Biden vs. Trump: Outbound FDI Regulation

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This is the sixth in a series of TAG memos contrasting the views of Joe Biden and Donald Trump that could most shape U.S. policy toward the Indo-Pacific region in 2025. The fifth memo on their approaches to antirust policy can be found here.

Key Takeaways

Outbound FDI Regulation	Trump	Biden
Motivations	• Aimed to counter China's "Military-Civil Fusion" strategy	• Widened targets to add more of China's defense, intelligence, and surveillance apparatus
Implementation	• Applied aggressive entity-based approach using existing statutes • Tasked Pentagon with targeting; Treasury with implementation	• Crafted Executive Order for broader sector-based approach • Empowered Treasury for both targeting and implementation

- Both Donald Trump and Joe Biden sought to increase federal scrutiny over U.S. outbound foreign direct investment (FDI) into China and other "countries of concern." However, their approaches to restricting outbound FDI differed in respect to scope, targeting, and preferred implementing agencies.

- Trump experimented with a narrower, entity-based strategy, leveraging existing statutes to task the Department of Defense (DOD) with identifying companies contributing to China's "Military-Civil Fusion" (MCF) and having the Treasury Department implement the sanctions.

- Biden expanded Trump's targeting policies but granted Treasury clearer responsibility for both targeting and restricting investment in entire sectors – notably high-end semiconductors – linked to China's defense, intelligence, and security apparatus. Biden also aimed to restrict investment in Chinese companies accused of developing, using, and exporting surveillance technology that faciliated human rights abuses.

- A second Trump term would likely build on Biden's expanded targeting and 2023 Executive Order on outbound investment, but perhaps re-emphasize aggressive curbs on an entity-by-entity basis and renew prominent rhetoric about China's MCF. A re-elected Trump could also restore the DOD as the initial arbiter of MCF-related targeting, rather than relying on Treasury. A

second Biden administration will almost certainly intensify its current regime of sector-based outbound investment controls.

The State of U.S.-China FDI Flows

The United States is the world's largest source and recipient of direct investment. In 2022, cumulative U.S. investments abroad totaled approximately USD 9.3 trillion, while foreign investment in U.S. enterprises amounted to USD 12.3 trillion. China accounts for a notable – but shrinking – proportion of U.S. inbound and outbound direct investment. The U.S. Treasury estimates that in December 2023, American investors held USD 322 billion in mainland China and Hong Kong securities (mostly shares in private companies), while PRC holdings of U.S. securities (including government debt) totaled USD 1.87 trillion. The most important elements of U.S. direct investment in China are greenfield projects in the information and communications technology, automotive, and basic materials sectors – although investment in U.S.-China joint ventures is also common.

Beginning in 2021, global net FDI flow into China began to shrink, dropping from an annual high of over USD 300 billion to a record low of USD 33 billion in 2023. Investment from the United States has also diminished greatly. In parallel, China lost its status as a top-five investor in the United States, with annual Chinese investment in American companies dropping from USD 46 billion in 2016 to less than USD 5 billion in 2022.

These significant decreases were a result of China's stringent "Zero-COVID" measures, various macroeconomic headwinds, and policy unpredictability, along with greater U.S. scrutiny over investments in both directions. At present, Chinese firms now invest more in the United States than U.S. firms invest in China.

The Candidates in Comparison

Motivations

Trump: Trump implemented rigorous controls on U.S. outbound investment to counter China's strategy of "Military-Civil Fusion" (MCF) – Beijing's national drive to boost the technological capabilities of the Chinese military by erasing barriers between the commercial and defense sectors. Trump administration officials were especially concerned that investments to and from China carried risks of intellectual property theft, forced technology transfer, and other activities that could support China's efforts to develop "a world class military." As Trump's Secretary of State Mike Pompeo warned, "even if the Chinese Communist Party gives assurances about your technology being confined to peaceful uses, you should know there is enormous risk to America's national security."

Biden: Biden's motivations for regulating outbound FDI were similar to Trump's – although he sought to more broadly target China's intelligence agencies and technology sector. Under Biden's Executive Order 14032, Trump-era references to China's "Civil-Military Fusion" were superseded with broader language on the entire Chinese defense, intelligence, and security apparatus. Biden also took aim at Chinese entities accused of developing, using, and exporting technology that facilitated human rights abuses. This expansion of existing curbs was based on the concern that China was acquiring emerging technologies with potential military applications at a faster pace than export controls and other measures could prevent. Moreover, Beijing was increasingly exporting surveillance technology to enable oppression abroad. Biden officials were especially worried that outbound FDI into China could enable Beijing to circumvent the U.S. export control regime, undercutting previous efforts to deny China the resources required for the development of cutting-edge, dual-use technologies.

U.S. lawmakers expressed similar concerns. In July 2023, Senators Bob Casey (D-PA) and John Coryn (R-TX) introduced legislation – the National Critical Capabilities Defense Act (NCCDA) – to establish an interagency committee for scrutinizing U.S. overseas investments in areas that could potentially threaten national security. The NCCDA was just one of several bills intended to regulate U.S. outbound investment. In response to these pressures, Biden issued two related Executive Orders. The first was the sweeping EO 14032 in June 2021, which built on Trump's EO 13959 by directing the Treasury to create a new program prohibiting investment in an even wider range of Chinese companies. The second was EO 14105 on curbing U.S. investment in semiconductors, microelectronics, quantum information technologies, and AI. Prior to the Biden administration, the U.S. government had never imposed systematic, sector-based restrictions on outbound investment.

Implementation

Trump: Trump's approach to outbound foreign investment controls empowered both the Departments of Defense and the Treasury under existing authorities to aggressively curb investment in a narrow list of Chinese entities. In an important departure from previous policy, Trump first leveraged the DOD's statutory authority under Section 1237 of the 1999 National Defense Authorization Act (NDAA) to have the DOD take the lead in identifying Chinese companies with suspected connections to China's military.

Trump took several aggressive actions in the second half of his first term to regulate investments into China. In August 2018, the Trump administration worked with Republican lawmakers – including Marco Rubio (R-FL), Tom Cotton (R-AR), and Mike Crapo (R-ID) – to pass the Export Control Reform Act (ECRA), which gave the Commerce Department new authorities to curb the export of emerging

technologies to China, with implications for high technology investment. In November 2020, Trump took a significant and direct step to restrict the flow of U.S. capital into China by enacting Executive Order 13959. That EO drew upon existing statutes to prohibit investment in Section 1237 listed entities. 31 Chinese entities – including Huawei, Sinochem, and China Mobile – with suspected connections to China's military were identified with the rollout of the EO.

The EO also called upon the Treasury Department's Office of Foreign Assets Control (OFAC) to cross-list these entities and implement controls restricting U.S. persons from holding publicly traded securities affiliated with entities named by the DOD. This division of responsibilities created several implementation challenges, including some confusion between the Treasury and DOD entity lists. Three Chinese companies accordingly challenged their Section 1237 designations, with two – Xiaomi and Luokung –winning their appeals.

Overall, Trump's approach to outbound FDI restrictions was less transactional than his philosophy toward trade and export controls, which tended to be tied to progress in bilateral negotiations. As illustrated by the heavy focus on Huawei and the State Department's campaign criticizing China's MCF, Trump's strategy was narrowly targeted against specific entities that his advisors – especially within the DOD - identified as threats to U.S. national security.

A second Trump term would likely build on Biden's expanded foundation but re-elevate aggressive investment restrictions on an entity-by-entity basis. It might also return to its previous rhetoric on China's MCF, which has been rarely referenced by Biden's officials. A second Trump term could also re-empower the DOD as an arbiter of MCF targets and work with Congress to tighten requirements for cross-listing sanctions under the purview of Treasury and Commerce. Finally, Trump is less likely than Biden to collaborate with U.S. allies and partners on targeting certain Chinese entities and may not prioritize establishing a multinational outbound foreign investment control regime.

Biden: The Biden administration built upon Trump-era proposals for screening outbound FDI but further expanded them in several important respects. Biden's first Executive Order (14032) retained Trump's declaration of a national emergency related to China's MCF but expanded the scope of that emergency to include China's surveillance technology outside of China and the use of that technology to suppress human rights. Furthermore, that same Executive Order permitted the U.S. to target any Chinese entity deemed a threat to U.S. security and values connected with China's broader defense, intelligence, and security apparatus. Finally, Biden's approach empowered the Treasury Department – and not the DOD – as the primary agency responsible for both determining the targets of investment curbs and implementing ensuing restrictions. Although the DOD still maintains its own, amended list of Chinese entities suspected of supporting

China's military, inclusion on that list no longer automatically leads to economic penalties.

For Biden, curbs on U.S. investments in Chinese strategic industries were one pillar of his administration's broader strategy for preventing Beijing from achieving technological supremacy - a scheme which also incorporated intensive export controls, tighter scrutiny of inbound investments from China, and multilateral cooperation to de-risk supply chains.

A second Biden administration will almost certainly intensify its existing regime of outbound investment controls by adding new sectors for restriction. The Biden team will also seek to encourage other major economic partners (e.g., the G7 and the EU) to establish their own versions of the U.S. outbound investment screening regime – revisiting the issue after failing to sway the G7 membership on the matter in the run-up to the 2023 Hiroshima G7 summit. U.S. companies should anticipate additional EOs, Congressional actions, and potential collaborative efforts with international partners that substantially restrict tech-related foreign investments in China and also increase compliance burdens for investment in less-sensitive sectors.

Other Watchpoints

- **Congressional action**: U.S. lawmakers on both sides of the aisle have either enacted or proposed measures intended to regulate the flow and target of outbound FDI but have yet to enshrine anything in statute. The next Congress is expected to continue to debate laws that both complement and expand upon Biden's EO. Examples include the NCCDA, the Preventing Adversaries from Developing Critical Capabilities Act proposed by Rep. Michael McCaul (R-TX) and Rep. Gregory Meeks (D-NY), and the Chinese Military and Surveillance Company Sanctions Act proposed by Rep. Andy Barr (R-KY).

- **Presidential advisors**: Outbound FDI regulation is most likely to be influenced by the secretaries of treasury, commerce, and state, and the national security advisor. If re-elected, Biden could retain persons with views similar to Janet Yellen, Gina Raimondo, Antony Blinken, and Jake Sullivan in those roles. Trump's potential second-term picks for those positions and other related offices may hold views similar to his previous appointments, including Mike Pompeo, Steve Mnuchin, Robert Lighthizer, and Robert O'Brien – setting up more debate between national security and economic prosperity priorities.

- **Foreign countries and entities:** South Korea and Taiwan have outbound FDI screening systems due to their unique security situations. Germany and the European Union (EU) are mulling similar measures – though no EU member

state has yet enacted such controls. The scope and rigor of foreign outbound investment regulations may provide U.S. policymakers with benchmarks for their own measures. They could also affect the form of any potential U.S.-led international collaboration in curbing foreign investment to strategic industries in "countries of concern."

This report was prepared by Nick Ackert.

**This report was published prior to President Biden stepping down as the Democratic presidential candidate on July 21, 2024. A future Harris administration is likely to maintain the broad policy direction proposed by the Biden-Harris campaign.*