

Locke Lord QuickStudy: President Biden Issues Executive Order ?Banning Certain Technology Sharing With China

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On August 9, 2023 the U.S. President Biden issued [Executive Order](#) “Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern” (“Executive Order”).

Executive Order

The Executive Order supplements existing national security initiatives implemented and administered by the U.S. Department of the Treasury (“Treasury”) and the U.S. Department of Commerce (“Commerce”), in collaboration with pertinent executive departments and agencies. The Executive Order authorized Treasury and Commerce to draft specific rules and regulations that require U.S. persons to notify or obtain a license prior to participating in specific transactions with certain entities located within or under the jurisdiction of countries of concern, as well as with certain other entities owned by individuals from those countries. The term “U.S. person” means 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.

To date, the Executive Order only designates People’s Republic of China, along with the Special Administrative Region of Hong Kong and the Special Administrative Region of Macau, as “countries of concern.”

The Executive Order notes that regulations to be drafted identify categories of notifiable transactions that involve covered national security technologies and products that the Secretary of Treasury, in consultation with the Secretary of Commerce and other appropriate heads of agencies, may determine threaten the national security of the U.S., as identified in the Executive Order. Moreover, U.S. persons must inform Treasury about transactions involving specific entities associated with countries of concern that are engaged in activities linked to different designated technologies and products. The Executive Order provides that “covered national security technologies and products” are sensitive technologies and products in the semiconductors and microelectronics, quantum information technologies, and artificial intelligence sectors that are critical for the military, intelligence, surveillance, or cyber-enabled capabilities of a country of concern, as determined by the Secretary in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies. Where applicable, “covered national security technologies and products” may be limited by reference to certain end-uses of those technologies or products.

The Executive Order provides for a look-back one year after the effective date (and periodically thereafter) to assess the effectiveness of the Executive Order and the regulations promulgated thereunder, and authorizes a mechanism to adjust the regulations and definition of national security technologies and products as necessary.

Advanced Notice of Proposed Rulemaking

Simultaneously with the release of the Executive Order, Treasury issued an Advanced Notice of Proposed Rulemaking (“ANPRM”) seeking (i) public comment related to the implementation of the Executive Order, and (ii) early stakeholder participation in the rulemaking process. Specifically, the ANPRM provides initial details on key terms and aspects of the program’s implementation. Among other things, Treasury seeks input on the sub-sets of national security technologies and products related to semiconductors, quantum information technology, and artificial intelligence systems described in the ANPRM. The ANPRM will be succeeded by draft regulation in a subsequent stage of the process.

The program is expected to concentrate on U.S. persons engaging in specific transaction types that may entail intangible benefits, specifically encompassing the acquisition of equity interests (such as mergers and acquisitions, private equity and venture capital), greenfield investments, joint ventures, and specific debt financing transaction that have the potential to be converted to equity. These limitations are projected to apply to investments in entities involved in activities linked to designated subsets of technologies and products. These entities are either organized under the laws of countries of concern, have a primary business location in a country of concern, or are predominately owned by individuals or entities from countries of concern. The Treasury is contemplating introducing an exemption for particular categories of passive and other investments that might have a lower probability of conveying intangible benefits or to mitigate unintended consequences. For instance, the Treasury is considering excluding certain U.S. investments in publicly traded securities, index funds, mutual funds, exchange-traded funds, specific investments made as limited partners, committed but unallocated capital investments, and intra-company fund transfers from a U.S. parent company to its subsidiary from the program’s ambit.

Treasury is exploring potential restrictions on U.S. investments in certain activities carried out by PRC entities. This includes a potential ban on investments in PRC entities involved in electronic design automation software, semiconductor manufacturing equipment, advanced integrated circuits, supercomputers, and quantum computing-related ventures. Notification requirements might be imposed for investments in PRC entities dealing with less advanced integrated circuits and software with AI systems designed for specific end-uses that could pose national security concerns for the United States. While considering these measures, Treasury is not currently contemplating a separate notification requirement for quantum information technologies.

Current Events

In recent days, following the issuance of the Executive Order and ANPRM, U.S. businesses responded in different ways. Some U.S. financial center banks have taken steps to deepen ties with China by increasing investment in the country to capitalize on increasing local affluence and growth in wealth management businesses. Large U.S. investment banks, however, have been scaling back plans in China in the face of headwinds created by President Xi Jinping’s willingness to sacrifice economic priorities for security concerns, which has put a damper on dealmaking. In addition, the Biden administration approved significant subsidies to promote domestic

manufacturing in the “CHIPS for America Act and Inflation Reduction Act”, which is intended to break U.S. reliance on Chinese semiconductor manufacturers, and block U.S. companies from working with Chinese chipmakers and drive domestic production.

Conclusion

This paper is intended as a guide only and is not a substitute for specific legal or tax advice. Please reach out to the authors for any specific questions. We expect to continue to monitor the topics addressed in this paper and provide future client updates when useful.

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