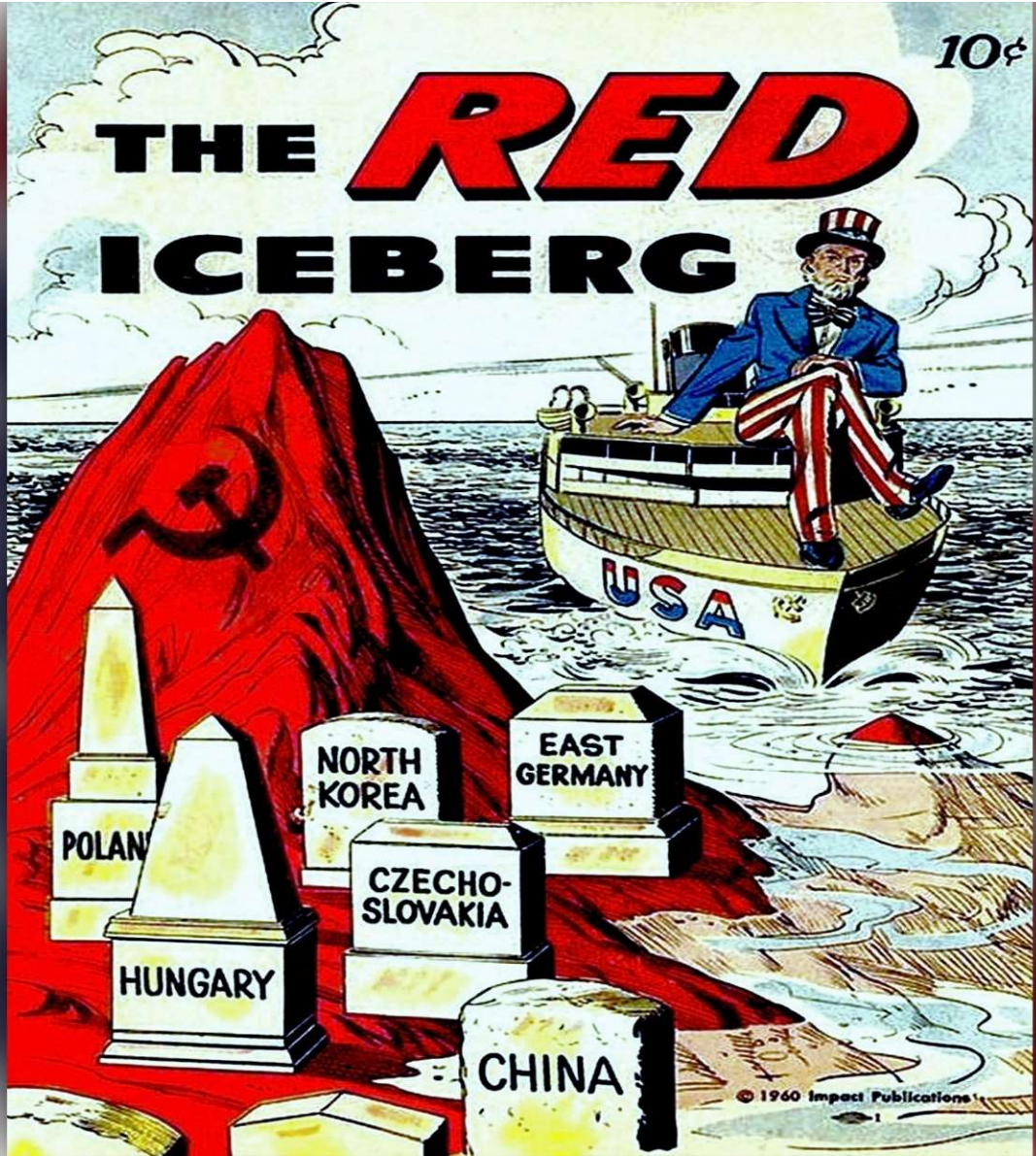
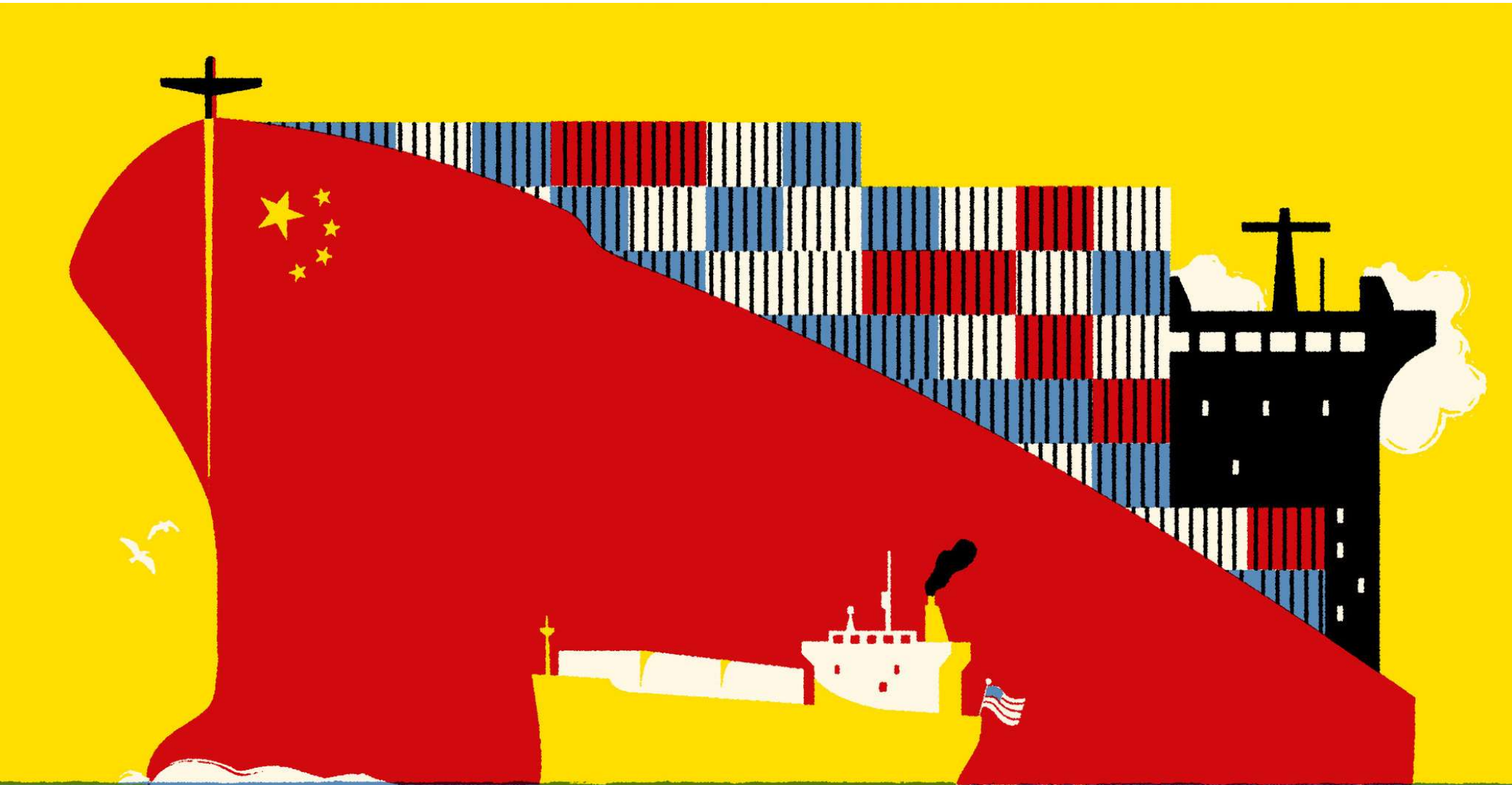


# A New “Red Scare”?

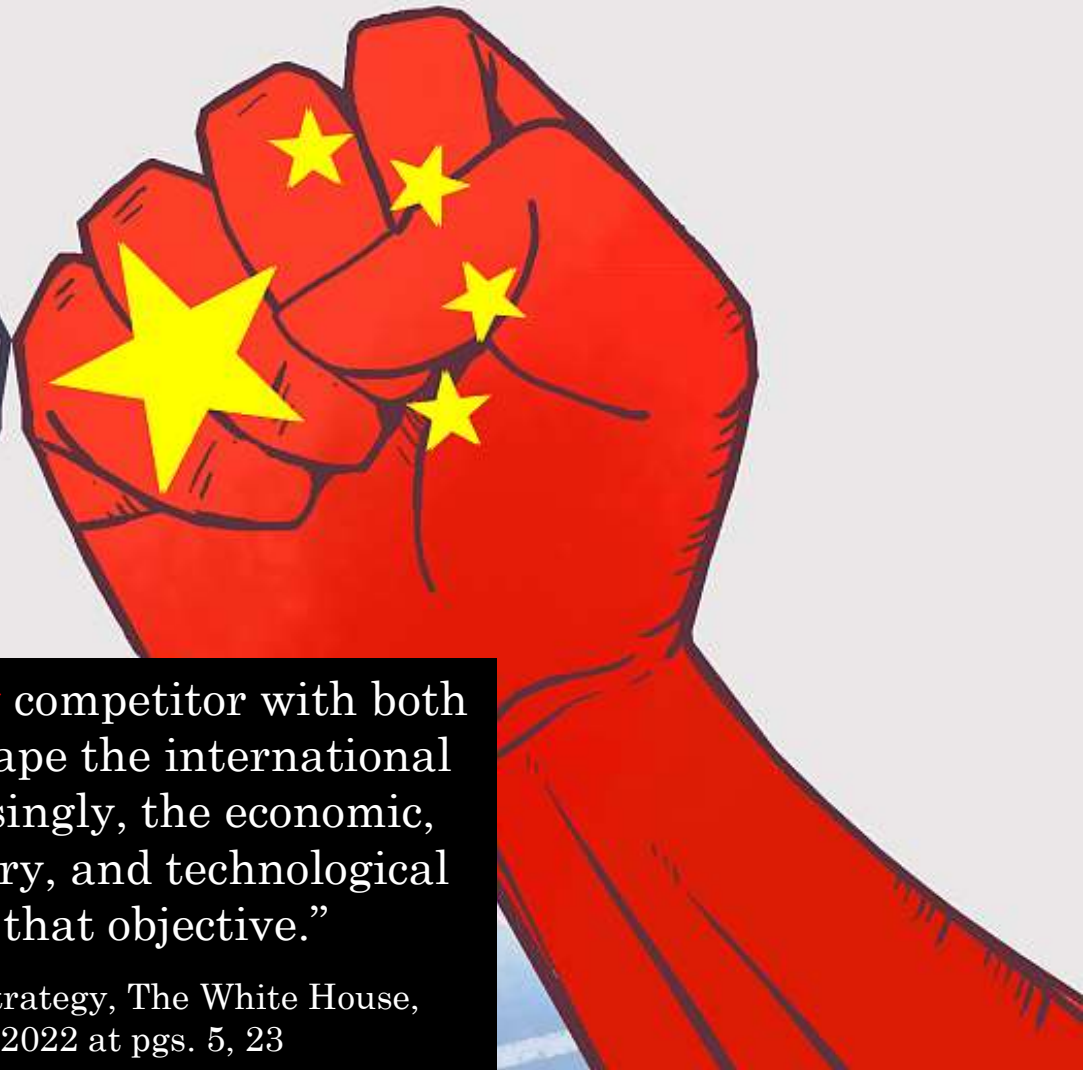
The Ins and Outs of the US’s  
New Program to Regulate  
Outbound Investment in China







# Current Administration's Focus on China



NATIONAL  
SECURITY  
STRATEGY

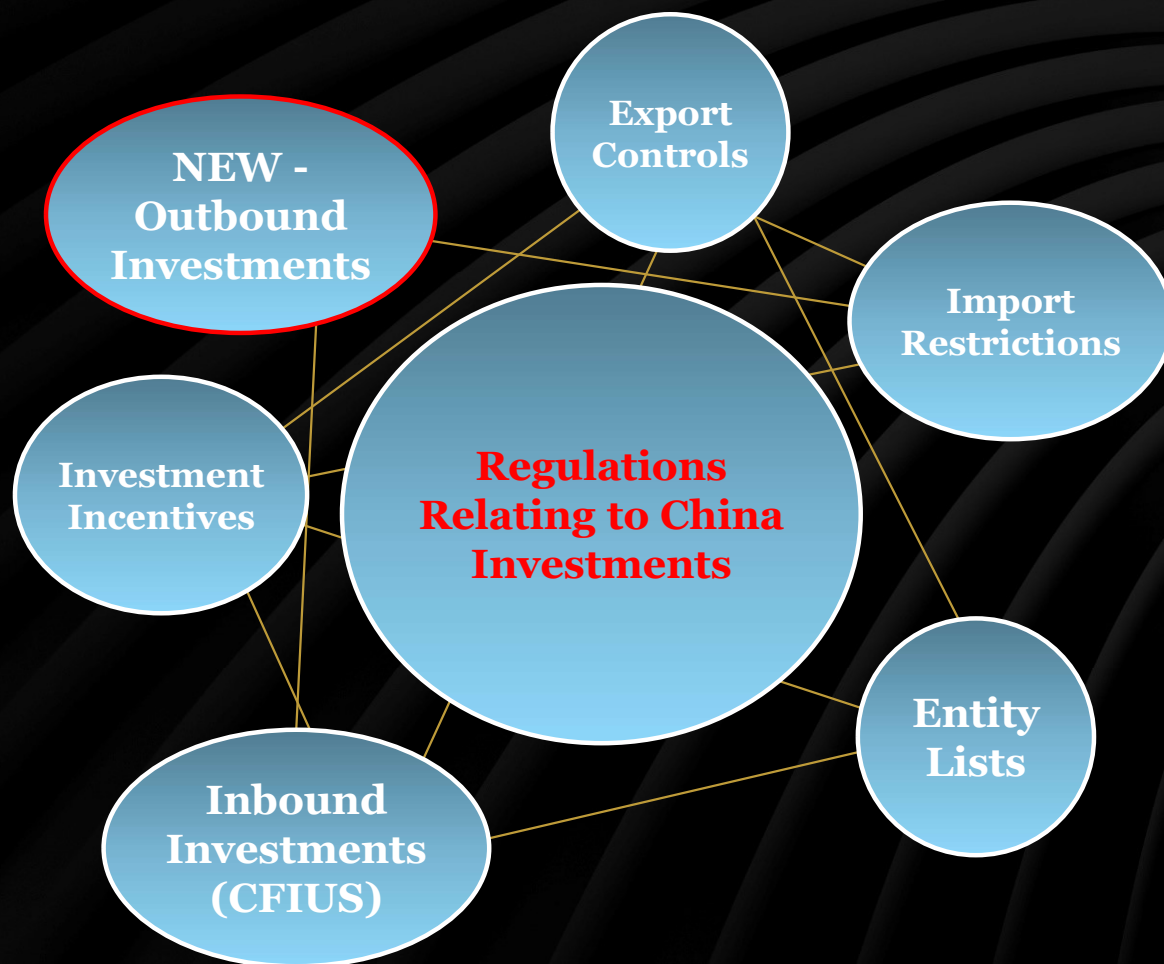
OC 1109 9/2022

China is “the **only** competitor with both the intent to reshape the international order and, increasingly, the economic, diplomatic, military, and technological power to advance that objective.”

National Security Strategy, The White House,  
October 12, 2022 at pgs. 5, 23



# Regulations to Address Competition with China





Outbound  
Investment in China  
is the new frontier in  
China containment





A photograph of President Joe Biden, wearing a dark pinstriped suit and a blue striped tie, seated at a wooden podium. He is leaning forward, focused on signing a document with a pen. The podium features the official seal of the President of the United States, which includes an eagle with a shield and the words "THE PRESIDENT OF THE UNITED STATES". In the background, a blue wall and a portion of the American flag are visible. A semi-transparent black box in the upper right corner contains white text.

# Executive Order ("EO") 14,105

88 Fed. Reg. 54,867  
(Aug. 11, 2023)



# EO 14,105

# SUMMARY

1. Prohibits “**U.S. persons**” from directly or indirectly entering into certain types of transactions with a “**covered foreign person**” engaged in activities involving specified “**covered national security technologies and products**”; and
2. Requires notification to Treasury by “U.S. persons” who participate in these transactions for “covered national security technologies and products.”

<p>Federal Register Vol. 88, No. 154 Friday, August 11, 2023</p>	<p><b>Presidential Documents</b></p>
<p>Title 3— The President</p>	<p>Executive Order 14105 of August 9, 2023 <b>Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern</b></p> <p>By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 <i>et seq.</i>) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 <i>et seq.</i>) (NEA), and section 309 of title 3, United States Code,</p> <p>I, JOSEPH R. BIDEN JR., President of the United States of America, find that countries of concern are engaged in comprehensive, long-term strategies that direct, facilitate, or otherwise support advancements in sensitive technologies and products that are critical to such countries' military, intelligence, surveillance, or cyber-enabled capabilities. Moreover, these countries eliminate barriers between civilian and commercial sectors and military and defense industrial sectors, not just through research and development, but also by acquiring and diverting the world's cutting-edge technologies, for the purposes of achieving military dominance. Rapid advancement in semi-conductors and microelectronics, quantum information technologies, and artificial intelligence capabilities by these countries significantly enhances their ability to conduct activities that threaten the national security of the United States. Advancements in sensitive technologies and products in these sectors will accelerate the development of advanced computational capabilities that will enable new applications that pose significant national security risks, such as the development of more sophisticated weapons systems, breaking of cryptographic codes, and other applications that could provide these countries with military advantages.</p> <p>As part of this strategy of advancing the development of these sensitive technologies and products, countries of concern are exploiting or have the ability to exploit certain United States outbound investments, including certain intangible benefits that often accompany United States investments and that help companies succeed, such as enhanced standing and prominence, managerial assistance, investment and talent networks, market access, and enhanced access to additional financing. The commitment of the United States to open investment is a cornerstone of our economic policy and provides the United States with substantial benefits. Open global capital flows create valuable economic opportunities and promote competitiveness, innovation, and productivity, and the United States supports cross-border investment, where not inconsistent with the protection of United States national security interests. However, certain United States investments may accelerate and increase the success of the development of sensitive technologies and products in countries that develop them to counter United States and allied capabilities.</p> <p>I therefore find that advancement by countries of concern in sensitive technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities of such countries constitutes an unusual and extraordinary threat to the national security of the United States, which has its source in whole or substantial part outside the United States, and that certain United States investments risk exacerbating this threat. I hereby declare a national emergency to deal with this threat.</p> <p>Accordingly, I hereby order:</p>

## EO 14,105

Federal Register  
Vol. 88, No. 154  
Friday, August 11, 2023

## Presidential Documents

Title 3—

Executive Order 14105 of August 9, 2023

The President

**Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) (NEA), and section 309 of title 3, United States Code,

I, JOSEPH R. BIDEN JR., President of the United States of America, find that countries of concern are engaged in comprehensive, long-term strategies that direct, facilitate, or otherwise support advancements in sensitive technologies and products that are critical to such countries' military, intelligence, surveillance, or cyber-enabled capabilities. Moreover, these countries eliminate barriers between civilian and commercial sectors and military and defense industrial sectors, not just through research and development, but also by acquiring and diverting the world's cutting-edge technologies, for the purposes of achieving military dominance. Rapid advancement in semiconductors and microelectronics, quantum information technologies, and artificial intelligence capabilities by these countries significantly enhances their ability to conduct activities that threaten the national security of the United States. Advancements in sensitive technologies and products in these sectors will accelerate the development of advanced computational capabilities that will enable new applications that pose significant national security risks, such as the development of more sophisticated weapons systems, breaking of cryptographic codes, and other applications that could provide these countries with military advantages.

As part of this strategy of advancing the development of these sensitive technologies and products, countries of concern are exploiting or have the ability to exploit certain United States outbound investments, including certain intangible benefits that often accompany United States investments and that help companies succeed, such as enhanced standing and prominence, managerial assistance, investment and talent networks, market access, and enhanced access to additional financing. The commitment of the United States to open investment is a cornerstone of our economic policy and provides the United States with substantial benefits. Open global capital flows create valuable economic opportunities and promote competitiveness, innovation, and productivity, and the United States supports cross-border investment, where not inconsistent with the protection of United States national security interests. However, certain United States investments may accelerate and increase the success of the development of sensitive technologies and products in countries that develop them to counter United States and allied capabilities.

I therefore find that advancement by countries of concern in sensitive technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities of such countries constitutes an unusual and extraordinary threat to the national security of the United States, which has its source in whole or substantial part outside the United States, and that certain United States investments risk exacerbating this threat. I hereby declare a national emergency to deal with this threat.

Accordingly, I hereby order:

## SUMMARY

## 3. Requires Review 1 year after Regulations

- assess whether to amend the regulations, including whether to adjust the definition of “covered national security technologies and products” to add or remove technologies and products in the semiconductors and microelectronics, quantum information technologies, and artificial intelligence sectors.

## 4. Requires Report to the President 1 year after Regulations

- assessment of the effectiveness of the regulations
- advancements by China in covered technologies
- aggregate sector trends
- Recommendations as to modifications



# EO 14,105

## SUMMARY

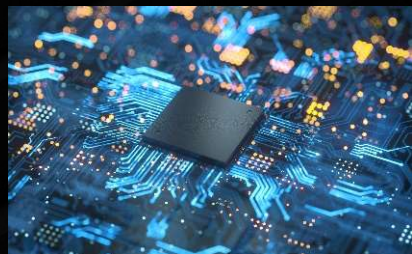
Importantly, unlike CFIUS mandatory filing requirements, Treasury claims it is “not considering a case-by-case determination on an individual transaction basis as to whether the transaction is prohibited, must be notified, or is not subject to the program.” 88 Fed. Reg. 54971



**Thus, private parties have obligation to determine on their own whether the prohibitions or notification requirements apply.**

<p>Federal Register Vol. 88, No. 154 Friday, August 11, 2023</p>	<p><b>Presidential Documents</b></p>
<p>Title 3— <b>The President</b></p>	<p>Executive Order 14105 of August 9, 2023 <b>Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern</b></p> <p>By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 <i>et seq.</i>) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 <i>et seq.</i>) (NEA), and section 309 of title 3, United States Code,</p> <p>I, JOSEPH R. BIDEN JR., President of the United States of America, find that countries of concern are engaged in comprehensive, long-term strategies that direct, facilitate, or otherwise support advancements in sensitive technologies and products that are critical to such countries' military, intelligence, surveillance, or cyber-enabled capabilities. Moreover, these countries eliminate barriers between civilian and commercial sectors and military and defense industrial sectors, not just through research and development, but also by acquiring and diverting the world's cutting-edge technologies, for the purposes of achieving military dominance. Rapid advancement in semiconductors and microelectronics, quantum information technologies, and artificial intelligence capabilities by these countries significantly enhances their ability to conduct activities that threaten the national security of the United States. Advancements in sensitive technologies and products in these sectors will accelerate the development of advanced computational capabilities that will enable new applications that pose significant national security risks, such as the development of more sophisticated weapons systems, breaking of cryptographic codes, and other applications that could provide these countries with military advantages.</p> <p>As part of this strategy of advancing the development of these sensitive technologies and products, countries of concern are exploiting or have the ability to exploit certain United States outbound investments, including certain intangible benefits that often accompany United States investments and that help companies succeed, such as enhanced standing and prominence, managerial assistance, investment and talent networks, market access, and enhanced access to additional financing. The commitment of the United States to open investment is a cornerstone of our economic policy and provides the United States with substantial benefits. Open global capital flows create valuable economic opportunities and promote competitiveness, innovation, and productivity, and the United States supports cross-border investment, where not inconsistent with the protection of United States national security interests. However, certain United States investments may accelerate and increase the success of the development of sensitive technologies and products in countries that develop them to counter United States and allied capabilities.</p> <p>I therefore find that advancement by countries of concern in sensitive technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities of such countries constitutes an unusual and extraordinary threat to the national security of the United States, which has its source in whole or substantial part outside the United States, and that certain United States investments risk exacerbating this threat. I hereby declare a national emergency to deal with this threat.</p> <p>Accordingly, I hereby order:</p>

“covered national security technologies and products”



“semiconductors and microelectronics”



“quantum information technologies”



“artificial intelligence”



## EO 14,105

## Specifically Targets China

Federal Register / Vol. 88, No. 154 / Friday, August 11, 2023 / Presidential Documents 54909

but no less than annually thereafter, the Secretary, in coordination with the Secretary of Commerce and in consultation with the heads of other relevant agencies and the Director of the Office of Management and Budget, as appropriate, shall provide the President, through the Assistant to the President for National Security Affairs:

(i) to the extent practicable, an assessment of the effectiveness of the measures imposed under this order in addressing threats to the national security of the United States described in this order; and

(ii) the establishment or expansion of the covered national security territories to whether any existing legislation should be taken to address the United States identified in this order; and

(b) recommendations, as appropriate, for modifications to this order, including sections or chapters of primary concern of this order; and

(c) the establishment or expansion of the covered national security territories to whether any existing legislation should be taken to address the United States identified in this order; and

**Sec. 5. Reports to the Congress.** The Secretary shall submit reports to the Congress, including and final reports to the Congress, consistent with section 1641(c) and section 204(c) of HRPAA.

**Sec. 6. Official United States Government.** The regulations issued under this order shall not apply to the conduct of the official business of the United States Government, its employees, grantees, or contractors.

**Sec. 7. Confidentiality.** The regulations issued under this order shall address the confidentiality of information submitted pursuant to this order, consistent with applicable law.

**Sec. 8. Additional Notifications and Penalties.** The regulations issued under this order shall address the confidentiality of information submitted pursuant to this order, consistent with applicable law.

(b) Subject to the regulations issued under this order, any person who, or attempts to violate any of the prohibitions set forth in this order or any regulation issued under this order is prohibited.

(c) In the regulations issued under this order, the Secretary may prohibit United States persons from knowingly directing transactions if such transactions would be prohibited transactions pursuant to this order if engaged in by a United States person.

(d) In the regulations issued under this order, the Secretary may require United States persons to:

(i) provide notification to the Department of the Treasury of any transaction by a foreign entity controlled by such United States person that would be a notifiable transaction if engaged in by a United States person; and

(ii) take all reasonable steps to prohibit and prevent any transaction by a foreign entity controlled by such United States person that would be a prohibited transaction if engaged in by a United States person.

**Sec. 9. Definitions.** For purposes of this order:

(a) the term "country of concern" means a country or territory listed in the Annex to this order that the President has identified to be engaging in a comprehensive, long-term strategy that directs, facilitates, or otherwise

The People's Republic of China

The Special Administrative Region of Hong Kong

The Special Administrative Region of Macau

## EO 14,105

Federal Register  
Vol. 88, No. 154  
Friday, August 11, 2023

## Presidential Documents

Title 3—

Executive Order 14105 of August 9, 2023

The President

Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) (NEA), and section 309 of title 3, United States Code,

I, JOSEPH R. BIDEN JR., President of the United States of America, find that countries of concern are engaged in comprehensive, long-term strategies that direct, facilitate, or otherwise support advancements in sensitive technologies and products that are critical to such countries' military, intelligence, surveillance, or cyber-enabled capabilities. Moreover, these countries eliminate barriers between civilian and commercial sectors and military and defense industrial sectors, not just through research and development, but also by acquiring and diverting the world's cutting-edge technologies, for the purposes of achieving military dominance. Rapid advancement in semiconductors and microelectronics, quantum information technologies, and artificial intelligence capabilities by these countries significantly enhances their ability to conduct activities that threaten the national security of the United States. Advancements in sensitive technologies and products in these sectors will accelerate the development of advanced computational capabilities that will enable new applications that pose significant national security risks, such as the development of more sophisticated weapons systems, breaking of cryptographic codes, and other applications that could provide these countries with military advantages.

As part of this strategy of advancing the development of these sensitive technologies and products, countries of concern are exploiting or have the ability to exploit certain United States outbound investments, including certain intangible benefits that often accompany United States investments and that help companies succeed, such as enhanced standing and prominence, managerial assistance, investment and talent networks, market access, and enhanced access to additional financing. The commitment of the United States to open investment is a cornerstone of our economic policy and provides the United States with substantial benefits. Open global capital flows create valuable economic opportunities and promote competitiveness, innovation, and productivity, and the United States supports cross-border investment, where not inconsistent with the protection of United States national security interests. However, certain United States investments may accelerate and increase the success of the development of sensitive technologies and products in countries that develop them to counter United States and allied capabilities.

I therefore find that advancement by countries of concern in sensitive technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities of such countries constitutes an unusual and extraordinary threat to the national security of the United States, which has its source in whole or substantial part outside the United States, and that certain United States investments risk exacerbating this threat. I hereby declare a national emergency to deal with this threat.

Accordingly, I hereby order:

## What is the justification for the new regulations?

- “Countries of concern” (i.e. CHINA) are “exploiting ... outbound investments”
  - “intangible benefits” of outbound investments including
    - enhanced standing and prominence
    - managerial assistance
    - investment and talent networks,
    - market access
    - enhanced access to additional financing.



# EO 14,105

<p>Federal Register Vol. 88, No. 154 Friday, August 11, 2023</p>	<p><b>Presidential Documents</b></p>
<p>Title 3— The President</p>	<p>Executive Order 14105 of August 9, 2023 <b>Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern</b></p> <p>By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 <i>et seq.</i>) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 <i>et seq.</i>) (NEA), and section 309 of title 3, United States Code,</p> <p>I, JOSEPH R. BIDEN JR., President of the United States of America, find that countries of concern are engaged in comprehensive, long-term strategies that direct, facilitate, or otherwise support advancements in sensitive technologies and products that are critical to such countries' military, intelligence, surveillance, or cyber-enabled capabilities. Moreover, these countries eliminate barriers between civilian and commercial sectors and military and defense industrial sectors, not just through research and development, but also by acquiring and diverting the world's cutting-edge technologies, for the purposes of achieving military dominance. Rapid advancement in semi-conductors and microelectronics, quantum information technologies, and artificial intelligence capabilities by these countries significantly enhances their ability to conduct activities that threaten the national security of the United States. Advancements in sensitive technologies and products in these sectors will accelerate the development of advanced computational capabilities that will enable new applications that pose significant national security risks, such as the development of more sophisticated weapons systems, breaking of cryptographic codes, and other applications that could provide these countries with military advantages.</p> <p>As part of this strategy of advancing the development of these sensitive technologies and products, countries of concern are exploiting or have the ability to exploit certain United States outbound investments, including certain intangible benefits that often accompany United States investments and that help companies succeed, such as enhanced standing and prominence, managerial assistance, investment and talent networks, market access, and enhanced access to additional financing. The commitment of the United States to open investment is a cornerstone of our economic policy and provides the United States with substantial benefits. Open global capital flows create valuable economic opportunities and promote competitiveness, innovation, and productivity, and the United States supports cross-border investment, where not inconsistent with the protection of United States national security interests. However, certain United States investments may accelerate and increase the success of the development of sensitive technologies and products in countries that develop them to counter United States and allied capabilities.</p> <p>I therefore find that advancement by countries of concern in sensitive technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities of such countries constitutes an unusual and extraordinary threat to the national security of the United States, which has its source in whole or substantial part outside the United States, and that certain United States investments risk exacerbating this threat. I hereby declare a national emergency to deal with this threat.</p> <p>Accordingly, I hereby order:</p>

## What is the justification for the new regulations?

### National Security

- China “conduct[s] activities that threaten the national security of the United States”
- Certain outbound investments “accelerate the development of advanced computational capabilities”
  - development of more sophisticated weapons systems,
  - breaking of cryptographic codes,
  - other applications that could provide these countries with military advantages.

# EO 14,105

## What is the justification for the new regulations?

Federal Register  
Vol. 88, No. 154  
Friday, August 11, 2023

### Presidential Documents

Title 3—

Executive Order 14105 of August 9, 2023

The President

**Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) (NEA), and section 309 of title 3, United States Code,

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Accordingly, I hereby order:

*“I hereby declare a national emergency to deal with this threat”*





V-171 [Amended]

From Lexington, KY; INT Lexington 251° and Louisville, KY, 114° radials; Louisville: Terre Haute, IN; Danville, IL; Peotone, IL; INT Peotone 281° and Joliet, IL, 173° radials; to Joliet, from Nodine, MN; INT Nodine 298° and Farmington, MN, 124° radials; to Farmington, from Alexandria, MN; INT Alexandria 321° and Grand Forks, ND, 152° radials; to Grand Forks.

Issued in Washington, DC, on August 8, 2023.

Karen L. Chioldini, Acting Manager, Rules and Regulations Group.

[FR Doc. 2023-17358 Filed 8-11-23; 8:45 am] BILLING CODE 4910-13-P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 56, 57, 60, 70, 71, 72, 75, and 90

[Docket No. MSHA-2023-0001] RIN 1219-AB36

Lowering Miners' Exposure to Respirable Crystalline Silica and Improving Respiratory Protection

AGENCY: Mine Safety and Health Administration, Department of Labor. ACTION: Proposed rule; extension of comment period.

SUMMARY: The Mine Safety and Health Administration (MSHA) is extending the comment period on the proposed rule entitled Lowering Miners' Exposure to Respirable Crystalline Silica and Improving Respiratory Protection published in the Federal Register on July 13, 2023, with an established public comment period that is scheduled to end on August 28, 2023. In response to requests for additional time to develop and submit comments on the proposed rule, MSHA is extending the comment period for an additional 15 days—that is, from August 28, 2023, to September 11, 2023.

DATES: The comment period for the proposed rule that was published on July 13, 2023, at 88 FR 44852 is extended. All comments must be submitted by midnight Eastern Time on September 11, 2023.

ADDRESSES: All submissions must include RIN 1219-AB36 or Docket No. MSHA-2023-0001. You should not include personal or proprietary information that you do not wish to disclose publicly. If you mark parts of a comment as "business confidential" information, MSHA will not post those

parts of the comment. Otherwise, MSHA will post all comments without change, including any personal information provided. MSHA cautions against submitting personal information.

You may submit comments and informational materials, clearly identified by RIN 1219-AB36 or Docket Id. No. MSHA-2023-0001, by any of the following methods:

1. Federal eRulemaking Portal: https://www.regulations.gov. Follow the online instructions for submitting comments for MSHA-2023-0001.

2. Email: xaMSHA-comments@dol.gov. Include "RIN 1219-AB36" in the subject line of the message.

3. Regular Mail: MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202-5450.

4. Hand Delivery or Courier: MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia, between 9:00 a.m. and 5:00 p.m. Monday through Friday, except Federal holidays. Before visiting MSHA in person, call 202-693-9440 to make an appointment.

Docket. For access to the docket to read comments, hearing transcripts, supporting materials, and other documents, go to https://www.regulations.gov. The docket can also be reviewed in person at MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Arlington, Virginia, between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays. Before visiting MSHA in person, call 202-693-9440 to make an appointment.

Email Notification. To subscribe to receive an email notification when MSHA publishes rulemaking documents in the Federal Register, go to https://public.govdelivery.com/accounts/USDOL/subscribers/acw.

FOR FURTHER INFORMATION CONTACT: S. Aromie Noe, Director, Office of Standards, Regulations, and Variances, MSHA, at: silicaNPRM@dol.gov (email); 202-693-9440 (voice); or 202-693-9441 (facsimile). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: On July 13, 2023, MSHA published in the Federal Register the proposed rule entitled Lowering Miners' Exposure to Respirable Crystalline Silica and Improving Respiratory Protection (88 FR 44852). The proposed rule is available at the Federal eRulemaking Portal, https://www.regulations.gov, and at MSHA's website, https://www.msha.gov. The proposed rule would amend MSHA's existing standards to better protect miners against occupational exposure to

respirable crystalline silica, a carcinogen, and to improve respiratory protection for all airborne hazards.

The public comment period for this proposed rule was scheduled to close on August 28, 2023, 45 days after publication of the proposed rule. MSHA received requests from commenters for both an extension of the comment period and for no extension of the comment period. Several requested that there not be any extension, so that a final rule can be promulgated without delay to prevent additional discussions among miners. Others requested that the comment period be extended to prepare comments, gather data and information, and address the questions MSHA raised in the proposal. Generally, those requestors asked for an additional 60, 90 or 120 days.

After reviewing these comments, MSHA has determined that it is appropriate to extend the public comment period until September 11, 2023, in order to provide stakeholders and interested parties an additional 15 days to review the proposal and prepare comments.

Authority and Signature [Authority: 30 U.S.C. 811] Dated: August 8, 2023.

Christopher J. Williamson, Assistant Secretary of Labor for Mine Safety and Health.

[FR Doc. 2023-17370 Filed 8-11-23; 8:45 am] BILLING CODE 4520-43-P

DEPARTMENT OF THE TREASURY

Office of Investment Security

31 CFR Chapter VIII

[Docket ID TREAS-DO-2023-0009]

RIN 1505-AC82

Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern

AGENCY: Office of Investment Security, Department of the Treasury. ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Executive Order of August 9, 2023, "Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern" (the Order), directs the Secretary of the Treasury (the Secretary) to issue regulations that identify categories of transactions involving technologies and products that may contribute to the threat to the

Department of Treasury Advance Notice of Proposed Rulemaking (ANPRM) 88 Fed. Reg. 54,961-72 (Aug. 14, 2023)





## Who do the rules apply to?

- Proposed definition of “**U.S. person**” includes “any United States citizen, lawful permanent resident, entity organized under the laws of the United States or any jurisdiction within the United States, including any foreign branches of any such entity, and any person in the United States.”
  - Comports with the standard definition in U.S. sanctions practice
  - Does **not** include foreign subsidiaries of U.S. businesses directly, but proposed rules would place obligations on U.S. parents, or other controlling U.S. entities, to enforce the rules at their non-U.S. controlled entities.



## Who do the rules apply to?

- Proposed definition of “**U.S. person**” – Public Comments
  - Does it apply only to the U.S. person entity or individual undertaking the covered transaction and not to other parties involved in or tangential to the transaction, including third-party financial institutions?
  - How does it apply to dual citizens?
  - Should the definition be mutually exclusive with definition of covered foreign person to prevent situations where a company is classified as both?
  - Are non-U.S. companies that have U.S. nationals as board members or senior employees a “U.S. person”?
  - Are parent companies of U.S. subsidiaries considered “U.S. persons”?





## Who do the rules apply to?

- Proposed definition of “covered foreign person”
  1. a “person of a country of concern” (i.e. China) that is engaged in, or that a U.S. person knows or should know will be engaged in, an identified activity with respect to a “covered national security technology or product”; or
  2. a person whose direct or indirect subsidiaries or branches are referenced in item (1) and which, individually or in the aggregate, comprise more than 50 percent of that person’s consolidated revenue, net income, capital expenditure, or operating expenses.



88 Fed. Reg. at 54,964

## Who do the rules apply to?

- Proposed definition of “covered foreign person” – Public Comments
  - Difficulty in making determination whether covered activity comprises more than 50 percent of a foreign person’s revenue, net income, or other metrics (“50% Rule”) due to unavailability of information such as Chinese banking and ownership information
  - 50% Rule is ambiguous as to whether it refers to an operating company employing personnel engaged in the covered activity, or whether a holding company may be considered “engaging in” the covered activity
  - Requests for Treasury to publish and maintain a fixed list of entities determined to be “covered foreign persons,” along the lines of Commerce’s existing Entity List or Treasury’s sanction lists









# What are Notifiable and Prohibited Transactions?



# Semiconductors and Microelectronics

## Notifiable

- Integrated Circuit Design – IC design which is not otherwise prohibited
- Integrated Circuit Fabrication: IC fabrication which are not otherwise prohibited
- Integrated Circuit Packaging: IC packaging which are not otherwise prohibited.

88 Fed. Reg. 54,967–68

## Prohibited

- Technologies that Enable Advanced Integrated Circuits
  - Software for Electronic Design Automation
  - IC Manufacturing Equipment: development or production of front-end semiconductor fabrication equipment designed to be exclusively used for the volume fabrication of ICs
- Advanced Circuit Design and Production
  - *Advanced IC Design*: Design of ICs that exceed the thresholds in Export Control Classification Number (“ECCN”) 3A090, or integrated circuits designed for operation at or below 4.5 Kelvin.
  - *Advanced IC Fabrication*: Fabrication of IC (i.e. the process of forming devices such as transistors, poly capacitors, non-metal resistors, and diodes, on a wafer of semiconductor material) that meet any of the following criteria:

# Semiconductors and Microelectronics

## Notifiable

## Prohibited

- (i) Logic ICs using a nonplanar transistor architecture or with a technology node of 16/14 nanometers or less, including but not limited to fully depleted silicon-on-insulator (FDSOI) integrated circuits;
- (ii) NAND memory with 128 layers or more;
- (iii) DRAM using 18 $\mu$ m half-pitch or less;
- (iv) Integrated circuits manufactured from a gallium-based compound semiconductor;
- (v) ICs using graphene transistors or carbon nanotubes; or
- (vi) ICs designed for operation at or below 4.5 Kelvin.

# Semiconductors and Microelectronics

## Notifiable

## Prohibited

- *Advanced IC Packaging*: IC packaging that support 3-D integration of ICs, using silicon vias or through mold vias, where “packaging of integrated circuits” is defined as the assembly of various components, such as the IC die, lead frames, interconnects, and substrate materials, to form a complete package that safeguards the semiconductor device and provides electrical connections between different parts of the die.
- **Supercomputers:**
  - Installation or sale to third-party customers of a supercomputer, which are enabled by advanced ICs, that can provide a theoretical compute capacity of 100 or more double-precision (64-bit) petaflops or 200 or more single-precision (32-bit) petaflops of processing power within a 41,600 cubic foot or smaller envelope



# Quantum Information Technologies

## Notifiable

[NONE, as of now]

88 Fed. Reg. 54,968

## Prohibited

- Quantum Computers and Components
  - Production of a quantum computer (defined as a computer that performs computations that harness the collective properties of quantum states, such as superposition, interference, or entanglement), dilution refrigerator, or two-stage pulse tube cryocooler.
- Quantum Sensors
  - Development of a quantum sensing platform designed to be exclusively used for military end uses, government intelligence, or mass-surveillance end uses.
- Quantum Networking and Quantum Communication Systems:
  - Development of a quantum network or quantum communication system designed to be exclusively used for secure communications, such as quantum key distribution.

## AI Systems

**PROPOSED DEFINITION:** “an engineered or machine-based system that can, for a given set of objectives, generate outputs such as predictions, recommendations, or decisions influencing real or virtual environments. AI systems are designed to operate with varying levels of autonomy.”

88 Fed. Reg. 54,969

## AI Systems

### Notifiable

- Development of software that incorporates an AI system and is designed to be exclusively (or primarily) used for:
  - i. Cybersecurity applications, digital forensics tools, and penetration testing tools;
  - ii. Control of robotic systems;
  - iii. Surreptitious listening devices that can intercept live conversations without consent of parties involved;
  - iv. Non-cooperative location tracking (including international mobile subscriber identity (IMSI) Catchers and automatic license plate readers); or
  - v. Facial recognition.

### Prohibited

- Development of software that incorporates an AI system and is designed to be exclusively (or primarily) used for military, government intelligence, or mass-surveillance end uses.

88 Fed. Reg. 54,968–69



## Are there exceptions?

Treasury is considering a category of “**excepted transactions**” that “present a lower likelihood of concern”:

- Investments in publicly traded securities, index funds, mutual funds, ETFs, or similar instruments (including associated derivatives) offered by an investment company or by a private investment fund;
- Passive investments by a limited partner (“LP”) into a VC fund, PE, fund of funds, or other pooled investment funds below a to be determined *de minimis* threshold (to be set by Treasury).
- Acquisitions of equity or other interest owned or held by a “covered foreign person” in an entity or assets located outside of a “country of concern” (i.e. China) where the “U.S. person” is acquiring all interests in the entity or assets held by “covered foreign persons”;
- An intracompany transfer of funds from a U.S. parent company to a subsidiary located in China; or
- A transaction made pursuant to a binding, uncalled capital commitment entered into before the date of the EO.



88 Fed. Reg. 54,965

## Are there exceptions?

### EXCEPTION TO THE EXCEPTION

NOT an “excepted transaction” if the transaction

- Provides a U.S. person “rights beyond those reasonably considered to be standard minority shareholder protection”
  - “Membership or observer rights on, or the right to nominate an individual to a position on, the board of directors or an equivalent governing body of the covered foreign person”; or
  - “Any other involvement, beyond the voting of shares, in substantive business decisions, management, or strategy of the covered foreign person.”



88 Fed. Reg. 54,965

## Are there exceptions?

Treasury also identified transactions that would not fall within the definition of “covered transaction”

1. University-to-university research collaborations;
2. Contractual arrangements or the procurement of material inputs for any of the “covered national security technologies or products” (such as raw materials);
3. Intellectual property licensing arrangements;
4. Bank lending;
5. Processing, clearing, or sending of payments by a bank;
6. Underwriting services;
7. Debt rating services;
8. Prime brokerage;
9. Global custody;
10. Equity research or analysis; or
11. Other services secondary to a transaction.



88 Fed. Reg. 54,965



## Are there exceptions?

### PUBLIC COMMENTS

- Requests for a waiver application system
- Requests for an advisory opinion process, through which Treasury could provide advance notice of whether a particular transaction would be notifiable or prohibited.

## What are obligations of US Persons with respect to controlled foreign entities?

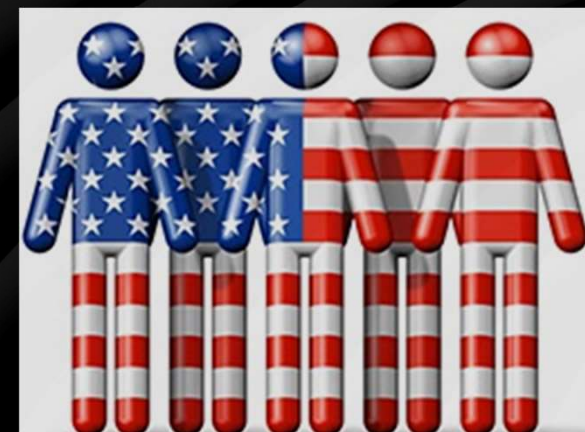
1. Notify Treasury of “any transaction by a foreign entity *controlled by such United States person* that would be a notifiable transaction if engaged in by a United States person” and
2. “take **all reasonable steps** to prohibit and prevent any transaction by a foreign entity controlled by such United States person that would be a prohibited transaction if engaged in by a United States person.”



## What are reasonable steps to prohibit a transaction by a foreign entity controlled by United States person?

Such reasonable steps could explicitly include the following:

- i. Relevant binding agreements between a U.S. person and the relevant controlled foreign entity or entities;
- ii. Relevant internal policies, procedures, or guidelines that are periodically reviewed internally;
- iii. Implementation of periodic training and internal reporting requirements;
- iv. Implementation of effective internal controls;
- v. Testing and auditing function; and
- vi. The exercise of governance or shareholder rights, where applicable



88 Fed. Reg. at 54,971



## Is there a knowledge requirement?

- Most Treasury sanctions programs typically apply a strict liability standard
- ANPRM states that a “knowledge standard” could be adopted across the program. 88 Fed. Reg. 54,969–70
  - Most likely a U.S. person would “need to know, or reasonably should know” from an appropriate amount of due diligence, “that it is undertaking a transaction involving a covered foreign person and that the transaction is a covered transaction.” 88 Fed. Reg. 54,970
  - Knowledge would also be inferred from a conscious or willful avoidance of facts. 88 Fed. Reg. 54,969



## What is “knowingly directing” transactions?

1. Defines this standard to capture actions where a U.S. person “orders, decides, approves, or otherwise causes to be performed a transaction that would be prohibited under these regulations if engaged in by a U.S. person,”
2. U.S. person has “actual knowledge, or should have known, about the conduct, the circumstance, or the result.”

88 Fed. Reg. at 54,971



## What is “knowingly directing” transactions?

- Proposed due diligence and knowledge requirements – **Public Comments**
  - Should there be a “safe harbor” or a “reasonable reliance” standard, to allow U.S. persons to rely on diligence responses from the prospective investee or foreign partner?
  - Should knowledge requirement be based only on information available to the U.S. person at the time of the transaction, not based on information available later?
  - Should Treasury to publish extensive guidance that describes relevant due diligence steps, red flags, and other specific examples of sufficient practices to meet the standard for “reasonable and appropriate” due diligence?



## What are the penalties?

EO envisions both civil and criminal penalties for violations of the proposed regulations. 88 Fed. Reg. at 54,870

1. **CRIMINAL Penalties** – “refer potential criminal ... violations to the Attorney General.”

2. **CIVIL Injunctive Relief**

“nullify, void, or otherwise compel the divestment of any prohibited transaction entered into after the effective date” of the implementing regulations.



88 Fed. Reg. 54,972

## What are the penalties?

### 3. CIVIL Monetary Penalties

Penalties up to the maximum allowed under International Emergency Economic Powers Act (currently US **\$356,579** per violation) (88 Fed. Reg. 2,229 Jan. 13, 2023) for:

- 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.



88 Fed. Reg. 54,972

## Will the Regulations Apply Retrospectively or Prospectively?

- Almost all commenters agreed that the EO and the regulation should be prospective, not retroactive,
  - Only apply to transactions and investments made after rules finalization
- Currently, the proposed rules are ambiguous as to whether Treasury would seek to exercise authority to unwind transactions completed before final rules are adopted



# Will the Regulations Apply Retrospectively or Prospectively?

- **HOWEVER**

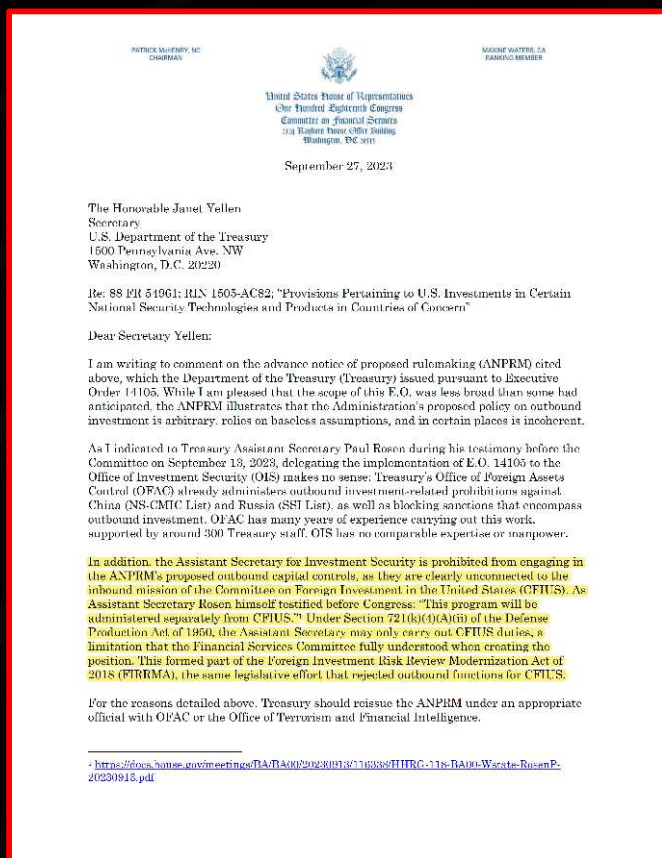
- Treasury intends definition of covered transaction “to be forward-looking, and not to cover transactions and the fulfillment of uncalled, binding capital commitments with cancellation consequences made prior to the issuance of the Order.” 88 Fed. Reg. 54964
- Treasury states that it “would not use [its] authority to unwind a transaction that was not prohibited at the time it was completed.” 88 Fed. Reg. 54972

## When will the regulations come into effect?

- **SHORT ANSWER: There is no effective date set, but probably Q4 2024 or Q1 2025**
  - Usually an extended timeline for regulations
  - Broad list of 83 specific questions for public comment
  - Public comments closed on September 28, 2023
  - At some undefined point, Treasury will issue a Proposed Notice of Rulemaking setting out the near-final version of the regulations and allowing for one more period of public comment.
  - Final rules will come into effect at some point after public comment period ends, which is very likely months away.
  - CFIUS is illustrative. Took about 18 months (August 2018 law passage to February 2020 final rules effective)



# Potential Legal Challenge



- Chairman McHenry raised legal issues with the proposed regulations:
  - Asserting that the Office of Investment Security cannot statutorily implement the regulation, and
  - Questioning reliance on the International Emergency Economic Powers Act (IEEPA) as part of the authority for the regulation, describing its use as “novel.”
- Could set up litigation over final regulations



## How to Prepare for the Impending Regulations

- Monitor final regulations to determine scope of rules on outbound foreign investment
- Carefully trace and document due diligence efforts when investments may relate to China and covered technologies;
- Ensure that agreements between a U.S. person and the relevant controlled foreign entity or entities have binding requirements not to enter prohibited transactions under the new rules;
  - Include a representation and warranty regarding compliance with new regulations;

# How to Prepare for the Impending Regulations

- Review client internal policies, procedures, or guidelines;
  - Ensure proper reporting procedures are in place to prevent unauthorized investments
  - Implement periodic training on reporting requirements
- Review current and future mergers, acquisitions, and investments for with regard to ownership, board membership, and technologies involved.



## Harold Davis

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