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# Regulation of U.S. Outbound Investment to China

## Introduction

The U.S. government has generally supported an open investment environment at home and abroad to promote U.S. economic growth, sustain the U.S. position as a premier destination for foreign direct investment, and ensure U.S. competitiveness. The U.S. government's interagency Committee on Foreign Investment in the United States (CFIUS) reviews a small subset of foreign inbound investments, primarily mergers and acquisitions, that could result in foreign control of a U.S. business and raise potential national security concerns. Since 2016, some Members of Congress have focused on the potential U.S. economic and national security effects of certain U.S. *outbound* investments to the People's Republic of China (PRC or China), including the transfer of U.S. technology and know-how in sensitive or strategic areas.

The 118<sup>th</sup> Congress is considering legislation to strengthen foreign investment review authorities and restrict some U.S. investment in the PRC and other "countries of concern" that involves dual-use and critical technology. In response to congressional activity, in August 2023, President Biden issued Executive Order (E.O.) 14105 to establish a targeted outbound investment program. Some countries (e.g., PRC, South Korea, Taiwan) have outbound investment regimes. While the E.O.'s proposed scope of covered activity is limited, it is considered a departure from traditional U.S. economic policy. Opponents argue that existing tools like sanctions and export controls can address risks. Proponents argue that new measures are needed to preserve a market-based climate and counter PRC policies that incentivize and require the transfer of U.S. technology and capabilities to PRC competitors to benefit the PRC government.

## Background and Policy Debate

Since 2016, Congress has led efforts to strengthen U.S. foreign investment review and has considered regulating some outbound activity. Enactment of the Foreign Investment Risk Review Modernization Act (FIRRMA, Title XVII, Sub. A, P.L. 115-232) in 2018 enhanced authorities for CFIUS to review, mitigate, or restrict *inbound* foreign investments in U.S. businesses involved in critical technologies, critical infrastructure, or sensitive personal data, and certain real estate transactions. Other proposed FIRRMA provisions—e.g., on U.S. *outbound* investment—were diluted or eliminated during congressional and executive branch deliberations, following business pressure and other policy considerations. Instead, Members reformed U.S. export controls to regulate some critical and emerging dual-use technologies and technology transfer abroad. Since FIRRMA's enactment, Congress has returned to these investment issues, in part in response to high-profile PRC greenfield investments in the United States and U.S. investments in China in strategic sectors (e.g., semiconductors and biotechnology). U.S. investments in China include the creation of research and development

centers, production facilities, and joint ventures (JVs) with the PRC government and PRC firms. Some Members say U.S. portfolio investments support PRC firms in strategic sectors and also should be regulated.

U.S. firms have benefitted from the ability to invest and sell in China as a top global market since the 1990s. Despite the commitments it made to join the World Trade Organization in 2001, the PRC maintains policies and practices that require firms to localize production in China and transfer technology to PRC firms in order to sell or operate in the market. Since 2014, the PRC government has issued additional industrial policies and economic security measures. The U.S. Chamber of Commerce, among other business groups, has expressed support for the Biden Administration's efforts "to develop a thoughtful regime that safeguards American national security and economic leadership without unnecessarily restricting beneficial U.S. business activity." At the same time, the Chamber advocates for an approach that is "narrowly tailored to target specific national security concerns in a transparent, efficient, and predictable manner," follows "clear, workable rules," and avoids creating a chilling effect on firm activity. The Semiconductor Industry Association warns that foreign firms could fill any loss of U.S. market share in countries of concern that might result from any new restrictions.

## Congressional Action

Congress has sought to address what some Members see as statutory, regulatory, and implementation gaps with regard to CFIUS and export controls (see **text box**).

## Select Legislation on Outbound Investment

Enacted legislation in the 117<sup>th</sup> Congress includes

- **Consolidated Appropriations Act, 2023** (P.L. 117-328) directed the Departments of Commerce and the Treasury to report on an outbound investment initiative and the resources required to establish and implement it. The agencies released their status reports in March 2023.

Bills introduced in the 118<sup>th</sup> Congress include

- **National Critical Capabilities Defense Act of 2023** (H.R. 3136) would create a committee to review and regulate/prohibit certain U.S. investments involving “national critical capabilities” in “countries of concern.”
- **Outbound Investment Transparency Act of 2023** (S. 2678) proposed notification of certain investments in certain sectors. It was included in a Senate-version of the National Defense Authorization Act for FY2024 (S. 2226) and excluded from the enacted NDAA.
- **Preventing Adversaries from Developing Critical Capabilities Act** (H.R. 6349) would prohibit or require notification with respect to certain activities of U.S. persons involving covered sectors in countries of concern. It would codify key aspects of E.O. 14105.

Some legislation broadly aims to sustain and rebuild U.S. production, technology, and innovation capabilities and counter PRC trade and investment policies of concern. Proposals include notification requirements, prohibitions in key sectors, and a case-by-case review process broadly similar to CFIUS that some call a “reverse CFIUS.” Some Members advocate for an entity-based sanctions approach to restricting investments, rather than a sectoral approach. For example, H.R. 760 would direct the President to impose blocking sanctions on firms tied to PRC military and surveillance activities. In February 2024, committees held hearings to debate H.R. 6349 and H.R. 760. Some experts say that sanctions could augment a sectoral approach by including portfolio investments and banning investment in PRC firms already subject to other U.S. restrictions.

## Executive Branch Action

E.O. 14105 directs the Treasury Department to create a targeted outbound investment program. The E.O. reiterates an “open investment” posture that promotes cross-border investment, where “not inconsistent with the protection of United States national security interests.” It asserts that “advancement by countries of concern in sensitive technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities” constitutes an “unusual and extraordinary threat” to U.S. national security. It says that such countries can exploit U.S. investment and related intangible benefits such as “enhanced standing and prominence, managerial assistance, investment and talent networks, market access, and enhanced access to additional financing.” The E.O. authorizes a program with features that include

- A two-tiered system that (1) prohibits certain outbound investments in “countries of concern” involving sensitive technologies and products that pose an acute national security risk, and (2) requires notification for investments in technologies with a lower risk profile.
- “Covered national security technologies and products,” broadly identified as those in the (1) semiconductors

and microelectronics, (2) quantum information technologies, and (3) artificial intelligence (AI) sectors.

- Unlike CFIUS, no case-by-case review of transactions.
- Coverage of investments in “countries of concern” limited to the PRC (including Hong Kong and Macau).

Treasury issued a notice of proposed rulemaking (NPRM) in June 2024 and an advance NPRM in 2023 to solicit public input. In the June 2024 NPRM, Treasury said that it defined technologies and products identified in the E.O. to focus on the types of investments that present a likelihood of conveying both capital and intangible benefits. The rule describes the outbound investment regime as narrow and targeted. In practice, the regime’s breadth depends on the final rule and how Treasury interprets certain definitions.

**Covered transactions** would include acquisitions of equity interests; certain debt financing; greenfield or brownfield investments (e.g., the acquisition, leasing, or development of operations, land, property); JVs; and limited partner (LP) investments in non-U.S. pooled investment funds where the U.S. person “*knows* [the fund] is likely to invest in a *person of a country of concern*.” The rule elaborates on a “knowledge standard,” i.e., knowledge a U.S. person must have about the facts and circumstances of a transaction to trigger obligations under the rule.

**Excepted transactions** would include investments in publicly-traded securities; LP investments in venture capital or private equity funds that are solely passive and of certain size; intracompany transactions; and some transactions in third countries. The NPRM would allow the Treasury Secretary to grant exemptions on national interest grounds.

The NPRM expressly targets loopholes. It prohibits a U.S. person from “knowingly directing” a transaction by a non-U.S. entity (e.g., foreign fund), and prevents U.S. parent firms from using a “controlled foreign entity” (subsidiary) to undertake an investment that would otherwise be a prohibited or notifiable transaction. It also defines U.S. persons as any U.S. citizen, lawful permanent resident, entity organized under U.S. laws or within U.S. jurisdiction (e.g., foreign branch), or any person in the United States.

## Multilateral Cooperation

Some legislation (e.g., H.R. 6349) would direct the U.S. government to coordinate with allies and partners to develop comparable regimes. A May 2023 G7 joint statement recognized the role of outbound investment authorities to address risks, complement existing authorities, and “protect our sensitive technologies from being used in ways that threaten international peace and security.” Similarly, a May 2023 U.S.-European Union Trade and Technology Council (TTC) statement expressed a common interest in preventing the use of a narrow set of technologies by actors that may use enhanced military and intelligence capabilities to undermine peace and security. The European Commission is considering outbound investment measures in its economic security strategy.

## Key Issues for Congress

Congressional approaches to a U.S. outbound investment regime differ with regard to relevant countries, sectors, and activity to be covered. Most legislation targets China; some include Iran, North Korea, and Russia. H.R. 6349 most closely reflects the Biden Administration’s approach, and

would expand the covered technologies and countries of concern. Some Members favor the legislative process to set “statutory boundaries” on any new rules. Some Members support more restrictions than the E.O., while others have raised concerns about the scope of new rules and whether they could discourage investment in the U.S. market or erode U.S. competitiveness. As Congress considers whether and how to regulate outbound investment and oversee E.O. 14105 implementation, key questions include

- How could the U.S. government best organize a new outbound investment regime, designate the role of national security and economic agencies, and address any potential overlap with inbound investment review authorities?
- What visibility does the U.S. government have into U.S. investment activity in China without a notification or review process? What current authorities does it have to review, mitigate, and restrict these activities?
- What is the best approach for determining which sectors/activities are subject to regulation?
- How would proposals affect U.S. competitiveness as a destination for investment, particularly compared to major economies that lack such regimes?

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