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# Long-Awaited Outbound Investment Program Finally Addressed

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On August 9, 2023, President Biden issued an Executive Order entitled, “[Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern](#)” (the “EO”), declaring a national emergency with respect to the “advancement by countries of concern in sensitive technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities of such countries.” In the EO, President Biden requires that the U.S. Department of the Treasury (“Treasury”) issue regulations that prohibit U.S. persons from engaging in, or otherwise require U.S. persons to notify Treasury of, certain transactions with “countries of concern” in the semiconductor and microelectronic, quantum information technologies, and AI systems industries. Following the issuance of the EO, on August 14, 2023, Treasury published an [advance notice of proposed rulemaking](#) (“ANPRM”), inviting comments on its intent to “establish a program” in accordance with the prohibition and notification requirements set forth in the EO. While implementation of such a program may take some time, the EO and ANPRM underscore the United States’ efforts to protect U.S. national security in light of sensitive and advanced technological development. We provide some key takeaways as well as take a deeper dive into Treasury’s proposed outbound U.S. investment program below.

## Key Takeaways

- Treasury plans to implement a program that prohibits, or requires parties to notify Treasury of, certain types of transactions involving “countries of concern” and activities related to semiconductors and microelectronics, quantum information technologies, and AI systems.

- The outbound investment program would not consist of a case-by-case review of transactions; rather, U.S. persons would be responsible for determining whether a transaction was prohibited or required notification to Treasury.
- “Countries of concern” can be changed from time to time and is currently defined as China (including Hong Kong and Macau).
- With certain exceptions as described in more detail below, transactions at issue will include acquisitions of equity interest, provision of debt financing when convertible to equity interest, greenfield investments, and establishment of joint ventures.
- Filings for notifiable transactions will be due 30 days after close of the transactions.
- Parties interested in submitting comments on Treasury’s proposed outbound U.S. investment program can do so by September 28, 2023.

## **Overview of the Outbound Investment Program**

In the ANPRM, Treasury sets out the general framework for a program that meets the requirements of the EO while balancing national security concerns against the benefits of outbound U.S. investment. The result is a narrowly tailored program that either prohibits or requires notification of certain transactions with “covered foreign persons” involving “discrete categories of advanced technologies and products.”

Notably, Treasury does not intend to undertake a case-by-case review of the U.S. outbound investments. Indeed, Treasury states that “parties will have the obligation to determine whether a given transaction is prohibited, subject to notification, or permissible without notification.” Thus, parties to transactions in these industries will need to include such a review in due diligence.

For transactions that require notification, Treasury proposes collecting information about: (i) the parties involved in the transaction, (ii) the transaction itself, (iii) how the parties determined the transaction was a “notifiable transaction,” (iv) the national security technologies and products at issue, (v) due diligence conducted in connection with the transaction, and (vi) plans for future business growth and opportunities.

Treasury contemplates that such a filing will be required within 30 days of closing and will be filed electronically through a portal on Treasury's website. Treasury explains that the purpose of the notification requirement is to "increase the U.S. Government's visibility into U.S. person transactions involving the defined technologies and products that may contribute to the threat to the national security of the United States," which will help Treasury form future policy.

### **Affected Parties**

The program would apply to U.S. persons, which would include "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."

As discussed above, U.S. persons would either be prohibited from entering into, or required to notify Treasury of, certain types of outbound investments into "covered foreign persons" whose business involved certain categories of "covered national security technologies and products." The ANPRM notes that Treasury is considering defining a "covered foreign person" as "(1) a person of a country of concern that is engaged in, or a person of a country of concern that a U.S. person knows or should know will be engaged in, an identified activity with respect to a covered national security technology or product; or (2) a person whose direct or indirect subsidiaries or branches are referenced in item (1) and which, individually or in the aggregate, comprise more than 50 percent of that person's consolidated revenue, net income, capital expenditure, or operating expenses."

Furthermore, a "person of a country of concern" will potentially be defined as "(1) any individual that is not a U.S. citizen or lawful permanent resident of the United States and is a citizen or permanent resident of a country of concern; (2) an entity with a principal place of business in, or an entity incorporated in or otherwise organized under the laws of a country of concern; (3) the government of a country of concern, including any political subdivision, political party, agency, or instrumentality thereof, or any person owned, controlled, or directed by, or acting for or on behalf of the government of such country of concern; or (4) any entity in which a person or persons

identified in items (1) through (3) holds individually or in the aggregate, directly or indirectly, an ownership interest equal to or greater than 50 percent.”

“Countries of concern” are identified in an Annex to the EO and currently are identified as the People’s Republic of China, including Hong Kong and Macau. This list can be updated or changed at any time.

### **Investments at Issue**

Consistent with the EO, Treasury is considering use of the term “covered transaction” to refer to both outbound investments that are (1) prohibited transactions and (2) notifiable transactions. “Covered transaction” would be defined as the following types of transactions:

[A] U.S. person’s direct or indirect

- (1) acquisition of an equity interest or contingent equity interest in a covered foreign person;
- (2) provision of debt financing to a covered foreign person where such debt financing is convertible to an equity interest;
- (3) greenfield investment that could result in the establishment of a covered foreign person; or
- (4) establishment of a joint venture, wherever located, that is formed with a covered foreign person or could result in the establishment of a covered foreign person.

Furthermore, Treasury intends to prohibit conspiracies to violate the program’s rules as well as any transaction that is designed to evade, causes a violation of, or attempts to violate the program’s rules. U.S. persons also may not “knowingly invest[] in a third-country entity that will use the investment to undertake a transaction with a covered foreign person that would be subject to the program if engaged in by a U.S. person directly.”



Notably, Treasury does not intend the following transactions to be addressed by the definition of covered transaction: “university-to-university research collaborations; contractual arrangements or the procurement of material inputs for any of the covered national security technologies or products (such as raw materials); intellectual property licensing arrangements; bank lending; the processing, clearing, or sending of payments by a bank; underwriting services; debt rating services; prime brokerage; global custody; equity research or analysis; or other services secondary to a transaction.”

Additionally, Treasury intends the definition of “covered transactions” be forward-looking, and thus will not include “transactions and the fulfillment of uncalled, binding capital commitments with cancellation consequences made prior to the issues of the Order.”

Treasury also intends to except certain transactions from the definition of “covered transaction,” which it will refer to as “excepted transactions.” The ANPRM contemplates that “excepted transaction” would be defined as follows:

1.a. An investment:

- i. into a publicly traded security, with “security” defined as set forth in section 3(a)(10) of the Securities Exchange Act of 1934; or
- ii. into an index fund, mutual fund, exchange-traded fund, or a similar instrument (including associated derivatives) offered by an investment company as defined in the section 3(a)(1) of the Investment Company Act of 1940 or by a private investment fund; or
- iii. made as a limited partner into a venture capital fund, private equity fund, fund of funds, or other pooled investment funds, in each case where
  - A. the limited partner’s contribution is solely capital into a limited partnership structure and the limited partner cannot make managerial decisions, is not responsible for any debts beyond its investment, and does not have the ability (formally or informally) to influence or

participate in the fund's or a covered foreign person's decision making or operations and

B. the investment is below a de minimis threshold to be determined by the Secretary.

1.b. Notwithstanding a., any investment that affords the U.S. person rights beyond those reasonably considered to be standard minority shareholder protections will not constitute an “excepted transaction;” such rights include, but are not limited to:

i. Membership or observer rights on, or the right to nominate an individual to a position on, the board of directors or an equivalent governing body of the covered foreign person; or

ii. Any other involvement, beyond the voting of shares, in substantive business decisions, management, or strategy of the covered foreign person.  
or

2. The acquisition of the equity or other interest owned or held by a covered foreign person in an entity or assets located outside of a country of concern where the U.S. person is acquiring all interests in the entity or assets held by covered foreign persons; or

3. An intracompany transfer of funds from a U.S. parent company to a subsidiary located in a country of concern; or

4. A transaction made pursuant to a binding, uncalled capital commitment entered into before the date of the Order.

### **Whether a Covered Transaction Is Prohibited or Requires Notification**

According to Treasury, whether a covered transaction will be prohibited or require notification will depend on the particular activities related to “covered national security technologies and products.” The ANPRM identifies the following high-level categories: [1]

	<b>Prohibited:</b>	<b>Notification Requirement:</b>
<b>Semiconductors and Microelectronics</b>	<ul style="list-style-type: none"> <li>• Technologies that Enable Advanced Integrated Circuits <ul style="list-style-type: none"> <li>◦ Software for Electronic Design Automation</li> <li>◦ Integrated Circuit Manufacturing Equipment</li> </ul> </li> <li>• Advanced Integrated Circuit Design and Production <ul style="list-style-type: none"> <li>◦ Advanced Integrated Circuit Design</li> <li>◦ Advanced Integrated Circuit Fabrication</li> <li>◦ Advanced Integrated Circuit Packaging</li> </ul> </li> <li>• Supercomputers</li> </ul>	<ul style="list-style-type: none"> <li>• Integrated Circuit Design not otherwise prohibited</li> <li>• Integrated Circuit Fabrication not otherwise prohibited</li> <li>• Integrated Circuit Packaging not otherwise prohibited</li> </ul>



<p><b>Quantum Information Technologies</b></p>	<ul style="list-style-type: none"> <li>• Quantum Computers and Components</li> <li>• Quantum Sensors (designed to be exclusively used for military end uses, government intelligence, or mass-surveillance end uses)</li> <li>• Quantum Networking and Quantum Communication Systems (designed to be exclusively used for secure communications)</li> </ul>	<p><i>None</i></p>
<p><b>AI Systems</b></p>	<ul style="list-style-type: none"> <li>• The development of software that incorporates an AI system and is designed to be exclusively used for military, government intelligence, or mass-surveillance end uses.</li> </ul>	<ul style="list-style-type: none"> <li>• The development of software that incorporates an artificial intelligence system and is designed to be exclusively used for: cybersecurity applications, digital forensics tools, and penetration testing tools; the control of robotic systems; surreptitious listening</li> </ul>



devices that can intercept live conversations without the consent of the parties involved; non-cooperative location tracking (including international mobile subscriber identity (IMS!) Catchers and automatic license plate readers); or facial recognition.

## Submission of Comments

Parties interested in submitting comments on Treasury’s proposed program may do so by September 28, 2023. Notably, the ANPRM itself includes a number of questions that Treasury has posed to the public, seeking further information on how it can refine its program to permit cross-border investment while narrowly tailoring any prohibitions or filing requirements to protect national security.

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[1] The ANPRM describes in more detail the specific activities related to “semiconductors and microelectronics” as well as “quantum information technologies.”


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