Outbound Investment Review Swiftly Takes Shape Amid China Worries

By Stephenie Gosnell Handler, Annie Motto, and Chris Mullen

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As information trickles out about how the government will implement an outbound investment review program or "reverse CFIUS," Gibson Dunn attorneys Stephenie Gosnell Handler, Annie Motto, and Chris Mullen say the program should be narrowly tailored to critical technologies used in national security.

Late last year, Congress directed the Treasury Department to submit a report explaining what resources would be needed to establish and implement an outbound investment review program, the so-called "reverse CFIUS."

CFIUS (the Committee of Foreign Direct Investment in the United States) has authority to review the national security implications associated with certain foreign investments in or acquisitions of US businesses.

In contrast, a "reverse CFIUS" mechanism is expected to give the US government authority to screen and monitor outbound investment from the United States to "countries of concern"—most notably China—in order to review the flow of US capital that would directly support the use of critical technologies by China's military or civil sector.

Recently released reports from two federal agencies on this topic, the Biden administration's proposed fiscal year 2024 budget, recent statements by the Secretary of Commerce, and research by non-governmental groups highlight key aspects of what are expected to define any potential regime.

Regardless of what the regime ultimately looks like, there is broad consensus that a successful outbound investment review program should be grounded in clear policy objectives and narrowly tailored to critical technologies implicating national security. To that end, proposals for interim outbound investment review measures should be focused on finding the right regime to balance national security concerns without unnecessarily stifling innovation.

TREASURY, COMMERCE REPORTS SHED LIGHT

Estimating $10 million in costs for the program, Treasury's report highlights the administration's focus on designing a targeted outbound review regime to address national security concerns arising from outbound investments into "sensitive technologies" and "certain entities involved in a sub-set of certain key advanced technologies that are critical to U.S. national security."

Commerce's report emphasizes that the agency will provide "core sector-specific technical expertise . . . necessary to accurately define, scope, and assess the appropriate sectors" for enforcement. Commerce's functions may include compliance support and analyzing aggregate trends within sectors.

EXECUTIVE ORDER TO TARGET KEY SECTORS

President Joe Biden's fiscal year 2024 budget proposes to make historic investments in US innovation and global technological competitiveness. This budget is released against the backdrop of the US government's broader National

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Security Strategy, which emphasizes US technological leadership as a key national security priority.

The strategy also highlights recent legislative and executive actions that support national security objectives, including the CHIPS and Science Act, the National Biotechnology and Biomanufacturing initiative, and stringent new export controls restricting China's access to advanced semiconductors and supercomputing, among others. Notably, the budget includes $16.7 million in funds allocated for outbound investment review.

The Biden administration is expected to release an executive order that will restrict US investments in certain sectors of the Chinese economy. Secretary of Commerce Gina Raimondo confirmed that any such regime would aim to curtail the flow of US venture capital that would advance semiconductor or artificial intelligence technologies that could be used by China's military or its civil sector in support of national security.

AI DIFFICULT TO TARGET

According to recent research by Georgetown University's Center for Security and Emerging Technology (CSET), US investors constitute a relatively small share of investments in the Chinese AI market—about 17% of the transactions in the study.

But the majority of those investors become involved in the venture capital stage, potentially underscoring the US government's concern that such funding is directly financing market research, product development, and business expansion in sectors with national security applications.

Outbound investments may also come with intangible benefits such as mentorship and coaching, technical expertise, name recognition, and networking opportunities for Chinese AI companies. Controlling the transfer and offshoring of intellectual property to foreign adversaries is a key reason for bipartisan support of reverse CFIUS.

It is a difficult task to craft an outbound investment review regime that targets only certain technologies while still protecting and encouraging investment in emerging sectors such as AI. One of the core challenges—as the CSET research highlights—is that AI is difficult to define in a way that facilitates traditional controls. A wide array of uses and technologies can arguably fall under the "AI umbrella," and most AI applications are likely to be considered dual-use with potential military and surveillance end uses by foreign governments.

REVERSE CFIUS OUTLOOK

The US government could put interim measures in place to test the effects of any long-term regime. Raimondo has recently confirmed that the US government is considering a pilot program to address risks surrounding outbound investment in China. The goal is to prevent overly broad enforcement of such a mechanism to the detriment of US workers and the economy.

Another interim approach that has been broadly discussed would be for the US government to devise a program for collecting data—as a precursor to an actual review mechanism—on US outbound investment for purposes of identifying program objectives and targeting a subset of investments in critical technologies.

Sanctions and export controls regimes could also provide an interim mechanism to address outbound investments via expansion or revision of the scope of such programs and the use of restricted party lists.

Coordination with US allies will be crucial to ensuring that restrictions on investments by US parties is not backfilled by non-US parties. Multilateral engagement by the Biden administration with regard to any such review mechanism remains likely. Concerned parties both inside and outside of the US should continue to watch this space, particularly as momentum for outbound review picks up pace in Europe.

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