



Long-Awaited Executive Order on Outbound Investment Issued: Regulatory Comment Process Commences in Advance of Implementation of Any New Rules

蓄势已久的美国境外投资行政命令已发布：征求意见程序已在新规实施前启动

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On August 9, 2023, President Biden issued an Executive Order on Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern. The new Executive Order (EO) is the culmination of more than a year of deliberation by the Biden Administration regarding outbound investment provisions and kicks off a 45-day comment process to develop a new regulatory mechanism for reviewing outbound investments in foreign countries of concern. This regulatory process and the criteria under consideration are described in the Department of the Treasury's Advance Notice of Proposed Rulemaking (ANPRM), the key aspects of which are summarized below.

2023 年 8 月 9 日，美国总统拜登发布了一项《关于解决美国在受关注国家的某些国家安全技术及产品投资的行政命令》。这一新的行政命令是拜登政府一年多来就美国境外投资法规审议的最终成果，并启动了为期 45 天的征求意见程序，以建立新的监管机制来审查美国对“受关注国家”的境外投资。美国财政部同日发布的《拟议规则制定预先通知》（《预先通知 ANPRM》）中具体描述了这一监管流程和讨论中的规则制定标准，其主要内容在下文中总结。

Importantly, the ANPRM does not itself implement the EO and is not draft regulatory text. The ANPRM will be followed by draft regulations after Treasury receives and reviews comments. The administration did not lay out a specific timeline for the implementation of the outbound investment regime.

重要的是，美国财政部的《预先通知 ANPRM》本身并不是行政命令的实施规则，也不是境外投资监管规则的文本草案。美国财政部将在收到并审阅意见后起草实施规则。拜登政府并没有给出实施该项境外投资监管制度的具体时间表。

Notification and Prohibition Requirements 通报和禁止的要求

The EO directs the Department of Treasury, in consultation with other agencies such as the Department of Commerce, to establish and implement a new national security program aimed at monitoring outbound investments.

这一新的行政命令指示美国财政部与美国商务部等其他政府机构协商，制定并实施旨在监管对外投资的新的美国国家安全制度。



The new national security program will:
此项新的美国国家安全制度将：

1. Require U.S. persons to **notify** Treasury of certain transactions involving covered foreign persons (“**notifiable transactions**”), and
要求美国主体（包括机构和个人，定义见后）将涉及受管辖外国主体的特定交易（**须通报的交易**）**通报**美国财政部，并
2. **Prohibit** U.S. persons from undertaking certain other transaction involving covered foreign persons (“**prohibited transactions**”).
禁止美国主体进行涉及受管辖外国主体的特定其他交易（**禁止的交易**）。

The EO broadly references “**covered national security technologies and products,**” which are defined to include technologies and products in the (1) semiconductors and microelectronics, (2) quantum information technologies, and (3) artificial intelligence sectors that are critical to China’s military, intelligence, surveillance or cyber-enabled capabilities.

该行政命令提及一个宽泛的术语 “**受管辖国家安全技术 and 产品**”，其被定义为包含对中国军事、情报、监视或网络能力至关重要的 (1) 半导体和微电子、(2) 量子信息技术和 (3) 人工智能领域的技术和产品。

The ANPRM provides additional details on the sub-sets of technologies currently contemplated for future regulation. The chart below summarizes the potential sectors the Treasury Department is contemplating covering as prohibited or notifiable transactions.

美国财政部的《预先通知 ANPRM》中提供了更多有关目前考虑未来进行监管的具体技术类别的详细信息。下表总结了美国财政部正在考虑将其纳入禁止或须通报交易的潜在行业。

Sector 行业	Prohibited Investments 禁止的交易	Notifiable Investments 须通报的交易
Semiconductors and Microelectronics 半导体和微电子	(1) Specific technology, equipment, and capabilities that enable the design and production of advanced integrated circuits (ICs) or enhance their performance (e.g., Electronic Design Automation software, front-end semiconductor manufacturing equipment); (1) 能够设计和生产先进集成电路或提高其性能的特定技术、设备 and 能力（例如电子设计自动化软件、前端半导体制造设备）； (2) Advanced integrated circuit design, fabrication, and packaging capabilities; and (2) 先进的集成电路设计、制造、封装能力；和 (3) Installation or sale to third-party customers of certain supercomputers	Any IC design, fabrication or packaging of ICs not otherwise prohibited 任何未被另行禁止的集成电路设计、制造或封装



Sector 行业	Prohibited Investments 禁止的交易	Notifiable Investments 须通报的交易
	<p>(3) 为第三方客户安装或向第三方客户销售某些超级计算机</p> <p>Note the concepts of “advanced ICs” and “supercomputers” track definitions and concepts subject to additional regulation pursuant to the Commerce Department’s October 2022 export control rulemaking. 请注意，“先进集成电路”和“超级计算机”的概念遵循美国商务部 2022 年 10 月出口管制新规中的定义和概念。</p>	
Quantum Information and Technologies 量子信息技术	<p>(1) Quantum computers and components (e.g., dilution refrigerator, two-stage pulse tube cryocooler) (1) 量子计算机和组件（如稀释制冷机、两级脉冲管制冷机）</p> <p>(2) Quantum sensors exclusively used for military, government intelligence or mass surveillance end uses (2) 专门用于军事、政府情报或大规模监视最终用途的量子传感器</p> <p>(3) Quantum networking and quantum communication systems designed exclusively for secure communication (3) 专为安全通信而设计的量子网络和量子通信系统</p>	<p>No separate notification requirement currently being considered 目前没有考虑单独的通报要求</p>
AI Systems 人工智能系统	<p>If the covered foreign persons engaged in the development of software that incorporates an AI system and is designed to be exclusively used for military, government intelligence, or mass-surveillance end uses. 如果受管辖外国主体参与开发包含人工智能系统且设计目的是专属用于军事、政府情报或大规模监视最终用途的软件。</p> <p>Alternatively, “primarily used” could take the place of “exclusively used.” “专属用于”的表述可能会被“主要用于”替代。</p>	<p>Considering a requirement to notify if covered foreign person is engaged in the development of software that incorporates an artificial intelligence system and is designed to be exclusively used for: 美国财政部正在考虑要求以下交易进行通报：对于受管辖外国主体参与开发包含人工智能系统且专属用于以下用途的软件的投资：</p> <p>cybersecurity applications, digital forensics tools, and penetration testing tools; the control of robotic systems; surreptitious listening devices that can intercept live conversations without the consent of the parties involved; non-cooperative location tracking (including international mobile subscriber identity (IMSI) Catchers and automatic license plate readers); or facial recognition. 网络安全应用程序、数字取证工具和渗透测试工具；机器人系统的控制；可以在未经有关各方同意的情况下拦截实时</p>



Sector 行业	Prohibited Investments 禁止的交易	Notifiable Investments 须通报的交易
		对话秘密窃听设备；非合作性位置跟踪（包括国际移动用户身份（IMSI）捕获器和自动车牌读取器）；或面部识别。 The term “primarily used” could take the place of “exclusively used.” “专属用于”的表述可能会被“主要用于”替代。

Treasury does **not** anticipate that the program will involve a “case-by-case” review of U.S. outbound investments (as is the case with inbound investment as reviewed by the Committee on Foreign Investment in the United States).

美国财政部预计该制度**不会**涉及对美国境外投资的“逐案”审查（与美国外国投资委员会审查的入境投资相同）。

Key Defined Terms

关键的术语定义

The EO offers the following key definitions:

行政命令包含了以下关键的术语定义：

- **“Covered foreign person”** means a person of a **“country of concern”** who or that is engaged in activities involving one or more covered national security technologies or products.
“受管辖外国主体”是指从事涉及一项或多项受管辖国家安全技术或产品活动的“受关注国家”的主体。
 - Based on the ANPRM, Treasury is considering elaborating upon this definition, which may include companies **outside of a “country of concern,” where more than 50 percent of that company’s or its subsidiaries’ consolidated revenue, net income, capital expenditure or operating expenses is derived from a “country of concern.”**
 - 根据《预先通知 ANPRM》，美国财政部正在考虑详细阐述这一定义，可能包含“受关注国家”以外的公司，即该公司或其子公司**超过 50%的合并收入、净利润、资本支出或运营费用**源自“受关注国家”。
- **“Covered transaction.”** This term is not defined in the EO. Pursuant to the ANPRM, Treasury is considering using a single term, “covered transaction,” that would apply to the definition of both prohibited and notifiable transactions. Treasury is considering defining the term “covered transaction” to mean a U.S. person’s direct or indirect:
“受管辖交易”。该术语在行政命令中没有定义。根据《预先通知 ANPRM》，美国财政部正在考虑使用单一术语“受管辖交易”，该术语适用于禁止交易和须通报交



易的定义。美国财政部正在考虑将“受管辖交易”一词定义为如下交易，如果美国主体通过该等交易可直接或间接：

(1) acquisition of an equity interest or contingent equity interest in a covered foreign person;

获得受管辖外国主体的股权或或有股权；

(2) provision of debt financing to a covered foreign person where such debt financing is convertible to an equity interest;

向受管辖外国主体提供可转换为股权的债务融资；

(3) greenfield investment that could result in the establishment of a covered foreign person; or

可能导致设立受管辖外国主体的绿地投资；或

(4) establishment of a joint venture, wherever located, that is formed with a covered foreign person or could result in the establishment of a covered foreign person.

与受管辖外国主体成立合营企业，无论该合营企业的所在地在何处。

- **“Countries of concern”** are identified in the Annex to the EO. At this time, these include China, Hong Kong and Macau.
行政命令的附件中确定了“受关注国家”。“受关注国家”包括中国（指中国大陆）、中国香港和中国澳门。

- **“U.S. persons”** are defined as 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. The regulations apply to U.S. persons **wherever** they are located.

“美国主体”被定义为任何美国公民、美国合法永久居民、根据美国法律或美国境内任何司法管辖区组建的实体，包括任何该等实体的任何外国分支机构，以及美国境内的任何人。这些规定适用于美国主体，**无论**其位于何处。

- While not directly defined to include foreign subsidiaries of U.S. companies, the EO states that the Treasury Department may require U.S. persons to:

虽然行政命令没有直接将“美国主体”定义包含美国公司的外国子公司，但行政命令规定美国财政部可要求美国主体采取以下行动：

- Provide notification to 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

如果一项交易由某个美国主体开展须要进行通报，则由该美国主体控制的外国实体开展的任何该等交易也应当进行通报；且



- 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.

如果一项交易由某个美国主体开展属于禁止的交易，则该美国主体应采取一切合理措施，禁止和阻止由该美国主体控制的外国实体进行任何该等交易。

The EO also provides the Treasury Department with authority to prohibit U.S. persons from “knowingly directing” transactions that would be prohibited if engaged in by a U.S. person. Pursuant to the ANPRM, Treasury is considering defining “directing” to mean that 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. This definition could capture U.S. persons serving as general partners of a foreign fund, as well as U.S. persons serving in senior level roles that are directing transactions. The Treasury Department is contemplating excluding from this prohibition certain identified conduct which is attenuated from national security, such as the provision of secondary, wraparound, or intermediary services.

这一新的行政命令还授权美国财政部禁止美国主体“在明知的情况下指示”一项若由美国主体自行进行则会被禁止的交易。根据《预先通知 ANPRM》，美国财政部正在考虑将“指示”定义为美国主体**命令、决定、批准或以其他方式促使进行**一项如果由美国主体自行进行会被禁止的交易。这一定义可以涵盖担任外国基金普通合伙人的美国主体，以及担任对交易会进行指示的高级管理职位的美国主体。美国财政部正在考虑将某些会削弱国家安全的特定行为排除在上述禁止规定之外，例如提供次要性、概括性或中介性服务。

While the EO does not have retroactive effect, the Treasury Department may, after the effective date of the regulations, request information about transactions by United States persons that were completed or agreed to after the date of the issuance of the EO to “better inform the development and implementation of the program.”

虽然这一新的行政命令不具有追溯力，但美国财政部可以在实施规则生效后，要求提供有关美国主体在行政命令发布之日后完成或达成协议的交易的信息，以“更好地为该制度的制定和实施提供信息”。

What's Next?

下一步是什么？

The EO is the first step in establishing what is likely to be a more comprehensive outbound investment mechanism. Notably, it comes alongside pending legislation on outbound investment that has been introduced in Congress and will likely influence efforts by Congress to create a similar mechanism. Our team recently explored such legislation [here](#).

该行政命令是美国建立更全面的对外投资监管制度的第一步。值得注意的是，其与国会已提出的有关对外投资的待决立法同期出现，并可能会影响国会创建类似制度的努力。本所近期介绍了该等[立法动态](#)。



Given the potential issues and impact that could be presented by new rules on Outbound Investment, Treasury is soliciting comments by **September 23, 2023**, to inform drafting of a proposed regulation.

鉴于美国对外投资新规则可能带来的潜在问题和影响，美国财政部正在征求公众意见，以便为拟议规则的起草提供信息，征求意见的截止日期为 **2023 年 9 月 23 日**。