

Ranking Member Pat Toomey (R-Pa.)
Opening Statement
Full Committee Hearing
September 29, 2022 at 10:00 AM

Mr. Chairman, thank you.

China's economic and military rise poses the greatest challenge to core U.S. interests since the end of the Cold War. Under Xi Jinping's autocratic rule, China is seeking to dominate the Indo-Pacific, with clear security implications for U.S. allies and partners there, and engaging in relentless efforts to undermine human rights and American values, including free expression, the rule of law, and democratic governance.

Recently, White House officials and a few of my Senate colleagues have advanced a peculiar idea that in order to fully meet this challenge posed by China, the United States should adopt some of the Chinese government's strategies for managing its economy. That thinking has led this Congress to enact industrial policy like new distortive taxpayer subsidies for semiconductor manufacturing. I thought that approach was a big mistake.

Especially given that recent episode, I am concerned about efforts to impose new capital controls on American investment in China. Advocates want a new regulatory regime so U.S. officials are notified of, and can potentially stop, U.S. investments in certain Chinese businesses.

If those investments credibly pose a risk to our national security, then I'm not reflexively opposed to this concept. However, there are several reasons why we should proceed carefully with this idea.

Some claim that current U.S. legal authorities, including our dual-use export control system overseen by the Bureau of Industry and Security, or BIS, are inadequate or incapable of addressing the risk posed by American investments in China. But it's important to remember that BIS regulates the flow of goods, software, and technology into jurisdictions and to end users of concern, and retains the force of law in the context of a U.S. investment.

As Commerce Undersecretary Alan Estevez told this Committee in July, BIS has complete authority to block the transfer, of any kind, of technology, intellectual property, blueprints, procedural know-how, or software going to

China, including when Americans make investments in China. What, then, is the need for an outbound investment notification regime?

Well, in the words of National Security Advisor Jake Sullivan, it would capture outbound investments that “circumvent the spirit of export controls.” It appears Mr. Sullivan was referring to certain U.S. investments in China that are legal under U.S. law, but might be of concern.

It appears that Mr. Sullivan’s concern is investments that could result in the transfer of operational and managerial expertise and enhance the ability of Chinese firms to make sophisticated technologies might be prohibited from receiving if a U.S. company wanted to export those technologies. The inherent problem with Mr. Sullivan’s invoking the “spirit of export controls” is it’s hard to define a “spirit,” and therefore, it could be subject to expansive and varying interpretation.

While I think we should carefully examine this issue, I’m concerned that the White House is reportedly rushing to issue an executive order that establishes an outbound investment regime unilaterally. Let me be very, very clear about this: An Executive Order is not a substitute for a new congressionally-passed law. Legislation benefits from a deliberative, open, and democratic process.

A White House EO will inherently lack these characteristics—even if an EO is accompanied by a notice and comment period—and certainly should not precede a law. In addition, an EO will, very likely, place no limits on what technologies can be added to the regime in the future.

Why is it important to establish clear parameters on an outbound regime from the outset? Because time and again, presidents of both parties have misused sweeping national security authorities in ways far beyond how Congress initially intended. President Trump nearly used IEEPA to impose tariffs on Mexico over immigration policy. And Democrat and Republican senators were shocked when President Trump abused 232 “national security” authority to impose tariffs on U.S. partners and allies.

We should all be equally opposed to the Biden administration’s continuation of the Trump administration’s abuse of power under Section 232, which continues to this day. Appropriately scoping an outbound

regime is important to preclude it from being used as a backdoor for trade protectionism in the future.

It's vital that we prevail in this contest with China. We can do so by ensuring that the United States remains the single greatest global destination for capital formation, research and development, and the smartest minds in the world to come and work.

Creating a flawed outbound investment regime would undermine our economic leadership, discouraging the flow of capital, ideas, and people into the United States. After all, why would you start a firm in the U.S. if you know doing so risks precluding you from investing in China—the second largest economy in the world?

Given these stakes, I'm recommending a set of principles to guide the creation of any outbound investment regime. These principles are based on the premise that it is wholly irresponsible to have a regime that does not have clear statutory boundaries on its application. Therefore, a notification regime for outbound American investments in China should, at a maximum, only be applicable to direct U.S. investments in Chinese entities that are manufacturing, producing, developing, or testing a technology, for which a U.S. exporter would otherwise be required to seek a license under current U.S. law to export. I intend to solicit feedback on these principles, and work with Senators Cornyn, Casey, and Chairman Brown to incorporate them into the upcoming National Defense Authorization Act.