

Morgan Lewis

CONTINUING EVOLUTION OF
US-CHINA
RELATIONS
2023 AND BEYOND

Outbound Investment Review

July 11, 2023

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Presenters



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History and Background

Congressional Action

- Considered in Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), but ultimately not included
 - In lieu of outbound investment provisions, FIRRMA extended CFIUS coverage of inbound reviews to emerging and foundational technologies.
- U.S.-China Economic and Security Review Commission, top 10 recommendations (2021)
- Outbound investment regimes for the US are not new
 - President Johnson issued EO 11387 (Governing Certain Transfers Abroad)
 - Authority delegated to Commerce, Office of Foreign Investment
 - Foreign Direct Investment Regulations (15 CFR 1000.101-1000.1301 (Supp. 1969))
 - Neither well received nor considered effective – EO revoked by President Reagan in 1986

History and Background (Cntd.)

- National Critical Capabilities Defense Act of 2021 (NCCDA 2021)
 - Included in House of Representatives bill, America COMPETES Act
 - Not included in companion Senate legislation
 - Ultimately not included in final CHIPS Act that passed Congress and was signed by the President
 - CHIPS Act did contain very narrow outbound investment provisions, but limited to recipients of CHIPS Act funding.
- National Critical Capabilities Defense Act of 2022 (NCCDA 2022)
 - Part of conference committee discussions, but never formally introduced as a bill
- National Critical Capabilities Defense Act of 2023 (NCCDA 2023)
 - Re-introduced in May 2023

History and Background (Cntd.)

Executive Branch Action

- An Executive Order has been under consideration for approximately two years and is expected to issue this year.
- Likely bases for jurisdiction are the International Emergency Economic Powers Act (IEEPA) and National Emergencies Act (NEA).

Policy Objectives

US Government National Security Concerns – longstanding as the same concerns exist in a comparable form in 1968 under President Johnson

- Technology transfer
- Support to PRC development of indigenous capabilities at the expense of US industries and in support of PRC capabilities
- Supply chain for US critical capabilities

Potential Downsides to Regulation

- Economic collateral damage
- Regulatory ambiguity – confusion or inconsistencies in implementation
- Other countries may not follow suit, although some already have such regimes

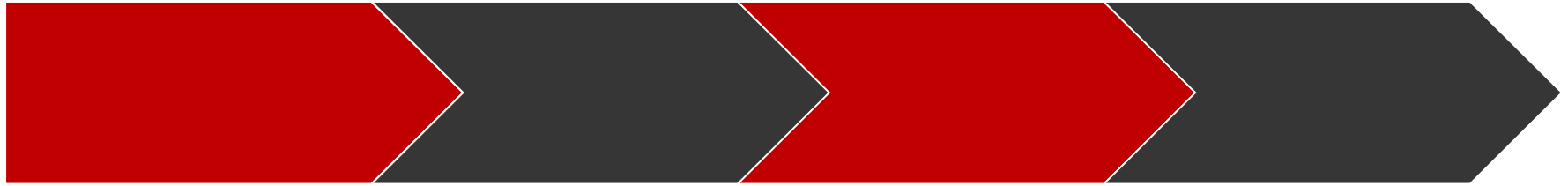
Potential Scope of Executive Order

- Sectors:
 - Semiconductors (broadly inclusive of industries supporting semiconductors, such as semiconductor equipment)
 - Artificial Intelligence (and supporting industries)
 - Quantum Computing (unclear whether this will extend to quantum encryption and quantum sensing, both of which are also sensitive)
- Discussed but likely not covered at this time:
 - Biotechnology and biomanufacturing
 - Battery technology and rare Earth minerals

Potential Scope of Executive Order (Cntd.)

- “Investment Plus” - Investment accompanied by management expertise, efficiency expertise, transfer of know-how and other technical expertise
 - What about passive investment?
- PRC military benefit, whether direct or indirect
- Approval requirement vs. notification requirement
- Mandatory vs. voluntary
- Mitigation
- Prospective

Potential Process



**Department
of Treasury
as Chair**

**Roles for
Department of
Commerce and
other agencies**

**Notice and
Opportunity to
Respond**

**Compliance
and
Enforcement**

Likely Multilateral Efforts

- Biden Administration favors multilateral approach
- Expect outreach to allies and partners to coordinate a similar outbound process
- EU support – preliminary consideration of outbound investment reviews underway
- G7 discussion – likely to expand
- Anticipate a reaction from the PRC
 - Comparable to what is ongoing with respect to recent export control restrictions
 - Likely to result in disruptions
 - Could be anticipatory – so consider planning requirements if the PRC chooses to act prior to the issuance of the EO or possible Congressional legislation

And what does the EU say?

“Outbound investment controls are the other side of the coin of export controls...because you can effectively ban exports of so-called dual use technologies, which we have done for instance to prevent feeding Russia’s war machine, but that still leaves room for the leakage of sensitive technologies through investments on the ground.”

EU Trade Commissioner Dombrovskis

EU moves on outbound investment control



- A novel step and a gradual process
- EU Commission Work Programme (September 2022)
- EU Commission President Von der Leyen's speech on EU-China Relations (March 2023)
- EU Economic Security Strategy (June 2023)
- Proposal for EU instrument: end of 2023

First features of EU outbound investment control

- **Restrictive application:**

“Prevent the **narrow set of technological advances** that are assessed to be core to **enhancing military and intelligence capabilities** of actors who may use them to **undermine international peace and security** being fueled by EU companies` capital, expertise and knowledge”

“Prevent the leakage of **sensitive emerging technologies**, as well as other **dual-use items**, to destinations of concern that operate **civil-military fusion** strategies and to **avoid backfilling** of any controlled exports and investments”

- **Potential scope:**

Microelectronics	Quantum computing	Robotics
Artificial intelligence	Biotech	
<i>potential dual-use purposes</i>		
<i>human rights implications</i>		

Meanwhile in the EU...the toolbox is filling up

Export Controls		Anti-Coercion Instrument	
Net Zero Industry Act		Critical Raw Materials Act	
Foreign Direct Investment Control		Sanctions	
Foreign Subsidies Regulation			

Challenges for EU outbound investment control

- **Enforcement:** EU intervention in a traditional Member State prerogative
- **Parallelism:** EU Measures and EU Member State Measures
- **Divergence:** Conflicting interests amongst EU Member States



Preparing for the EO, Potential Regulations and Multilateral Efforts

- Evaluate current and planned investments – consider:
 - Existing diligence requirements for outbound investments – whether minority or broader
 - Current agreements – do force majeure or other changed circumstances clauses cover any regulatory changes
 - Litigation potential – management and preparation for same
 - US Government requests for filings – likelihood or requirement
 - Does EO 14083 (inbound CFIUS reviews) provide any insight into where or how an outbound regime may be implemented
- Be aware of potential for congressional action that could be broader in scope than Executive Order
 - Legislation is more difficult to pass as it requires consensus
 - Current bipartisan consensus exists regarding China, although some policy differences have arisen

Biography



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Giovanna M. Cinelli is the leader of the international trade and national security practice. As a practitioner for more than 30 years, she counsels clients in the defense and high-technology sectors on a broad range of issues affecting national security and export controls, including complex export compliance matters, audits, cross-border due diligence, and export enforcement, both classified and unclassified.

She handles complex civil and criminal export-related investigations and advises on transactional due diligence for regulatory requirements involving government contracts, export policy, and compliance, as well as settlement of export enforcement actions before the US departments of State, Commerce, Treasury, and Defense, and related agencies. Giovanna has conducted dozens of export investigations and has negotiated six consent agreements before the Department of State. She advises clients on matters before the Committee on Foreign Investment in the United States (CFIUS), and addresses mitigation requirements that may apply as part of CFIUS clearances for cross-border transactions. Giovanna is a member of the Morgan Lewis CFIUS working group.

Biography



David Plotinsky

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David Plotinsky, the former acting chief of the US Department of Justice's Foreign Investment Review Section, represents clients such as venture capital, private equity, and infrastructure firms. In particular, he steers clients through government national security review processes for foreign investment, including by the Committee on Foreign Investment in the United States (CFIUS) and Team Telecom. In addition, David focuses on trade, information communications technology and services, and critical and emerging technology. He maintains a security clearance and advises clients on their most sensitive matters.

David has been named to the Foreign Investment Watch Top Advisors 2023 list, which recognizes leading legal, financial, compliance, and communications professionals who provide advice concerning national security review of foreign investments in the United States and overseas.

Biography



Christina Renner

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Christina Renner concentrates her practice on European Union (EU) and German merger control/foreign direct investment (FDI) and antitrust law, with experience in cartels and general behavioral matters, abuse of dominance, as well as EU state aid laws. Christina has experience in handling multijurisdictional merger and FDI filings for a variety of clients and regularly advises on complex cross-border competition and EU regulatory compliance matters. She also regularly advises on a variety of EU cross-border trade issues, including EU sanctions and foreign subsidies.

Christina has an established EU regulatory practice that spans from traditional to virtual networks across a variety of industries, including energy, telecommunications, transportation, retail and ecommerce, life sciences, and digital markets.

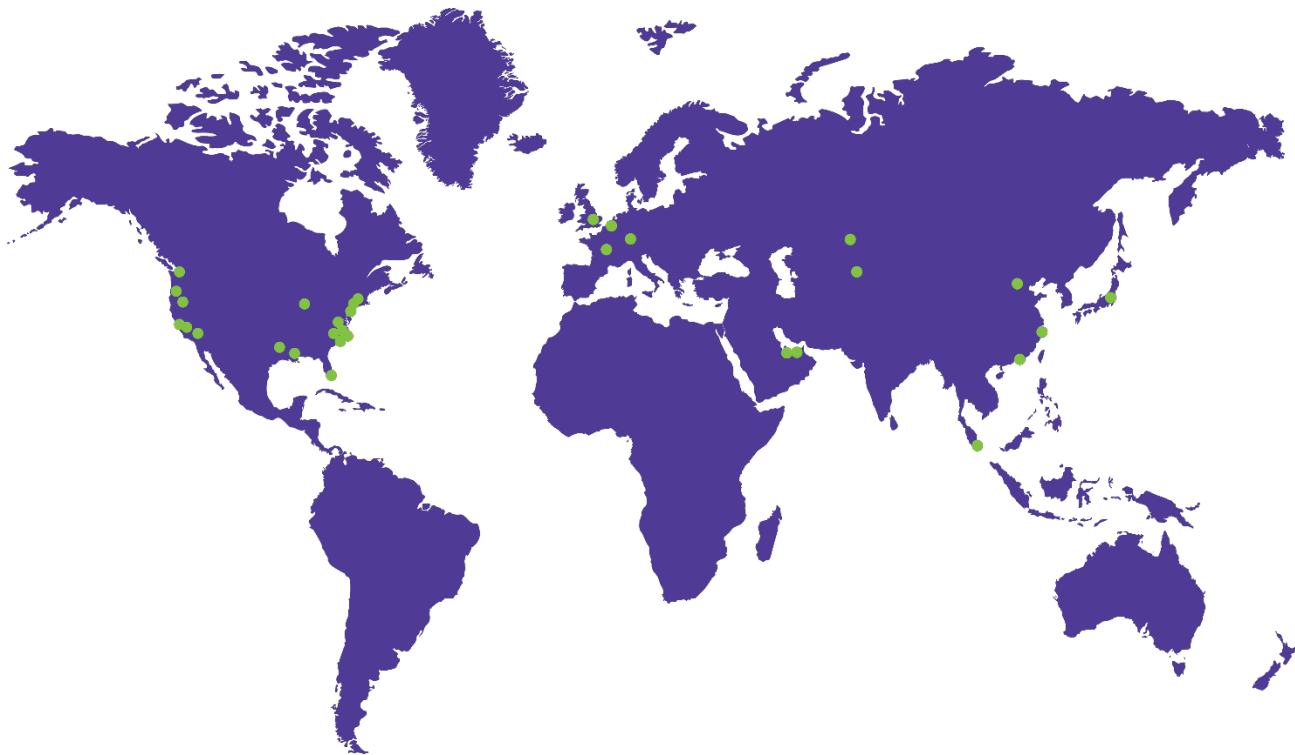
Christina also represents diverse international clients in antitrust investigations before the European Commission and other national competition authorities, including in litigation before European courts.

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