senators Casey and Cornyn’s Outbound Investment Transparency Act (OITA) was attached, by a bipartisan vote of 91 to 6, to the Senate’s version of the National Defense Authorization Act (NDAA) for fiscal year 2024.²⁹ Narrower than the senators’ prior proposals, the OITA would still broaden the scope of the outbound program beyond what the executive order provides to include passive investments, additional technology sectors, and transactions with Iran, North Korea, and Russia.³⁰ The OITA, though, would not establish prohibitions; it would only require notifications. The Senate’s version of the NDAA must be reconciled with the House’s bill, which does not include an equivalent outbound investment mechanism.

Wishing to prevent the then-anticipated executive order from interfering with warming U.S.-China relations, Treasury Secretary Janet Yellen had sought to assuage China during her visit there in July,³¹ but the Chinese government immediately decried the president’s order when it was issued. “This is deglobalization and a move to phase China out,” the Foreign Ministry stated.³² The United States, it continued, should “stop politicizing, instrumentalizing and weaponizing tech and trade issues, immediately cancel the wrong decisions, remove the restrictions on investments in China.”³³ It is unclear whether China, which itself imposes restrictions on outbound investment (as do other countries, such as South Korea and Taiwan) and is trying to attract foreign investment to counter recent declines,³⁴ will retaliate against the United States. China’s ambassador to the United States indicated it would in a July statement.³⁵ Even before the executive order was announced, some U.S. investment firms announced that they were pausing or cutting back on certain transactions or splitting off their Chinese operations.³⁶ Others are preparing for tougher oversight, both from the executive branch and Congress.³⁷ Although the order is narrow, it—and politics broadly,

²⁸ 168 CONG. REC. S7819, S7918, S8479 (Dec. 20, 2022) (explanatory report incorporated by reference by Section 4 of the Consolidated Appropriations Act, 2023).

²⁹ See 169 CONG. REC. S3511-S3512 (July 25, 2023) (approving Senate Amendment 931).

³⁰ See S. 2226, Sec. 1085, 118th Cong., 1st Sess. (2023).

³¹ See Transcript: Treasury Secretary Janet Yellen on “Face the Nation,” CBS NEWS (July 9, 2023), at <https://www.cbsnews.com/news/janet-yellen-treasury-secretary-face-the-nation-transcript-july-9-2023> [<https://perma.cc/YQ9B-T2B7>]; Alan Rappeport & Ana Swanson, *Looming U.S. Investment Restrictions on China Threaten Diplomatic Outreach*, N.Y. TIMES (July 13, 2023), at <https://www.nytimes.com/2023/07/13/us/politics/us-china-investment-restrictions.html>.

³² Charles Hutzler, *U.S. and China Poised to Drift Further Apart After Investment Ban*, WALL ST. J. (Aug. 10, 2023), at <https://www.wsj.com/articles/u-s-and-china-poised-to-drift-further-apart-after-investment-ban-1e37427d>.

³³ *Id.*

³⁴ See *China’s Foreign Investment Gauge Declines to 25-Year Low*, BLOOMBERG (Aug. 8, 2023), at [https://www.bloomberg.com/news/articles/2023-08-07/china-foreign-investment-gauge-at-25-year-low-amid-high-tensions; China Looks to Attract Foreign Investment as Its Economy Struggles, BLOOMBERG \(Aug. 13, 2023\), at <https://www.bloomberg.com/news/articles/2023-08-13/china-issues-plan-to-further-attract-foreign-investment>.](https://www.bloomberg.com/news/articles/2023-08-07/china-foreign-investment-gauge-at-25-year-low-amid-high-tensions; China Looks to Attract Foreign Investment as Its Economy Struggles)

³⁵ See Eric Martin, *China to Respond if the US Puts Limits on Investment, Envoy Says*, BLOOMBERG (July 19, 2023), at <https://www.bloomberglaw.com/document/Ry23F8T0AFB4>.

³⁶ See Jacky Wong, *Sequoia Faces Up to the New U.S.-China Reality*, WALL ST. J. (June 7, 2023), at <https://www.wsj.com/articles/sequoia-faces-up-to-the-new-u-s-china-reality-d1e131bd>; Aruna Viswanatha, Jing Yang & Berber Jin, *Sequoia Turns to Outside National-Security Experts to Vet New China Tech Investments*, WALL ST. J. (Feb. 24, 2023), at <https://www.wsj.com/articles/sequoia-pares-back-china-tech-investments-as-u-s-national-security-concerns-grow-c17348b5>.

³⁷ See Kate O’Keeffe & Berber Jin, *U.S. Venture Firms’ Deals in China Tech Investigated by Congress Panel*, WALL ST. J. (July 19, 2023), at <https://www.wsj.com/articles/u-s-venture-firms-deals-in-china-tech-investigated-by-congress-panel-710addc8>; Silla Brush, *BlackRock, Fund Managers Brace for Even More Scrutiny Over China*,

which portend more expansive regulation through statutes and administrative actions—will have a chilling effect on U.S. investment in China.

As with the controls issued in 2022 on exporting sophisticated chips and chip manufacturing equipment to China, the goals of the outbound investment program will only be realized if they are a part of a coordinated multinational initiative. This is especially true since U.S. investment in China is relatively small (five percent of all foreign investment there in 2021 and 2022) and has been contracting, currently at twenty-year low.³⁸ For this reason, the administration consulted with allies and partners as it drafted the order and the ANPR.³⁹ For this reason too, it has encouraged other governments to impose similar restrictions. In its statement in May, the Group of Seven's leaders, at the United States' urging, noted that capital controls "could be important to complement existing tools of targeted controls on exports and inbound investments."⁴⁰ The same language appeared in the Joint Statement of the EU-U.S. Trade and Technology Council shortly thereafter.⁴¹ In June, the European Commission announced that it is "examin[ing] possible measures to address security risks related to outbound investments, with a view to proposing an initiative by the end of" 2023.⁴² Germany, the United Kingdom, and other countries are considering actions as well.⁴³

The Senate Provides Its Advice and Consent to Ratification of U.S.-Chile Tax Treaty After Eleven Years

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By a vote of 95–2, the Senate on June 22, 2023, approved a resolution of advice and consent to the ratification of a tax treaty between the United States and Chile.¹ The treaty² had

BLOOMBERG (Aug. 15, 2023), at <https://www.bloomberg.com/news/articles/2023-08-15/blackrock-fund-managers-brace-for-even-more-scrutiny-over-china>.

³⁸ See Hutzler, *supra* note 32; Rappeport & Swanson, *supra* note 31; see also Emily S. Weinstein & Ngor Luong, *U.S. Outbound Investment into Chinese AI Companies* 1 (Feb. 2023), at <https://cset.georgetown.edu/wp-content/uploads/CSET-U.S.-Outbound-Investment-into-Chinese-AI-Companies.pdf> [<https://perma.cc/HRJ2-B7RL>] ("[B]etween 2015 and 2021, 167 U.S. investors participated in 401 investment transactions—or 17 percent of 2,299 global investment transactions—into Chinese AI companies.").

³⁹ See Treasury Fact Sheet, *supra* note 5.

⁴⁰ White House Press Release, G7 Leaders' Statement on Economic Resilience and Economic Security (May 20, 2023), at <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/20/g7-leaders-statement-on-economic-resilience-and-economic-security> [<https://perma.cc/UST7-9EQC>].

⁴¹ See Joint Statement EU-US Trade and Technology Council of 31 May 2023 in Lulea, Sweden (May 31, 2023), at https://ec.europa.eu/commission/presscorner/detail/en/statement_23_2992 [<https://perma.cc/VQ8E-WE3F>].

⁴² European Commission, Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy," at 11 (June 20, 2023), at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023JC0020> [<https://perma.cc/5B8Q-EYL4>].

⁴³ See Strategy on China of the Government of the Federal Republic of Germany (2023), at <https://www.auswaertiges-amt.de/blob/2608580/317313df4795e104f1ea3263d41860d8/china-strategie-en-data.pdf> [<https://perma.cc/G9XW-C8TZ>]; White House Press Release, The Atlantic Declaration: A Framework for a Twenty-First Century U.S.-UK Economic Partnership (June 8, 2023), at <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/08/the-atlantic-declaration-a-framework-for-a-twenty-first-century-u-s-uk-economic-partnership> [<https://perma.cc/2UHW-HZJQ>].

¹ See 169 CONG. REC. S2209 (June 22, 2023) [hereinafter Resolution of Advice and Consent].

² See Convention Between the Government of the United States of America and the Government of the Republic of Chile for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to