

October 3, 2022

The Honorable Jake Sullivan
National Security Advisor
The White House
1600 Pennsylvania Ave. NW
Washington, D.C. 20500

Dear Mr. Sullivan:

I am writing with regard to the Administration's reported plans to issue an Executive Order regulating certain investment flows to China.¹ In 2018, the House Financial Services and Senate Banking Committees enacted the bipartisan Foreign Investment Risk Review Modernization Act (FIRRMA) and Export Control Reform Act (ECRA), which overhauled, respectively, the Committee on Foreign Investment in the United States (CFIUS) and U.S. export controls. This inbound *and* outbound policy arose from numerous public hearings across multiple congressional committees; robust, line-by-line engagement on legislative text with the interagency; and countless discussions with domestic and foreign stakeholders. Such a thorough process strengthened the final products, protecting our national security with clear democratic legitimacy.²

I am therefore concerned that the Administration may choose to resort to unilateral measures, such as the International Emergency Economic Powers Act (IEEPA), rather than work with Congress to address the threat posed by China. An enduring investment policy toward China will embrace, not evade, regular-order deliberations. Effective policy will also recognize that the problems posed by Chinese technological advancements are not so much "unusual and extraordinary" as they are a generational challenge that implicate government action for the long haul.

As your colleague Peter Harrell has argued, IEEPA can be prone to overuse: this overuse would only worsen by circumventing Congress here, even if our goals with respect to China are similar.³ A September 27 letter⁴ to the President from Speaker Pelosi and Senate Majority Leader Schumer calling for such Executive action only highlights how an outbound regime has

¹ <https://www.wsj.com/articles/white-house-weighs-order-to-screen-u-s-investment-in-tech-in-china-other-countries-11662674581>

² <https://thehill.com/blogs/congress-blog/economy-budget/401985-a-rare-nonpartisan-good-news-story-in-washington/>

³ <https://www.lawfareblog.com/how-reform-ieepa>

⁴ https://www.casey.senate.gov/imo/media/doc/letter_to_president_biden_on_outbound_investment_executive_action2.pdf

yet to achieve a consensus *even within their caucuses*.⁵ By contrast, the House version of FIRRMA/ECRA passed by a vote of 400 to 2. An outbound E.O. would therefore rest on the weakest of foundations.

As you continue to develop the Administration's views on outbound investment, I would urge you to work with elected officials, particularly congressional committees of jurisdiction, while devoting special attention to the following:

Coherence

When certain kinds of Chinese investment in U.S. technology firms became a concern, Congress responded with FIRRMA. Rather than claiming that Beijing must be worried by Chinese investors "funding American defense capabilities," the U.S. government of course argued the opposite: foreign investors' home government may pose a risk to the country *receiving* investment. This is the basic premise behind investment screening. If supporters of outbound restrictions believe this idea is stood on its head when Americans invest in China, the Administration should ensure that their theory of risk is internally consistent.

At the same time, discussion of an outbound investment regime rarely, if ever, distinguishes between direct and portfolio investment, let alone seeks to estimate the importance of the former compared to other, often far more significant means of business support such as credit and revenues. Any serious attempt to stop funding a Chinese company would make those activities central so that China cannot shrug off coercive measures. This is why Congress, in the recently enacted CHIPS Act, placed guardrails on "significant transactions" with Chinese semiconductor entities, rejecting an investment-only approach for a country that already sits on \$3 trillion in reserves and earns nearly \$10 billion on average each day from its exports.

Similarly, arguments for U.S. screening of outbound investments as a channel for high-risk advisory services fail to address why China could not simply procure the services in question, whether from the U.S. or allied countries. ECRA rightly understands that an effective policy must focus on know-how transferred to China regardless of the form the transfer takes. ECRA further seeks to multilateralize export controls to prevent offshoring, an essential consideration for our national security. Under Secretary of Commerce for Industry and Security Alan Estevez, who once proposed an "outbound CFIUS" to screen joint ventures' transfer of technology and intellectual property, has since testified to Congress that export controls and his department have ample jurisdiction to capture these very scenarios.⁶ The President should respond cautiously if outbound supporters, resistant to these facts four years ago, now attempt to move the joint-venture goalposts.

⁵ Another signee, Senator Cornyn, testified on September 29 before the Senate Banking Committee that legislative action would be "far preferable" to an Executive Order.

⁶ <https://www.banking.senate.gov/hearings/advancing-national-security-and-foreign-policy-through-export-controls-oversight-of-the-bureau-of-industry-and-security>

Appropriate Methods

In 2021, CFIUS approved virtually all of the covered transactions it reviewed and processed 90 percent of notices without mitigation measures.⁷ The President blocked no transactions. Even so, CFIUS regularly exhausts the maximum statutory time allowed for reviews, with a number of notices withdrawn and later refiled to restart the clock. By law, a transaction subjected to a CFIUS assessment, review, and investigation may be evaluated for over four months. In other words, CFIUS is bureaucratically complex even as it greenlights nearly all transactions. Though this works for a screening regime that “support[s] unequivocally such investment, consistent with the protection of the national security,”⁸ it is the *last* method one would choose to cut off support for bad actors in China.

The President should discount accordingly outbound proposals that cling to reviews at all costs. They reflect a lack of understanding of investment screening as it exists, and they seem to believe that mitigation agreements would be enforced in China – an absurd idea. Reports that the Administration still needs to understand outbound investment flows, potentially through company notifications, highlights how backwards the development of outbound policy risks becoming: to effectively combat China, we should first map out the problem and then design solutions, not the other way around. A ready-fire-aim approach would run counter to decades of U.S. investment policy.

Unintended Consequences

When Congress enacted FIRRMA, it understood that CFIUS would serve as a reference point for foreign countries’ own investment screening efforts. Congress refused to weaponize CFIUS for non-national security purposes, knowing this would encourage others to indulge in the same. The fact that some proponents of an outbound regime want to inject a vast array of extraneous goals into a screening framework should thus alarm the Administration. By imposing such a framework through Executive Order, the President would invite all future administrations to extend restrictions beyond their original intent, no matter how narrowly drafted they are initially.

Other risks from overreach abound, including the potential reliance on a sector approach. When modernizing CFIUS in 2018, Congress opposed using sectors as a jurisdictional test; they risk becoming a placeholder concept instead of a focusing tool: the limitless breadth of the U.S. government’s “critical infrastructure sectors” is a case in point.⁹ Moreover, future attempts to specify, adapt, or unwind guidance on sectors could prove vulnerable to politicization that may undermine our national security. Even the most carefully defined sector could overlook technologies and know-how that are not confined to a sector at all, rendering a category obsolete from the start. Hopes that a rulemaking process would fix problems after the fact are signs of a proposal that is not fully baked.

⁷ <https://home.treasury.gov/system/files/206/CFIUS-Public-AnnualReporttoCongressCY2021.pdf>

⁸ See Executive Order 11858, as amended by Executive Order 13456:

<https://home.treasury.gov/system/files/206/EO-11858-Amended.pdf>. Note that EO 11858, as issued in 1975, called for nothing comparable to present-day CFIUS, despite outbound supporters’ suggestions to the contrary. CFIUS is the product of subsequent changes to the Defense Production Act that Congress made through the Exon-Florio Amendment, the Byrd Amendment, the Foreign Investment and National Security Act, and FIRRMA.

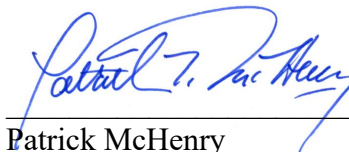
⁹ <https://www.cisa.gov/critical-infrastructure-sectors>

Mr. Jake Sullivan
October 3, 2022
Page 4

Finally, I encourage you to consult with colleagues at Treasury's Office of Terrorism and Financial Intelligence to evaluate the effectiveness of existing investment-related sanctions, such as those arising from the Countering America's Adversaries through Sanctions Act, Executive Orders targeting new investment in Russia following its invasion of Ukraine, and restrictions involving publicly traded securities issued by Chinese Military-Industrial Complex Companies (several of which are not, in fact, public companies). Any responsible outbound proposal should be informed by the achievements or shortcomings of these initiatives in achieving foreign policy goals. In the past, Administration colleagues such as Mr. Harrell, Treasury Deputy Secretary Wally Adeyemo, and Treasury Assistant Secretary Elizabeth Rosenberg have taken this principle seriously.¹⁰

The previous two administrations developed rigorous plans to reform CFIUS and export controls, working closely with congressional committees of jurisdiction to address long-term problems. I urge the Biden Administration to act with similar transparency and thoughtfulness so that we counter the threat posed by China with maximum effectiveness.

Sincerely,



Patrick McHenry
Ranking Member
Committee on Financial Services

Cc: The Honorable Maxine Waters, Chairwoman, Committee on Financial Services
The Honorable Janet Yellen, Secretary, Department of the Treasury

¹⁰ <https://www.cnas.org/publications/reports/americas-use-of-coercive-economic-statecraft>;
<https://home.treasury.gov/system/files/136/Treasury-2021-sanctions-review.pdf>