U.S. Chamber of Commerce

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August 2, 2024

Via regulations.gov (Docket ID TREAS-DO-2024-0012)

Meena R. Sharma
Director
Office of Investment Security Policy and International Relations
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Re: Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern

Dear Ms. Sharma:

The U.S. Chamber of Commerce (the "Chamber") welcomes the opportunity to comment on the notice of proposed rulemaking ("NPRM") regarding the Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern issued on June 21, 2024, by the Department of the Treasury's Office of Investment Security (the "Proposed Rule") to implement the Executive Order 14105 of August 9, 2023, on "Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern" (the "Outbound Order").

The Chamber appreciates the extensive work that the Department of the Treasury ("Treasury") has undertaken in crafting a Proposed Rule that reflects feedback from the Chamber, along with others, provided in response to the advance notice of proposed rulemaking published on August 13, 2023 ("ANPRM"). In particular, the Chamber applauds Treasury's efforts to refine the various definitional and process considerations of the implementing regulations, including the scope of the knowledge standard and diligence requirements, technical parameters for covered technologies, and the data collection elements that U.S. parties will be required to provide in a notification.

The Chamber remains strongly committed to protecting U.S. national security and supports a balanced regime that safeguards American national security and economic leadership without excessive restrictions on beneficial U.S. business activity. The Chamber also believes that the contours of the final rule will also establish an important benchmark for other aligned economies that are considering analogous outbound investment screening processes.

A go-it-alone approach by the U.S. government risks creating a disproportionate regulatory burden on U.S. companies and could undercut American competitiveness against foreign competitors operating without similar restrictions.

To that end, while the Proposed Rule represents significant progress in many respects, it is imperative that Treasury resolve remaining definitional and procedural ambiguities so that U.S. businesses can make appropriate plans for compliance and remain confident that the final rule will be applied in a transparent, efficient, and predictable manner that minimizes unintended consequences.

As described further below, the Chamber believes that the success of the outbound investment program – the first ever attempt by a Western democratic economy to regulate and control outbound capital flows and other investments for national security reasons – will depend on crystal clear definitions and exceptions that are strictly focused on facilitating compliance and administrability, along with a process designed to mitigate business uncertainty. The Chamber respectfully recommends that the Treasury Department adopt a number of clarifications and changes in the final rule as addressed further in this letter, including among others:

- Clarify the scope of brownfield investments that would be covered, and relatedly, the scope of intracompany transactions and support for "ongoing operations" that would be excepted.

- Provide greater definition to, or clarity regarding, key terms and phrases in the rule, including, for example, the meaning of "engaged in" as implemented in the definition of a "covered foreign person" and the use of the term "design" in connection with "covered activities."

- Establish mechanisms that will assist implementation and provide greater clarity and certainty to parties, such as through the establishment of an advisory opinion process whereby transaction parties can request guidance from Treasury for ambiguities regarding potentially prohibited transactions.

I. KEY DEFINITIONS

A. "COVERED TRANSACTION" (§ 850.210)

1. Clarify the scope of "covered transactions" involving brownfield investments.

In a departure from the ANPRM, the NPRM includes "brownfield investments" within the definition of "covered transactions." Specifically, the NPRM states that a "covered transaction" includes the "[a]cquisition, leasing, or other development of operations, land, property, or other assets in a country of concern" if it results in "the engagement of a person of a country of concern in a covered activity where it was not previously engaged in such covered activity." This language as drafted is ambiguous and will create significant business uncertainty if it is adopted as proposed.

It is unclear at what juncture a person would be considered as engaging in a new covered activity in which it previously was not engaged. Based on the current language of the proposed rule, businesses would face uncertainty not knowing whether, for example, the design of a next generation integrated circuit – even if such integrated circuit is of the same kind already being designed by the business – would be considered as engaging in a "new" covered activity such that a notice obligation could be triggered. We recognize that Treasury has suggested in the NPRM that the purpose of the language in § 850.210(a)(4)(ii) is to capture "business pivots," but the "business pivot" language itself does not appear in the actual proposed rule, is left unexplained, and is not an understood concept in other areas of law.

Further compounding the ambiguity is the exception to the covered transaction definition in § 850.501(c), which suggests that an intracompany transaction that "supports ongoing operations" would not be covered by the Proposed Rule, but simultaneously notes that brownfield investments would be outside the scope of this exception. U.S. persons are thus faced with an impossible task: they must somehow determine, with limited guidance, at what juncture the support of "ongoing operations" for existing covered activities already being undertaken by a controlled foreign entity would trigger the Proposed Rule's restrictions related to brownfield investments. As currently drafted, a business looking to ensure compliance with the Proposed Rule may have to adopt the position that it cannot provide any ongoing support to its controlled foreign subsidiary, where such subsidiary is a covered foreign person that is engaged in a covered activity, on the basis that Treasury could view such ongoing support as a "brownfield investment" where there is any advancement (technical or otherwise) in the company's efforts or successes with respect to that covered activity. When applied to "knowingly directed" transactions, this same dynamic complicates the ability of U.S. person executives to recuse themselves.

While we recognize the U.S. government has provided specific technical guidance on permissible expansions of existing operations in the semiconductor sector, for example in the Department of Commerce's October 7, 2022 export controls on advanced computing and semiconductor manufacturing items to the People's Republic of China (PRC) and the final rule implementing the national security guardrails of the CHIPS and Science Act, we ask that Treasury clarify the intended scope of covered transactions under § 850.210(a)(4) given the considerable impact the ambiguity regarding "new" covered activities may have on U.S. businesses' development and existing operations.

2. Define "joint venture."

The regulations do not define "joint venture" – a term that could be very broad, potentially covering almost any business relationship where two parties are providing resources to support a common goal. Without a definition for "joint venture," the Proposed Rule could sweep in a large number of ordinary and administrative business relationships and commercial commitments that are unrelated to investment activity. At a minimum, we recommend that Treasury provide clarification in the final rule that a joint venture includes the acquisition of equity or contingent equity in the joint venture entity by a U.S. person.

The final rule should also expressly confirm that the routine activities of an existing JV would not be deemed a covered transaction unless it results in a "new" covered activity previously not undertaken by the existing JV.

3. ***Clarify that the provision of customer support to, or the procurement of a product from, a covered foreign person engaged in covered activities is not itself a covered activity.***

Whether a transaction is a "covered transaction" under the Proposed Rule turns in part on whether the covered person is engaging in certain activities, with Treasury specifically using terms such as "develop," "produce," "fabricate," and "design" to describe such covered activities. While some of these terms are further defined (*e.g.*, "develop" at § 850.211; "produce" at § 850.223) the term "design" is not defined. It is therefore not clear whether, for example, an entity that is not itself engaged in a covered activity would nonetheless be viewed as engaging in a covered activity if it sells a product to a covered foreign person and provides further customer support to such covered foreign person (including, for example, support for integration of the product). Within the semiconductor industry, it is not uncommon to provide support on the integration of the chip, and typically such support would not be understood to constitute the "design," "development," "production," or "fabrication" of a product.

It also is not uncommon for customers of software companies or semiconductor companies to test the products and provide feedback, which a supplier may use to improve its product, or to share information about future needs, which suppliers then incorporate into their development roadmaps. This also would not typically be understood to cover "design" or "development," since the customer itself is not undertaking the development and design work. It is unclear, however, under the NPRM whether such a procurement or partnership between a customer and a supplier would entail "development" or "design." This ambiguity, in turn, introduces uncertainty into whether, for example, an investment into a non-semiconductor company that procures semiconductor chips and tests those chips in its products, providing feedback that informs the design and development work, would be a covered transaction.

Without the clarification, the Proposed Rule risks unintentionally expanding the definition of "covered foreign persons" to include even entities that are providing incidental support to covered activities, which would be fundamentally inconsistent with the proclaimed targeted intent of the Outbound Order and introduce significant business uncertainty.

4. ***Reverse the position on note 1 to "covered transaction" with respect to prohibited transactions.***

Neither the provision of debt financing that is secured by equity, nor the foreclosure on such equity as collateral should constitute a covered transaction (whether the transaction is undertaken by a bank or non-bank entity). Moreover, where a borrower's payments on a loan are delinquent and the U.S. person lender seeks to restructure the loan – including by requesting rights to change the borrower's management or appoint a board member to enable continuous operations – such actions should not be considered a covered transaction. Indeed, we respectfully submit that, for the reasons explained below, applying the Proposed Rule to such transactions does not advance U.S. foreign policy goals.

Unlike other types of covered transactions, a lender taking equity as collateral does not involve a planned investment and is unlikely to involve the transfer of intangible benefits to a covered foreign person. Excluding this scenario would not open a loophole: lenders do not make loans with the objective of foreclosing on the collateral assets, and in the event of a foreclosure, the lender does not provide any capital to the borrower, in contrast with a traditional equity investment. As drafted, the Proposed Rule could paradoxically benefit covered foreign persons, undermining national security goals by potentially allowing them to default on loans (and keep the proceeds) without the risk of facing foreclosure. The Proposed Rule's approach also is inconsistent with the way taking equity as collateral is treated in other regulations, most notably in the Volker Rule exception for this activity as "debt previously contracted for." The final rule should accordingly be revised to clarify that a lender's foreclosure on collateral that constitutes an equity interest shall not itself be deemed an acquisition of such equity interest by the lender, at least with respect to prohibited transactions.

In the alternative, we recommend that debt be treated essentially the same way as it is under the regulations governing the Committee on Foreign Investment in the United States ("CFIUS") – i.e., the extension of a loan or a similar financing arrangement by a U.S. person to a covered foreign person, regardless of whether accompanied by the creation in favor of the U.S. person of a secured interest over securities or other assets of the covered foreign person, should not, by itself, constitute a covered transaction. *See* 31 C.F.R. § 800.306. In the case of such financing, the Proposed Rule should apply only when the financing is accompanied by financial or governance rights characteristic of an equity investment but not of a typical loan, such as an interest in profits of the covered foreign person or the right to appoint members of the board of directors of the covered foreign person, or at the time that the lender actually seeks to foreclose on the collateral and such foreclose meets the definition of "covered transaction" under 31 C.F.R. § 850.210(1) (i.e., the "[a]cquisition of an equity interest . . . in a person that the U.S. person knows at the time of the acquisition is a covered foreign person").

Likewise, secondary market debt transactions (*e.g.*, debt transactions arranged by registered investment advisors and then sold in secondary transactions) should be excluded from the scope of the Proposed Rule, even where the debt is secured by equity. As a practical matter, the purchasers in these secondary market transactions do not have access to diligence materials or the power to negotiate representations from the underlying issuer, making compliance with the Proposed Rule extremely difficult or impossible.

5. Clarify the scope of the "intent" standard for joint ventures and greenfield investments.

The NPRM adopts an "intent" standard in connection with greenfield or brownfield investments or joint ventures. In doing so, Treasury seeks to cover activities intended to bring about the establishment of a *covered foreign person* or a *person of a country of concern*'s engagement in a new covered activity, because, according to the NPRM, a U.S. person may not *know* at the time of the transaction that the entity will engage in a covered activity, yet Treasury seeks to capture transactions that are likely to convey intangible benefits. The "intent" standard introduces the possibility of expansive interpretive applications. To reduce business uncertainty and facilitate compliance, the final rule should clarify what constitutes "intent" on the part of the U.S. person – *e.g.*, the U.S. person having business plan, versus a stray thought.

6. Define “equivalent interest” as used in the definition of “covered transaction.”

31 C.F.R. § 850.210, as drafted in the Proposed Rule, defines a “covered transaction” to include a U.S. person’s direct or indirect “acquisition of an equity interest or contingent equity interest (or equivalent interest) in a covered foreign person.” We recommend providing additional clarification regarding what “equivalent interest” would include or removing that parenthetical from the final rule. It is not clear what an “equivalent interest” would be; the language accordingly introduces unnecessary confusion.

B. “COVERED FOREIGN PERSON” (§ 850.209)

7. Clarify the meaning of “engaged in” as implemented in the definition of a “covered foreign person.”

The NPRM defines a “covered foreign person” to include any person (including a U.S. person) that directly or indirectly holds any voting interest, board seat, or equity interest in a “person of a country of concern” that is “engaged” in a covered activity. While the proposed rule identifies such “covered activities,” (*e.g.*, “fabricat[ing]” certain integrated circuits), it offers no guidance or direction on what it actually means for a particular entity to “engage” in such covered activities (*e.g.*, what does it mean for an entity to “engage” in the “fabricat[ion]” of integrated circuits?). U.S. businesses are therefore left to determine whether, for example, the mere ownership of IP that may be related to a covered activity may constitute being “engaged” in a covered activity, or whether a holding company that has a board of directors that directs the activities of a subsidiary that, in turn, performs a covered activity would be considered “engaged in” that covered activity. This ambiguity creates serious implementation challenges for U.S. businesses trying to determine whether a transaction counterparty is a covered foreign person.

For example, in the context of a typical corporate structure that has a combination of operating and holding companies, it is not clear whether “engaged in” would refer only to the operating company that employs the personnel who are directly involved in the covered activity, or whether a holding company may be considered to be “engaged in” a covered activity simply because it owns or controls the operating company, or because its board of directors is responsible for directing the activities of an operating company engaged in a covered activity. These distinctions are relevant because most investments are made through holding companies, and not directly in operating companies. Treasury should clarify this issue in the final rule to facilitate compliance with the regulations.

8. Provide guidance on the aggregation requirement in prong (2) of “covered foreign person.”

The “covered foreign person” definition includes any person that attributes more than 50% of its revenue, net income, capital expenditure, or operating expenses to a “person of a country of concern” that is “engaged” in a covered activity, individually or in the aggregate with other such persons. As noted above, the term “engaged” remains undefined in this prong of the definition, making the 50% rule nearly impossible to implement in practice, for reasons noted above.

In addition to adopting a formal definition for "engaged," we also recommend that Treasury provide clearer guidance with respect to the aggregation requirement, which could create implementation challenges that would require U.S. companies to confirm that their transaction counterparties, including even U.S. counterparties, have accurately aggregated the revenues or expenses of all applicable interests, which may be allocated across tens or hundreds of different companies and equity positions that are not connected to each other.

9. ***Consider a* de minimis *threshold for prong (a)(2) of "covered foreign person" definition.***

The "covered foreign person" definition is currently defined to mean a person that directly or indirectly holds any voting interest, board seat, or equity interest in any person described in paragraph (a)(1) of § 850.209. As a result, the "covered foreign person" definition would capture outbound investments involving not only Chinese counterparties, but also U.S. counterparties with subsidiaries or operations in China that meet the thresholds set forth under § 850.209. Treasury should consider the potential unintended consequences of casting a wide net that would, in practice, impact even transactions between two U.S. parties and could limit investment in U.S. businesses on the basis of their operations in China.

Each extension of the prohibitions outside of the PRC makes the due diligence requirement more challenging to implement. The proposed extension of § 850.209 will require additional resources for many transactions, and the types of information related to details like net income, capital or operating expenditure that would be needed to evaluate whether a transaction counterparty (including a U.S. counterparty) might be a "covered foreign person" could be difficult to obtain. This is heightened by the fact that any amount of targeted activity in an underlying PRC company, no matter how inconsequential, could make the company a "covered foreign person" under prong (a). To narrow this coverage, Treasury should consider a *de minimis* equity interest (or other appropriate metric) in the entity, rather than "any" amount. This would capture those entities that have the ability to meaningfully direct the underlying entity's activity, and/or transfer intangible benefits, while limiting unintended consequences.

C. "AI SYSTEM" (§ 850.202)

10. Narrow the definition of "AI System."

The NRPM adopts definitions for "artificial intelligence" and "AI system" from Executive Order 14110, "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence" which was issued by President Biden on October 30, 2023 (the "AI Order"), after the ANPRM was published. Specifically, "AI system" is now defined to include not only the primary AI system itself, but also "any data system, software, hardware, application, tool, or utility that operates in whole or in part using" the AI system. While there may be a policy basis for implementing this broad definition in the context of the AI Order – which is focused on safety and security standards for AI and its wide-ranging applications – there is no clear reason or basis for the use of the definition in the context of the NPRM, at least with respect to notifiable transactions, particularly as such definition would have the effect of capturing not only entities directly engaged in developing AI but also any other entity that merely integrates such AI into their own technology, including for purely non-military reasons.

This is particularly the case as companies today are operating within the context of a fast-changing market landscape that has incentivized technology firms to purport to be "AI-driven" and/or adopt various AI functionalities without the capacity or intent to develop the underlying AI themselves. To minimize ambiguity regarding the scope of entities that could be covered and to ensure that the program is administrable, Treasury should remove prong (b) from the definition of "AI system."

11. *Provide a clear rationale for the proposed metrics/technical parameters for covered activities related to AI systems.*

The AI Order reference above indicates that general-purpose systems trained with 10^26 FLOPs (or ones predominantly trained on biological sequence data and using a quantity of computing power greater than 10^23) will fall under certain new reporting requirements. The final rule should seek to align the outbound investment restrictions on AI-related transactions with other national security related policies on AI that are focused on countries of concern, and at a minimum, provide a clear rationale for the proposed metrics (*e.g.*, explanation of why Treasury is considering a range of computing power from 10^23 to 10^25 specifically in the context of the Outbound Order).[1]

12. *Work to align the scope of notifiable and prohibited transactions for connected and electric vehicle technologies with other laws and regulations across the U.S. government.*

The Chamber continues to believe it is imperative that the Treasury Department focus on ensuring that the existing scope of the EO and proposed regulations are implemented with sufficient experience before entertaining expansion. However, given pending legislation and rulemakings ensuring connected vehicle ("CV"), advanced driver assistance ("ADAS"), autonomous vehicle ("AV") and electric vehicle ("EV") technologies do not benefit foreign adversary nations, Treasury should begin the process of working with other agencies in the U.S. government to align the scope for notifying and prohibiting covered transactions in the sectors involving companies with operations headquartered in China. That consideration should occur simultaneous with outreach to allies and economic partners to ensure that they are implementing compatible mechanisms covering similar technologies.

The scope of notifiable and prohibited transactions, for example, could be clarified to include outbound transactions that support China's development of advanced CV technologies, consistent with the definition proposed in pending Bureau of Industry and Security (BIS) regulations to secure and safeguard the Information and Communications Technology and Services (ICTS) supply chain for CVs.

[1] The Chamber continues to have concerns associated with floating-point operations per second (aka "FLOPs") being used as a metric to assess risk. See U.S. Chamber Files Comments to NTIA on Dual Used Foundation Open Models - C_TEC American Innovation (americaninnovators.com).

D. "KNOWINGLY DIRECTING" (§ 850.215)

13. *Provide additional clarity on the compliance burden for U.S. persons employed by non-U.S. entities.*

The final rule should clarify at what stage (*e.g.*, internal deliberations, informal engagements, negotiations, signing, closing) of a transaction a U.S. person employed by a foreign employer will be considered to have "directed" a covered transaction, and relatedly, at what stage of a transaction U.S. persons with senior-level authority must "recuse" themselves to comply with the Outbound Order.

The final rule should also clarify whether, with respect to prohibited transactions, penalties would apply to the senior-level U.S. person or the foreign company that undertook a prohibited transaction with participation from the senior-level U.S. person (i.e., would penalties apply exclusively to the individual, or to the affiliated entities as well?).

14. *Clarify the scope of senior level positions subject to the "knowingly directing" standard.*

The final rule should provide further guidance on the persons who could be covered by these provisions, including by clarifying what it means to "possess senior-level authority." In parallel, the final rule should consider clarifying positions that would be considered incidental to a transaction and therefore not covered (*e.g.*, certain legal staff, etc.) Additionally, the final rule should clarify the meaning of "direct," "order," "decide upon" as these terms would apply to a transaction or decision-making process.

II. EXCEPTIONS

15. *Clarify the scope of intracompany transactions and support for "ongoing operations" that are excepted.*

The NPRM provides that transactions between a U.S. person parent and its controlled foreign entity to support such entity's ongoing operations or other activities will be excepted, *so long as those activities are not "covered activities"* and provided that the transaction itself is not a greenfield investment, brownfield investment, or entrance into a joint venture. While the preamble to the NPRM seems to indicate that any intracompany transaction to support a controlled foreign entity's ongoing operations would be excepted, the language in the NPRM could be interpreted to allow support of ongoing operations *only* where those operations do not involve "covered activities." Such an interpretation could have an adverse impact on the operations of U.S. businesses and their subsidiaries, where all support for ongoing operations of subsidiaries engaging in covered activities (even where pre-dating the regulations) may need to be evaluated for purposes of ensuring ongoing compliance with the regulations and may, in certain circumstances, be prohibited or notifiable.

To clarify this and minimize unnecessary business disruption – and to avoid over-burdening companies with ongoing compliance requirements that would extend well beyond the intended scope and reach of the regulations – we propose that the rule at a minimum allow

companies to (1) provide ongoing support for existing operations (i.e., predating the Outbound Order) in the prohibited category, so long as they provide notice; and (2) be excepted from the notification requirement for ongoing operations (i.e., predating the Outbound Order) if they would not be prohibited under the Outbound Order.

16. Exclude services provided by financial institutions that may facilitate covered transactions or involve financial products related to a covered transaction.

The final rule should include express language confirming that it does not apply to ancillary transactions, initial public offerings ("IPOs"), and other services provided by third party financial institutions that may facilitate covered transactions or involve financial products related covered transactions, including as advisors, underwriters, sources of debt financing, sponsors, arrangers, issuers, or in any other capacity. In this regard, we note that the Executive Order on Preventing Access to Americans' Bulk Sensitive Personal Data contains an exemption for transactions "ordinarily incident to and part of the provision of financial services, including banking, capital markets, and financial insurance services." The Department of Justice, in its associated advance notice of proposed rulemaking, indicates it is contemplating exempting transactions "to the extent that they are ordinarily incident to and part of the provision of financial services, including:

a. Banking, capital-markets, or financial-insurance services;

b. A financial activity authorized by 12 U.S.C. 24 (Seventh) and rules and regulations thereunder;

c. An activity that is "financial in nature or incidental to a financial activity" or "complementary to a financial activity," as set forth in section 4(k) of the Bank Holding Company Act of 1956 and rules and regulations thereunder;

d. The provision or processing of payments involving the transfer of *personal financial data* or *covered personal identifiers* for the purchase and sale of goods and services (such as the purchase, sale, or transfer of consumer products and services through online shopping or e-commerce marketplaces), other than data *transactions* that involve *data brokerage;* and

e. Compliance with any Federal laws and regulations, including the Bank Secrecy Act, 12 U.S.C. 1829b, 1951-1960, 31 U.S.C. 310, 5311-5314, 5316-5336; the Securities Act of 1933, 15 U.S.C. 77a *et seq.;* the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.;* the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.;* the Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.;* the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.;* the Export Administration Regulations, 15 CFR part 730, *et seq.;* or any notes, guidance, orders, directives, or additional regulations related thereto." 89 Fed. Reg. 15780, 15794.

This language was essential in the context of the Bulk Sensitive Personal Data Executive Order to prevent unintended consequences for the proper functioning of the U.S. financial

services sector, and we believe it is essential for the same reason here too. Treasury therefore should adopt equivalent exemptions in the final rule.

While we understand that Treasury declined to adopt an exception for such transactions in the NPRM, it is critical that the final rule unambiguously exempt these transactions in order to provide the financial services industry with legal certainty and to avoid unintended consequences to the detriment of the broader economy and U.S. policy objectives. Excluding these types of transactions from the scope of "covered transactions" simply by omitting them from the definition, or indicating that the "proposed definition of *covered transaction* has been crafted to refer to a narrow set of specific transaction types, and the proposed rule does not explicitly exclude a list of other activities from this definition as it is not necessary," does not provide sufficient clarity to avoid broader chilling effects on beneficial economic activity. That approach may lead financial institutions to determine that they are required to assess in every circumstance whether a transaction of the types described above could constitute a "covered transaction," which would increase the complexity of compliance, and increase costs astronomically for financial institutions that may undertake millions of these types of transactions every day, with no corresponding policy benefit.

17. Exclude derivatives from the scope of "covered transactions."

Trading in derivatives should be explicitly excluded from the scope of "covered transactions." An investor entering into a bilateral arrangement with a counterparty unaffiliated with a Chinese issuer where the investor and counterparty swap economic interests that are based on how that Chinese issuer performs economically has no impact on the Chinese issuer's ability to develop products or technologies, nor would it provide any of the sort of "intangible benefits" that are the focus of the Outbound Order. Moreover, compliance with the rule (if it were to include derivatives) would be very difficult or impossible – *e.g.*, if financial institutions were required to assess whether any issuer of securities was a covered foreign person prior to facilitating the sale of derivatives of the issuer's securities.

18. ***Broaden the exceptions for investments in securities issued by investment companies.***

31 C.F.R. § 850.501(a)(1)(ii) should not be limited to securities issued by companies registered with the SEC or that have elected to be a business development company under section 54 of the Investment Company Act of 1940 (15 U.S.C. 8a-54). Rather, this provision should be expanded to cover securities issued by companies with equivalent status under the securities laws of non-U.S. countries. Consider, for example, the European Union's Undertakings for Collective Investment in Transferable Securities. Expanding this exception would ensure clarity around what we understand to be Treasury's intent – i.e., that transactions in which the nexus to a covered foreign person is limited to publicly traded securities and related financial products are not subject to the Proposed Rule.

19. Expressly include activities that would not fall within the scope of "covered transactions" in the formally proposed "excepted transaction" definition.

We appreciate Treasury's commentary in the NPRM that the definition of "covered transaction" has been crafted to refer to a narrow set of specific transaction types, and the Proposed Rule accordingly does not explicitly exclude a list of other activities from this definition as it is not necessary. However, the NPRM also acknowledges potential ambiguities, noting, for example, that the "definition of covered transaction in the proposed rule would not usually apply to most routine intracompany activities…" (emphasis added). Given the ambiguities in the exception for intracompany exceptions (*e.g.*, the distinction between support for ongoing operations and a business pivot) and other ambiguities throughout the proposed regulations, it is essential that the final rule adopt a formal exception for the activities that were previously enumerated in the ANPRM.

20. *Adopt Alternative 1 for the exception for investments in pooled investment funds, or consider a significant increase to the* de minimis *threshold for LP investment exceptions.*

The NPRM presents two proposals for LP investments that could be excepted (*see* alternatives in § 850.501(a)(1)(iii)), and requests comments on these options in Question 22. As Treasury noted in its commentary, a *de minimis* dollar threshold would establish a brighter line test that would reduce the already high compliance burden. However, the proposed threshold of $1 million would, as a practical matter, disqualify most LP investments. Accordingly, the final rule should adopt Alternative 1; however, if Treasury wishes to adopt Alternative 2, it should proceed only with a much higher threshold or a percentage of total fund size that reflects commercial realities.

21. *Clarify the scope of LP investments that would be covered and the "reasonable and diligent inquiry" required for LP investments.*

Treasury's commentary on the Proposed Rule indicates Treasury's awareness that it may not be practicable for an LP to know, at the time of its investment in the fund, where its investment is going, even following reasonable and diligent inquiry. The final rule should elaborate and provide greater clarity on what reasonable and diligent inquiry would include specifically for an LP at the time of investment in an investment fund where the LP cannot reasonably know the specific targets of the fund. As with the knowledge standard, the rule could provide a standard with specific factors—*e.g.*, retaining a reputable due diligence firm, engaging both private and publicly available databases, engaging with the GP, researching past investments, outreach to and coordination with the U.S. government—that would be adequate for a reasonable and diligent inquiry.

Additionally, the final rule should also clarify the obligations, or lack thereof, related to the fund's future investments or follow on investments in existing portfolio companies after the LP has invested in the fund. In doing so, Treasury should consider clarifying that there is no obligation to exit LP arrangements made prior to August 9, 2023, even if such prior arrangements/investments would have been covered if made after the Outbound Order.

22. *Establish a clear* de minimis *threshold for passive investment.*

To reduce legal uncertainty, the final rule should adopt a clear *de minimis* level of passive investment in publicly traded securities (*e.g.*, 10% of voting) that will always be presumed to be passive and within the minority investment exemption.

23. Confirm that a transaction that affords only standard minority protections enumerated under § 850.501 will itself be excepted.

The Proposed Rule stipulates that an investment that affords the U.S. person rights beyond certain enumerated "standard minority shareholder protections" with respect to a covered foreign person will *not* be excepted. However, the Proposed Rule does not actually affirm that a transaction that only confers the identified "standard minority shareholder protections" itself would not be subject to the Outbound Order. Consistent with the approach taken in the CFIUS regulations (*see* 31 C.F.R. § 800.208(c)), the final rule should affirmatively confirm that an investment that affords only standard minority protections will indeed be excepted.

24. Consider the unintended consequences of the proposed exception for transactions involving a person of a country or territory outside of the United States with analogous outbound investment screening regimes.

We appreciate that the exception for transactions subject to analogous third country investment screening regimes aligns with the Administration's efforts to encourage the adoption of similar regimes by allies and partners. However, it is possible that this exception could make it easier for a U.S. person (or an investor from any jurisdiction) to invest in a non-Chinese, non-U.S. company, rather than invest in a U.S. company that is similarly situated with respect to its Chinese operations and therefore subject to the Outbound Order. Given the breadth of the "covered foreign person" definition, which would capture Chinese entities as well as certain U.S. entities with Chinese operations, the Proposed Rule could have the effect of discouraging investment in U.S. businesses by making U.S. companies with Chinese operations a less appealing destination from a regulatory perspective. Consider, for instance, a French company with Chinese subsidiaries that would otherwise have been subject to the Outbound Order and the implementation thereof by the U.S. Treasury Department, but as a result of the exception would now be subject to a potentially less stringent French program with fewer diligence requirements. In considering whether to formalize this exception in the final rule, Treasury should ensure that U.S. firms are not disadvantaged vis-à-vis their foreign competitors and consider the unintended consequences that an outright exception could have on capital flows into U.S. companies.

III. PROCESS

The Chamber continues to anticipate that even with the clearest of definitions and exceptions, there will be ambiguities that could create business uncertainty and trigger a chilling effect. The Chamber is therefore recommending that Treasury consider installing additional processes to prevent potential ambiguities from leading to unintended consequences, as follows.

25. Establish an advisory opinion process whereby transaction parties can request guidance from Treasury for ambiguities regarding potentially prohibited transactions.

The Chamber continues to believe that the NPRM potentially underestimates the gray area between prohibited and notifiable transactions and places the burden on parties to err on the side of caution, which could result in a presumption of prohibition where there are ambiguities. The U.S. government has never regulated outbound investments before, and it is not realistic to believe that the government will be able to avoid all unintended consequences of the rules. To ensure that the Outbound Order is administered in a manner that does not unintentionally harm U.S. interests, Treasury should establish an advisory opinion process whereby transaction parties can submit a description of a proposed transaction to Treasury, and within a defined reasonable time period, Treasury is required to provide an advisory opinion regarding whether the described transaction is prohibited, notifiable, neither, or requires additional information. Advisory opinions could be published to provide guidance to other transaction parties, in such form and in circumstances where publication would not reveal non-public information about the underlying transaction, including the identity of transacting parties.

For example, if a U.S. company believed that a transaction could fall in the prohibited category due to potential ambiguities in the interpretation of certain technology parameters, but Treasury provided guidance that the proposed transaction fell in the notifiable category, then the U.S. company could proceed with a formal notification and undertake the transaction, instead of presuming that the transaction would be prohibited.

Another example of where such opinions would be helpful is with respect to the scope of "intangible benefits." The preamble to the NPRM explains the types of intangible benefits that raise a concern to include "enhanced standing and prominence, managerial assistance, access to investment and talent networks, market access, and enhanced access to additional financing." But these terms themselves are broad and ambiguous. Leveraging an advisory opinion process to provide greater clarity regarding the parameters of what constitutes providing intangible benefits would enhance compliance.

26. Publish enforcement guidelines for violations.

Contemporaneously with the final rule, Treasury should publish enforcement guidelines, similar to those published by the Treasury Department's Office of Foreign Assets Control and the Department of Commerce's Bureau of Industry and Security, to give the public fair notice on how potential violations will be assessed.

27. Publish guidelines for transactions undertaken between August 9, 2023 and the effective date of the Final Rule.

The NPRM makes clear that transactions that occurred prior to August 9, 2023 will not be subject to the retroactive application of the Outbound Order, but it remains ambiguous how Treasury will treat transactions that were undertaken between August 9, 2023 and the effective date of the final rule (the "Interim Period"). Treasury should consider publishing guidance

regarding requirements for both prohibited and notifiable transactions that were undertaken during the Interim Period. The parameters of the rule have undergone major changes during the rulemaking process, and still require further refinement to clarify important ambiguities. This evolution presents challenges to business planning and effective compliance. Treasury should make clear that transactions carried out prior to the effective date of the final rule are also not subject to the requirements. In the alternative, Treasury could clarify that prohibited transactions undertaken during the Interim Period will not be subject to enforcement/penalties if parties submit a notification after the issuance of the final rule; notifiable transactions undertaken during the Interim Period could be notified within a certain period (*e.g.*, 100 days) after the effective date of the final rule.

28. Clarify that transactions subject both to the Outbound Order and the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS) will not be subject to the Outbound Order.

Due to the breadth of the "covered foreign person" definition, which could capture even U.S. companies that meet the thresholds set forth under § 850.209 with respect to their Chinese operations, Treasury should anticipate that there will be transactions that are subject both to the Outbound Order and the jurisdiction of CFIUS. Consider, for instance, an investment undertaken by the U.S. subsidiary of a Canadian company in a U.S. semiconductor company that derives more than 50% of its revenues from its advanced semiconductor manufacturing operations/sales in China. Under the Outbound Order, that transaction may be a prohibited transaction depending on the technical parameters of the covered activities undertaken by the Chinese subsidiaries. In such transactions that trigger overlapping jurisdiction, the national security review process administered by CFIUS, which includes the possibility of targeted mitigation, would be better equipped to address potential national security risks. In fact, it would be inconsistent with the objectives of the Outbound Order to prohibit beneficial foreign investment in a U.S. company where that investment may have been adjudicated and approved through the CFIUS review process. The final rule should clarify that where there is concurrent jurisdiction with CFIUS, a covered transaction will not be subject to the Outbound Order if it has been or will be notified to CFIUS.

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The Chamber appreciates the opportunity to provide these comments and welcomes continued engagement with Treasury on these issues.