

Biden Restricts US Investments In China's Tech

By **Lauren Berg**

Law360 (August 9, 2023, 11:18 PM EDT) -- President Joe Biden signed an executive order Wednesday restricting American investments in certain technologies that China is developing in its military modernization efforts, a move that experts say is a measured approach to address a concern that has been "percolating for years."

The highly anticipated order, which targets China and the special administrative regions of Hong Kong and Macau, will block dollars from leaving the U.S. to fund Beijing's efforts to develop semiconductors and microelectronics, artificial intelligence and quantum computer technologies. The administration said such technologies can enhance a country's military, intelligence and surveillance capabilities, posing a threat to U.S. national security.

"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," the order states.

As part of the order, the U.S. Department of the Treasury said it will oversee a "narrowly tailored" national security program complementing existing export controls. The department will issue regulations prohibiting U.S. nationals from "engaging in certain transactions" involving the three categories of technology at issue and require U.S. nationals to notify the department of other transactions that could contribute to a national security threat.

"The United States benefits from an open investment climate and this new program will not change that," the Treasury Department said in a statement Wednesday. "It is narrowly targeted at investments in highly sensitive technologies and products for the purposes of protecting U.S. national security."

"Treasury anticipates excepting certain transactions, including potentially those in publicly-traded instruments and intracompany transfers from U.S. parents to subsidiaries," it added.

The department said it is seeking public comment during the rulemaking process for the development of the national security program.

Anthony Rapa, co-chair of Blank Rome LLP's international trade practice, told Law360 on Wednesday that the Biden administration is "taking a measured approach" to a concern that has been "percolating

for years."

The order "establishes a framework for the Treasury Department to issue regulations that put the meat on the bones when it comes to how the U.S. government is going to regulate outbound investment in areas that are sensitive for national security," Rapa said, noting that the Treasury Department has started the process by issuing an advance notice of proposed rulemaking.

"That's meaningful in the regulatory world because starting with that is the most preliminary step you can take when it comes to issuing regulations," he said.

The U.S. hasn't really taken an approach like this before and the Biden administration's intention is to include a consultative process with the public and industry groups, the attorney said. That's also likely why it has taken so long to get to this point in the process, he added.

"This is new and complex, and there are a ton of moving parts," Rapa said, adding that the Treasury Department will have its hands full interpreting a number of issues and defining various terms in the regulations. It's still not clear, for example, if the rules will apply to businesses owned by Chinese nationals outside of China or to U.S. investors who own businesses outside the U.S.

"There's a lot of wood to chop," Rapa said. "Already a lot of hard work has been done, but there's more to do yet. There are a lot of twists and turns from here, and I think the order will be built out and elaborated upon over the coming years."

And Congress is still in the picture, Rapa said, noting that just a couple of weeks ago the Senate voted 91-6 to pass a bill that would require U.S. businesses to notify the Treasury Department when they invest in Chinese technology that could impact U.S. national security concerns.

A slate of six Republican and six Democratic senators in March introduced the Restricting the Emergence of Security Threats that Risk Information and Communications Technology Act, after months of speculation around the prospect of a government mechanism to vet outgoing U.S. investments akin to the Committee on Foreign Investment in the United States.

The bill calls on the secretary of commerce to "take action to identify, deter, disrupt, prevent, prohibit, investigate, or otherwise mitigate" dealings involving U.S. persons and technology from countries believed to pose a risk to national security or organizations under their control. It identifies six foreign adversaries at present: China, Cuba, Iran, North Korea, Russia and Venezuela.

And a bipartisan group of representatives in May reintroduced the National Critical Capabilities Defense Act, a bill aimed at screening outbound investments to foreign adversaries, especially in areas considered critical to national security, such as artificial intelligence, semiconductors and active pharmaceutical ingredients.

The bill would establish a review process for U.S. investments in supply chain areas deemed critical to national security, which also included minerals and materials and automobile manufacturing.

U.S. Senate Majority Leader Chuck Schumer, D-N.Y., applauded Biden's order, saying in a statement Wednesday that U.S. investors have "helped fuel the Chinese military's rise" and that the restrictions will make sure no more American dollars are used to fund Beijing's military advancements that "destabilize the region and threaten our national security."

Biden's executive order "creates the first notification and prohibition policy regime to identify and halt U.S. investments in critical technologies like semiconductors, quantum technologies, and artificial intelligence," Schumer said.

Caroline Brown of Crowell & Moring LLP, a member of the firm's international trade group and the steering committee of the firm's national security practice, pointed to the need to iron out the ambiguity of what kinds of transactions will be affected.

"While the sectors included as covered national security technologies and products are of no surprise, the ambiguity surrounding the definition of transactions that will ultimately be subject to the notifications and prohibitions portends a protracted rulemaking process in order to determine just how far the scope of the executive order will ultimately end up being," Brown said.

Meanwhile, industry groups expressed cautious optimism about the measured approach to implementing the new rules.

Rob Strayer, executive vice president of policy for the Information Technology Industry Council, said Wednesday that the tech trade association is encouraged that the administration wants to work with industry stakeholders in implementing the new rules.

"While we're still reviewing the details of today's executive order, we appreciate the Biden administration taking a risk-based approach to assessing business transactions," Strayer said in a statement. "Because technology investments can originate anywhere in the world, successful implementation will require robust coordination with global allies."

"A harmonized approach also will help ensure U.S. businesses are not unintentionally disadvantaged by these requirements," he added.

The Semiconductor Industry Association on Wednesday said it "recognizes the need to protect national security" and that ensuring a globally competitive U.S. semiconductor industry is part of achieving that goal.

"We are assessing today's proposal and welcome the opportunity to provide feedback as part of the public comment period," the association said in a statement. "We hope the final rules allow U.S. chip firms to compete on a level-playing field and access key global markets, including China, to promote the long-term strength of the U.S. semiconductor industry and our ability to out-innovate global competitors."

A representative for the Embassy of the People's Republic of China did not immediately respond to a request for comment Wednesday evening.

--Additional reporting by Jennifer Doherty and Renee Hickman. Editing by Emily Kokoll and Jay Jackson Jr.