



## Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

Editor-in-Chief: Karl P. Sauvant ([Karl.Sauvant@law.columbia.edu](mailto:Karl.Sauvant@law.columbia.edu))

Managing Editor: Matthew Conte ([msc2236@columbia.edu](mailto:msc2236@columbia.edu))

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### **CFIUS part II? The US moves to restrict outbound FDI to China**

by

Brian Egan and Katie Clarke\*

Amidst continued tensions with China, the Biden Administration released, on August 9, 2023, an executive order ([the Order](#)) and, an advance notice of proposed rulemaking ([ANPRM](#)) for regulating outbound US FDI to China (including Hong Kong and Macau). The Order directs the Department of the Treasury to establish a program (the Program) to prohibit certain outbound FDI in Chinese technology companies and require advance notice for other investments. Treasury Secretary Janet Yellen and others emphasized that the restrictions will be “[highly targeted and clearly directed at a few sectors](#).”

The Order and ANPRM come nearly one year after the Administration’s 2022 National Security Strategy [announced](#) (p. 33) that it was “pursuing targeted new approaches, such as screening of outbound investment, to prevent strategic competitors from exploiting investments.” The Program is unlikely to come into effect for several months.

A new mechanism to review *outbound* US FDI complements existing authority to review *inbound* US FDI. In 1988, Congress authorized the President to conduct national security reviews of foreign investment in US businesses. The [Committee on Foreign Investment in the United States](#) (CFIUS), an interagency committee chaired by the US Department of the Treasury, conducts these reviews on the President’s behalf.

While Congress has considered regulating outbound US investment for several years, legislation has proven to be elusive. In September 2022, several members of Congress who have been key proponents for legislation, led by Senators Robert Casey (D-Pa.) and John Cornyn (R-Tx.), [wrote to President Biden](#) to “urge your Administration to move forward with executive action—which

can then be bolstered by statutory provisions—to safeguard our national security and supply chain resiliency on outbound investments to foreign adversaries.” Senator Casey recently introduced [another legislative proposal](#) that would require notification of certain outbound investment, but would not prohibit any transactions. Thus, while the Order represents the first step toward regulating outbound US investment, legislative action is likely to follow.

The scope and contours of the Program are not settled. The ANPRM solicits public feedback on dozens of questions, including the definition of “U.S. persons” subject to the Program and their compliance obligations under the Program, the technologies and products covered by the Program from within the three broad industry sectors identified in the Order (semiconductors and microelectronics, quantum information technologies, artificial intelligence systems) and the types of transactions (e.g., investments in public securities) that may be carved out from the Program. This *Perspective* identifies three key issues the Administration must address in finalizing the Program:

- *Defining the problem.* The ANPRM states (p. 54962) that US investment can result in “enhanced standing and prominence” and other “intangible benefits” that create national security risks when Chinese investment targets are developing sensitive technologies and products. To address this problem in a targeted fashion, the Program must focus on (1) transactions that can yield such “intangible benefits” and (2) technology companies that are truly sensitive. Many of the questions in the ANPRM seek input on how these concepts should be defined.
- *Are these sanctions or something else?* Although [some](#) have called the concept of outbound FDI review a “reverse CFIUS,” the Program proposed by the Administration is more akin to a targeted economic sanctions program (indeed, [some members of Congress](#) have advocated that the Administration should use sanctions-like authorities to administer the Program). Unlike CFIUS, in which the government reviews and approves transactions on a case-by-case basis, the Program will categorically prohibit certain investments and require reporting for others. The US government already uses economic sanctions to prohibit new capital investments by US persons in [Russia](#) and in securities of “[Chinese Military-Industrial Companies](#).” For the Program to succeed, however, it must be more investor-friendly than a typical sanctions program. Sanctions restrictions are notoriously ambiguous and can lead to “over compliance,” given the significant penalties associated with sanctions violations. Ambiguity and “over compliance,” however, would not serve the Program’s objectives, which expressly do not change longtime US policy supporting open investment and free markets, including in China.
- *International cooperation.* Without international action by partners and allies, the US cannot cut off investment in Chinese industries of potential concern. Some US allies have

[signaled](#) a willingness to consider outbound FDI restrictions, and the Treasury’s [fact sheet](#) clarifies that the Order and ANPRM take into account discussions with partners and allies. These initiatives, however, are months, if not years, from fruition.

The US. government must navigate these issues for the Program to have its intended impact on investment in a narrow category of technology companies in China. Success will require the Administration to straddle the line between creating a toothless new regime and one that would broadly stifle US firms’ investments in China.

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\* Brian Egan ([Brian.Egan@skadden.com](mailto:Brian.Egan@skadden.com)) is a Partner at Skadden, Arps, Slate, Meagher & Flom LLP; Katie Clarke ([Katherine.Clarke@skadden.com](mailto:Katherine.Clarke@skadden.com)) is an Associate at Skadden, Arps, Slate, Meagher & Flom LLP. The authors wish to thank Daniel Gerkin, Stephen Heifetz and Joachim Pohl for their helpful peer reviews.

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For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Matthew Conte, at [msc2236@columbia.edu](mailto:msc2236@columbia.edu).

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