

## "REVERSE CFIUS" AT (ALMOST) LONG LAST: BIDEN ADMINISTRATION ISSUES HIGHLY ANTICIPATED EXECUTIVE ORDER ON OUTBOUND U.S. INVESTMENT

### INTRODUCTION

On August 9, 2023, President Biden issued the highly anticipated [Executive Order](#) ("EO") addressing outbound U.S. investments aimed at the development of critical technologies in "countries of concern" for military, intelligence, surveillance, or cyber-enabled capabilities. The EO heralds the first official step in the long-awaited "reverse CFIUS" process, which would constitute the reverse of the inbound foreign transaction reviews conducted by the Committee on Foreign Investment in the United States ("CFIUS"). While an important development, the measures called for under the EO still require the adoption of implementing regulations by the Department of the Treasury ("**Treasury**"). The EO is effective immediately, but the supporting regulations may not be issued for months.

The EO effectively declares a national emergency to address the threat posed by "countries of concern" (defined in the EO as countries identified in the EO's Annex, currently China, Hong Kong and Macau, though the President may modify the Annex and update the list of countries of concern in the future) and provides for the establishment of a national security program administered by Treasury to regulate certain U.S. investments into these countries in entities engaged in "*activities involving sensitive technologies critical to national security in three sectors: semiconductors and microelectronics, quantum information technologies, and artificial intelligence*" (see the White House press release [here](#)). Specifically, the EO requires Treasury to implement regulations to 1) require U.S. persons to provide notification of information related to certain transactions in the abovementioned industries in "countries of concern" and 2) prohibit U.S. persons from engaging, directly or indirectly, in certain other transactions in "countries of concern", as discussed in detail herein. With respect to the notification requirements, currently this appears to be contemplated as merely a notification, which is a significant difference from the case-specific review clearance process under the foreign investment regulations administered by CFIUS.

As indicated, the EO does not itself implement these restrictions, but directs Treasury to do so via new regulations. Accordingly, the notification requirements and prohibition will not be effective until Treasury issues such implementing regulations. At the same time the EO was issued, Treasury issued an [Advanced](#)

[Notice of Proposed Rulemaking \("ANPRM"\)](#), to seek public comment on potential definitions and scope for such regulations. As stated in the Treasury's press release, "[t]he ANPRM does not itself implement the E.O. and is not a draft regulatory text... the ANPRM will be followed by draft regulations at a later stage in the process."

U.S. regulations already restrict the export of many of the advanced technologies contemplated in the EO. The outbound investment program, however, aims to prevent U.S. investment from assisting in the acceleration of these critical technologies in certain countries which, as stated by Treasury "undermines the effectiveness of our existing export controls and inbound investment screening programs which also seek to protect U.S. national security."

## **CERTAIN U.S. INVESTMENTS INTO SPECIFIED INDUSTRIES IN CHINA, HONG KONG, AND MACAU (OR OTHER "COUNTRIES OF CONCERN") MAY REQUIRE NOTIFICATION TO TREASURY OR MAY BE STRICTLY PROHIBITED**

The EO directs Treasury, in consultation with the U.S. Commerce Department ("**Commerce**"), to issue regulations that would:

(1) require U.S. persons (defined below) to notify Treasury of certain transactions involving entities located in or subject to the jurisdiction of China, Hong Kong, or Macau and certain other entities owned by "persons of a country of concern" that are engaged in activities related to semiconductors and microelectronics, quantum computing, and artificial intelligence ("**Notifiable Transactions**"); and

(2) prohibit U.S. persons from engaging in certain transactions involving certain entities in or subject to the jurisdiction of China, Hong Kong, or Macau and certain other entities owned by "persons of a country of concern" that are engaged in activities related to semiconductors and microelectronics, quantum computing, and artificial intelligence ("**Prohibited Transactions**"). The EO further indicates that the implementing regulations should prohibit U.S. persons from engaging, **directly or indirectly**, in such Prohibited Transactions.

Importantly, the specific types of transactions that will be subject to the notification and prohibition requirements have not been defined. Instead, the EO instructs Treasury, in consultation with Commerce and other U.S. federal agencies, to identify "categories of [Notifiable Transactions] that involve covered national security technologies and products that the [U.S. Government] determines may contribute" to the threat against U.S. national security that is the basis of the EO. The EO also instructs them to identify categories of Prohibited Transactions that pose "a particularly acute national security threat because of their potential to significantly advance the military, intelligence, surveillance, or cyber-enabled capabilities of countries of concern". The EO also provides Treasury with the ability to place additional obligations on U.S. persons with respect to foreign entities that they control. Specifically, the EO states that Treasury may in its implementing regulations require U.S. persons to provide notification of any transaction by a foreign entity controlled by such U.S. persons that would be a Notifiable Transaction if engaged in by a U.S. person directly. The EO further states that Treasury may require such U.S. persons to "take all reasonable steps to prohibit and prevent" transactions by a foreign entity controlled by a U.S. person

if U.S. persons would be prohibited from engaging in the transaction directly. Treasury may also prohibit a U.S. person from "knowingly directing transactions" if such transaction would be prohibited pursuant to the EO.

## **THE EO GRANTS TREASURY AUTHORITY TO ENFORCE THE EO AND IMPLEMENTING REGULATIONS (ONCE ISSUED)**

The EO also provides Treasury with enforcement authority, such that it may investigate (in coordination with other U.S. federal agencies) violations of the EO and accompanying regulations and impose civil penalties that it deems necessary for such violations. Given that the EO was issued under the authority provided by the International Emergency Economic Powers Act ("**IEEPA**"), penalties as set by IEEPA apply.

Specifically, the EO grants Treasury powers similar those already held by CFIUS. Notably, it grants Treasury the authority to, among other things, (1) investigate and make request for information from parties related to a notifiable or prohibited transactions "at any time," including through civil administrative subpoenas; (2) nullify, void, or compel the investment of a prohibited transaction entered into after the regulations issued under the EO take effect; (3) refer potential criminal violations of the EO or the accompanying regulations to the U.S. Department of Justice for prosecution; and (4) exempt from the Notifiable Transactions and Prohibited Transactions requirements any transaction determined to be in the national interest of the United States.

## **KEY DEFINITIONS OF TERMS UNDER THE EO**

**"Country of concern"** means a country or territory identified in the Annex to the EO (as of the date of publication, this includes China, Hong Kong, and Macau).

**"United States person"** is defined as a U.S. citizen, lawful permanent resident, entity organized under the laws of the U.S. or any jurisdiction of the U.S., including their foreign branches, and any person in the United States.

**"Person of a country of concern"** is defined as: (1) an individual that is not a U.S. person and is a citizen or permanent resident of China, Hong Kong, or Macau (or other country of concern); (2) an entity organized under the laws of China, Hong Kong, or Macau (or other country of concern) or with a principal place of business in such countries; (3) the government of China, Hong Kong, or Macau (or other country of concern) "including any political subdivision, political party, agency, or instrumentality thereof, or any person owned, controlled, or directed by, or acting for or on behalf of the government of such country of concern"; and (4) any entity owned by a person identified in (1)-(3), above.

**"Covered national security technologies and products"** is defined as "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, as determined by the Secretary in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies. Where applicable, "covered national security technologies and products may be limited by reference to certain end-uses of those technologies or products."

## **ANPRM PROVIDES FURTHER INSIGHT INTO THE POTENTIAL REGULATORY FRAMEWORK**

As noted, the ANPRM invites participation in the rulemaking process, allowing the public to offer comments to inform the development of the outbound U.S. investment regulations. The ANPRM provides insight into the potential framework for regulating U.S. outbound investments, including – but not limited to – the following noteworthy areas:

- Treasury does not contemplate that the program will entail a case-by-case review of U.S. outbound investments. Rather, Treasury expects that the transaction parties will have the obligation to determine whether a given transaction is prohibited, subject to notification, or permissible without notification.
- Treasury anticipates that transactions covered by the program 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 by U.S. persons. Given the focus on transactions that could aid in the development of technological advances that pose a risk to U.S. national security, the Treasury Department expects to create a carveout or exception for specific types of transactions, such as certain investments into publicly traded securities or into exchange traded funds.
- It is not proposed that the program provide for retroactive application of the provisions related to the prohibition of certain transactions and the notification of others. However, Treasury may, after the effective date of the regulations, request information about transactions by U.S. persons that were completed or agreed to after the date of the issuance of the Order to better inform the development and implementation of the program.
- Definitions for the regulations.
- Treasury is considering including “indirect” transactions as “covered transactions” in order to close loopholes that would otherwise result, and to clarify that attempts to evade prohibitions on certain transactions cannot find safe harbor in the use of intermediary entities that are not “U.S. persons” or “covered foreign persons,” as defined.
  - Treasury provides the following example of conduct that may constitute “indirect” transactions: a U.S. person knowingly investing in a third-country entity that will use the investment to undertake a transaction with a covered foreign person that would be subject to the program if engaged in by a U.S. person directly.
- Treasury is considering requiring U.S. persons to furnish information in the form of a notification for applicable covered transactions in semiconductors and microelectronics and AI systems that includes, but is not limited to: (i) the identity of the person(s) engaged in the transaction and nationality (for individuals) or place of incorporation or other legal organization (for entities); (ii) basic business information about the parties

to the transaction, including name, location(s), business identifiers, key personnel, and beneficial ownership; (iii) the relevant or expected date of the transaction; (iv) the nature of the transaction, including how it will be effectuated, the value, and a brief statement of business rationale; (v) a description of the basis for determining that the transaction is a covered transaction – including identifying the covered national security technologies and products of the covered foreign person; (vi) additional transaction information including transaction documents, any agreements or options to undertake future transactions, partnership agreements, integration agreements, or other side agreements relating to the transaction with the covered foreign person and a description of rights or other involvement afforded to the U.S. person(s); (vii) additional detailed information about the covered foreign person, which could include products, services, research and development, business plans, and commercial and government relationships with a country of concern; (viii) a description of due diligence conducted regarding the investment; (ix) information about previous transactions made by the U.S. person into the covered foreign person that is the subject of the notification, as well as planned or contemplated future investments into such covered foreign person; and (x) additional details and information about the U.S. person, such as its primary business activities and plans for growth.

- With regard to the time frame in which U.S. persons must file notifications, Treasury is considering requiring that notifications be filed no later than 30 days following the closing of a covered transaction.
- Information would be collected via a portal hosted on Treasury's website to allow U.S. persons to electronically file notifications.
- Treasury is considering exempting from prohibition certain transactions in exceptional circumstances where the Secretary determines, in consultation with the heads of relevant departments and agencies, as appropriate, and in her sole discretion, that a particular transaction that would otherwise be a prohibited transaction should be permitted because it either (i) provides an extraordinary benefit to U.S. national security; or (ii) provides an extraordinary benefit to the U.S. national interest in a way that overwhelmingly outweighs relevant U.S. national security concerns.
- Treasury is considering penalizing the following with a civil penalty up to the maximum allowed under IEEPA: (i) material misstatements made in or material omissions from information or documentary material submitted or filed with Treasury; (ii) the undertaking of a prohibited transaction; or (iii) the failure to timely notify a transaction for which notification is required.

In addition to these insights, the ANPRM asks for the public to provide comments on the national security technologies and products related to semiconductors, quantum information technology, and artificial intelligence. The ANPRM addresses a variety of issues and enumerates specific questions for which they are seeking comments.

## **NEXT STEPS**

As Treasury has already issued the ANPRM to seek comments, we anticipate significant engagement between the U.S. government and stakeholders as Treasury works to draft a proposed rule to implement the EO requirements. Comments to the ANPRM can be submitted within the next 45 days, and interested clients are encouraged to reach out to discuss comment submission. Treasury likely will then take those comments into consideration as it begins to draft proposed rules, which the EO states will be subject to a notice and comment period, meaning the public will have the opportunity to provide further input on the regulations. The timing is unclear for publishing and implementing these new regulations.

Notably, the EO provides that one-year after the effective date of the implementing regulations, a mandatory assessment of the program must be conducted to determine whether to amend the regulations or if any covered sectors or products should be added/ or removed from the scope of the regulations.

## **CONCLUSION**

It is important to note that this EO was issued after the U.S. Government's coordinated efforts to limit outbound U.S. investments in China. On July 25, the U.S. Senate passed Amendment 931 (which we further discuss [here](#)) as part of the broader National Defense Authorization Act, which would require U.S. persons to notify the government of certain transactions in North Korea, China, Russia, and Iran related to advanced semiconductors and microelectronics, artificial intelligence and quantum, hypersonics, and other advanced technologies. Like the EO, Amendment 931 requires notification by U.S. persons and does not contemplate a case-by-case review of U.S. outbound investments (i.e., it is merely a notification, same as the EO). While the current lack of a CFIUS-like review process may be welcome news, there remains the likely additional burden on U.S. persons to determine whether a contemplated transaction is a Notifiable Transaction, subject to mandatory notification requirements, a Prohibited Transaction, or otherwise permissible without notification.

While neither the Amendment 931 nor EO version of outbound U.S. investment regulations are currently implemented, stakeholders should promptly consider their potential exposure and implications for investment strategy and business planning. We stand by ready to help.

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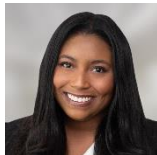
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