



Insight

White House Strikes First on Outbound Investment

TORI SMITH | AUGUST 24, 2023

Executive Summary

- The Department of Treasury is soliciting comments for its Advance Notice of Proposed Rulemaking (ANPRM) to promulgate rules for tracking and restricting flows of outbound capital by U.S. persons following President Biden's August 9 executive order.
- Treasury is expected to propose rules that would prohibit U.S. persons from engaging in certain types of investment – including private equity, venture capital, joint ventures, and some debt financing – in the sectors of semiconductors and microelectronics, quantum information technologies, and certain artificial intelligence systems in China, Hong Kong, and Macau.
- While the scope of the executive order and ANPRM is narrower than some proposals as it covers fewer sectors, it is broader than the tool in the Senate version of the National Defense Authorization Act: The administration's actions would go beyond a notification system and allow Treasury to block transactions and investigate and refer possible violators to the U.S. attorney general.

Introduction

On August 9, the Department of Treasury released an Advance Notice of Proposed Rulemaking (ANPRM) following the Biden Administration's release of its long-awaited executive order (EO) on outbound investment. The EO declared a national emergency under the International Emergency Economic Powers Act (IEEPA) and instructed Treasury to establish a program to prohibit U.S. persons from engaging in certain types of investment in "countries of concern," specifically China, Hong Kong, and Macau.

The EO identified the sectors for restriction as semiconductors and microelectronics, quantum information technologies, and certain artificial intelligence systems. Following the ANPRM, Treasury will collect public comments from interested parties to inform the development of proposed rules to implement the EO.

This move by the Biden Administration is unprecedented for the United States and marks a substantial shift in the federal government's involvement in capital flows. In some ways, the actions pursued by the administration are narrower than other proposals because they cover only three sectors. The Outbound Investment Transparency Act, for example, included six sectors for review. At the same time, acting first via IEEPA is a questionable use of executive authority, especially as Congress is considering several different proposals for screening outbound investment in the National Defense Authorization Act (NDAA), among other pieces of legislation. The administration's actions also go beyond the latest consensus in Congress for a notification-only system.

Brief Overview of the Executive Order & Advance Notice of Proposed Rulemaking

The first component of President Biden's [executive order](#) is the declaration of a national emergency under

IEEPA citing “advancement by countries of concern in sensitive technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities” as “an unusual and extraordinary threat to the national security of the United States” and “that certain United States investments risk exacerbating this threat.” The connection between these activities by “countries of concern” – which are identified as China, Hong Kong, and Macau – and U.S. capital is the assertion that these countries “are exploiting or have the ability to exploit” certain investments. Moreover, the EO claims that intangible benefits such as “enhanced standing and prominence, managerial assistance, investment and talent networks, market access, and enhanced access to additional funding” are prone to exploitation.

The EO then directs Treasury to promulgate regulations to address this threat to national security by requiring U.S. persons to notify Treasury of certain transactions that “may contribute to the threat” and by prohibiting other transactions that “pose a particularly acute national security threat.” The EO defines the covered sectors as “semiconductors and microelectronics, quantum information technologies, and artificial intelligence sectors that are critical for the military, intelligence, surveillance, or cyber-enabled capabilities.” Among other things, the EO instructs Treasury to “investigate, in consultation with the heads of relevant agencies, as appropriate, violations of this order or the regulations issued under this order and pursue available civil penalties for such violations.”

In conjunction with the EO, Treasury released an [ANPRM](#) to communicate “the framework that Treasury anticipates proposing for implementation of the program” and solicit public comment from stakeholders on how the agency should implement the EO. In the explanation of U.S. persons, Treasury notes that it is considering placing compliance requirements on Americans with control over foreign entities. The ANPRM also specifies that investments such as private equity, venture capital, joint ventures, and some debt financing will be included in the definition of covered transactions. It is also possible that regulations will have exceptions for some investments such as publicly traded securities, mutual funds, and intracompany transfers.

The ANPRM also provides additional detail on what Treasury is considering for rules on the three target sectors. Table 1 contains the areas that Treasury is considering placing restrictions on outbound investment for semiconductors and microelectronics, and Table 2 contains the same for Quantum Information Technologies. For artificial intelligence, Treasury is only considering requiring notification for “software that incorporates an artificial intelligence (AI) system and is designed for certain end-uses that may have military or intelligence applications and pose a national security risk.”[\[1\]](#)

Table 1: Possible Restrictions on Semiconductors and Microelectronics Investments

	Software and equipment design	Design, fabrication, and packaging of advanced chips	Installation or sale of supercomputers	Design, fabrication, and packaging of less advanced chips
Prohibited	X	X	X	
Notification				X

Table 2: Possible Restrictions on Quantum Information Technologies

	Production of quantum computers and some parts	Development of certain quantum sensors	Development of quantum networking and quantum communication systems
Prohibited	X	X	X

Notification			
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Comparison to Other Outbound Investment Restriction Proposals

Congress has debated the merits of creating an outbound investment screening mechanism for nearly two years. The most comprehensive proposal is the National Critical Capabilities Defense Act (NCCDA), sponsored by Senators John Cornyn (R-TX) and Bob Casey (D-PA). This legislation would establish an interagency committee to review outbound investment – that is, U.S. capital meant for investment in other countries. The bill would give the Committee on Foreign Investment in the United States (CFIUS) very broad authority to review investment meant for a “country of concern” and specifically gives the example of a “foreign adversary” or “non-market economy.” The bill sponsors attempted to attach the NCCDA to the NDAA for Fiscal Year 2023, but instead senators reached a consensus to pass the Outbound Investment Transparency Act as an amendment. It would require U.S. companies to report to the secretary of the Treasury investments into the sectors of advanced semiconductors and microelectronics, artificial intelligence, quantum information science and technology, hypersonics, satellite-based communications, and networked laser scanning systems with dual-use application in “countries of concern.”^[2]

The mechanism outlined in President Biden’s EO and the ANPRM is different than both the NCCDA and the Outbound Investment Transparency Act. Rather than coordinating the outbound review with CFIUS, the administration’s approach does not mention CFIUS and instead calls for the “establishment of a new and targeted national security program” run by Treasury in consultation with other relevant agencies. It is more expansive in power than Congress’ approaches because it would involve the blocking of some transactions; however, it is narrower in scope, with a focus on fewer sectors.

Some Democratic members of Congress [applauded](#) the Biden Administration’s actions and encouraged it to expand the scope of the program. Senator Casey, one of the NCCDA sponsors, issued a [statement](#) with similar sentiment and called upon Congress to pass legislation codifying an outbound investment screening program. As of this writing, Senator Cornyn, the other NCCDA sponsor, has not released a statement on the EO. Some Republican members [criticized](#) President Biden for not going far enough, claiming it contains loopholes and fails to address dual-use technology.

Next Steps on Implementation

Interested parties have until September 28 to submit comments on the ANPRM. There is no statutory deadline for Treasury to issue proposed rules, which could require another public comment period, or issue final rules under the Administrative Procedure Act. It is likely that these rules will not be finalized or go into effect until 2024. According to the [Peterson Institute for International Economics](#), however, the ANPRM allows Treasury to “request information on, not block or unwind, new transactions to start gathering data” before the final rules take effect.

In addition to promulgating rules, the Biden Administration does not seem to have international allies actively on board with similar approaches to outbound investment. Without such international cooperation, it is likely that capital from other countries will fill the void of U.S. capital in China. In a joint statement in May, the G7 recognized that “appropriate measures designed to address risks from outbound investment could be important to complement existing tools of targeted controls on exports and inbound investments, which work together to protect our sensitive technologies from being used in ways that threaten international peace and security.”

Congress will also come back from recess to convene a conference committee on the NDAA, when members

must decide whether the Senate's Outbound Investment Transparency Act will remain in the final version of the bill. If it is and the NDAA becomes law, Treasury will need to reconcile its implementation of President Biden's executive order with the scope of the Outbound Investment Transparency Act.

[1] <https://home.treasury.gov/system/files/206/Outbound-Fact-Sheet.pdf>

[2] <https://www.americanactionforum.org/insight/senate-defense-bill-amendments-would-increase-scrutiny-of-capital-flows/>