

White House Releases Outbound Investment Executive Order

Bottom Line: On Wednesday, August 9, 2023, the White House [released](#) an Executive Order (EO) on Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern, laying the groundwork for the development of a U.S. Outbound Investment Program. This new Program is significant in that it is the latest in a string of U.S. government steps to move beyond just trade and law enforcement actions to address national security concerns related to transfer of technologies and knowledge. For investors and industry, this Program will require even more due diligence on partners and activities in China to ensure that U.S. persons are not investing in a way that could unduly empower Chinese military and intelligence efforts.

The release of the EO was accompanied by the Department of Treasury's publication of the [Advance Notice of Proposed Rulemaking](#) (ANPRM), which launched a 45-day public comment period inviting feedback on implementation and development of the program. Specifically, the Treasury is developing a ruling that will, respective to certain technologies and products in a "country of concern":

1. **Prohibit** U.S. persons from engaging in certain transactions; and
2. Require U.S. persons to **notify** the Treasury of certain other transactions.

Currently China (including Hong Kong and Macau) is the only country listed as a "country of concern."

Context: The EO declares a "national emergency" and delineates actions from "countries of concern" that exploit U.S. outbound investments to develop sensitive technologies and products critical for military, intelligence, surveillance, and cyber-enabled capabilities. The EO's framing language describes the need to balance open global capital flows with national security concerns and provides a useful intellectual foundation through which to view U.S.-China techno-industrial competition. This program complements existing mechanisms—export controls, inbound investment screening, and sanctions—that the U.S. government uses to "protect" national security concerns related to China's interest in obtaining and transferring technologies to advance its military, intelligence, surveillance, and security capabilities. It also comes amid the continued development of other "protect" actions, such as the introduction of the Outbound Investment Transparency Act in the FY24 NDAA. These "protect" tools function in conjunction with "promote" policies, as barring technology transfer and development only creates an advantage if the U.S. is also innovating. This program acknowledges the value U.S. outbound investment brings to foreign markets—including intellectual know-how like the ability to scale—and marks the first step in the creation of a program that will evolve throughout the years.

Key Points

- 1 The Department of Treasury's ruling will be limited in scope to high-level categories of technology: 1) semiconductors and microelectronics, 2) AI systems, and 3) quantum information technologies, the latter of which the Treasury is only considering a prohibition requirement.
- 2 The ruling will be focused on direct and indirect investment, including mergers and acquisitions, private equity, venture capital, greenfield, joint ventures, and certain debt financing transactions.
- 3 Retroactive application of the provisions is not expected. The ruling will create carve outs, or exceptions, for specific types of transactions. Examples of exceptions cited in the ANPRM include university-to-university research collaborations, the procurement of raw materials, and bank lending.
- 4 The ANPRM calls for input on the definitions of the three targeted categories. Notably, the semiconductor and quantum sections of the ANPRM contain specific callouts to technologies and products; the AI section does not. Instead, the ANPRM notes that the Treasury is considering a definition for "AI system" that is focused on the end-use.

What comes next: The Treasury will integrate industry and stakeholder feedback from this comment period (ending September 28, 2023) into its development of the final ruling, which is expected to take over a year. Of note, Congress is also currently considering whether to codify a notification to the government—not prohibition—regarding US investments in semiconductors, artificial intelligence, quantum, hypersonics, satellite-based communication, and networked laser scanning systems. If Congress passes legislation, the Treasury-led process will have to adjust to incorporate any additional provisions written into law. On the industry side, this program puts the burden of responsibility on companies to understand the end-use of their outbound investments and technologies. Geopolitically, the U.S. is invested in securing allied alignment to help strengthen the impact of this ruling. Bilaterally, the U.S. continues to pursue economic and diplomatic stability with China while managing its national security concerns.
