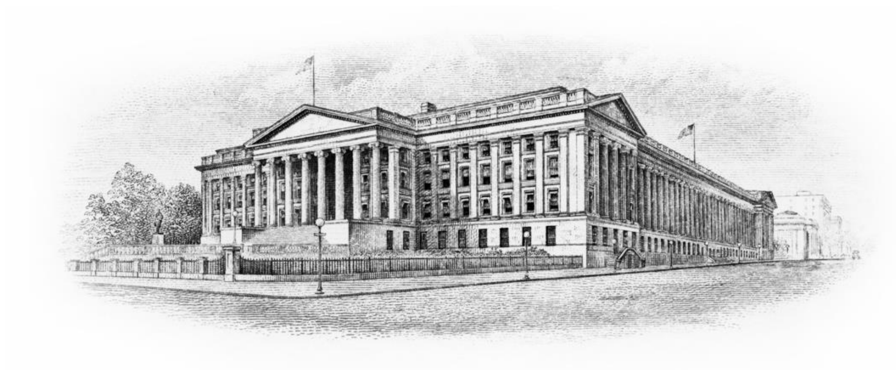

U.S. Department of the Treasury

Office of Investment Security

FACT SHEET: Treasury Department Issues Notice of Proposed Rulemaking on Implementation of Outbound Investment Executive Order (E.O. 14105)

Background

On June 21, 2024, the U.S. Department of the Treasury (Treasury) issued a Notice of Proposed Rulemaking (NPRM) setting forth the full proposed regulations that would implement Executive Order 14105, "Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern," issued by President Biden on August 9, 2023 (the Outbound Order). The Outbound Order directs the Secretary of the Treasury to issue regulations and administer the new program aimed at addressing the national security threat to the United States posed by countries of concern that seek to develop sensitive technologies and products critical for military, intelligence, surveillance, or cyber-enabled capabilities.

The Outbound Order describes the strategy that countries of concern are engaged in to advance the development of sensitive technologies and products. As part of this strategy, countries of concern are exploiting or have the ability to exploit certain United States outbound investments, including certain intangible benefits that often accompany United States investments and that help companies succeed. These intangible benefits include enhanced standing and prominence, managerial assistance, investment and talent networks, market access, and enhanced access to additional financing. Certain United States outbound investments may accelerate and enhance the successful development of sensitive technologies and products by countries of concern that develop them to counter United States and allied capabilities.

The Biden-Harris Administration is committed to keeping America safe and defending U.S. national security by protecting technologies that are critical to the next generation of military innovation. Cross-border investment flows have long contributed to U.S. economic vitality, and the implementation of the Outbound Order is consistent with our longstanding commitment to open investment in a manner that supports our national security interests. Treasury's NPRM proposes specific requirements for U.S. persons and reflects Treasury's consideration of public comments received in response to its August 2023 Advance Notice of Proposed Rulemaking (ANPRM) on initial considerations regarding implementation of the Outbound Order. In developing the NPRM, Treasury consulted with the Department of Commerce and numerous other U.S. Government departments and agencies. Additionally, Treasury engaged with U.S. allies and partners and will continue coordinating closely with them to advance the goals of the Outbound Order.

Treasury values public feedback regarding the implementation of the Outbound Order and will carefully consider public input received during the NPRM comment period, which concludes on August 4, 2024.

Key Elements of the NPRM

The following provides a general overview of the key elements of the NPRM. Please refer to the NPRM for further details, including important definitions.

- ***Requirements on U.S. persons:*** The proposed rule would place obligations on U.S. persons, including a notification requirement for certain transactions and prohibition of certain other transactions. A U.S. person would include any United States citizen or lawful permanent resident, as well as any entity organized under the laws of the United States or any jurisdiction within the United States, including any foreign branch of any such entity, and any person in the United States.

- ***Knowledge standard:*** The obligations of a U.S. person under the proposed rule would apply if such person has knowledge of relevant facts or circumstances related to a transaction. The proposed rule would elaborate on what it means for a person to have knowledge of a fact or circumstance. Under the proposed standard, a U.S. person may be assessed to have knowledge if the U.S. person possesses actual knowledge that a fact or circumstance exists or is substantially certain to occur, if the U.S. person possesses an awareness of a high probability of a fact or circumstance's existence or future occurrence, or if the U.S. person could have possessed such information through a reasonable and diligent inquiry. To provide clarity, the proposed rule would include factors that Treasury could consider in assessing whether a U.S. person undertook a reasonable and diligent inquiry. Such factors reflect information that should be ascertainable and/or contractual assurances that should be obtainable through reasonable due diligence.

- ***Specific categories of covered transactions:*** The proposed rule would apply to certain transactions by U.S. persons, including the acquisition of an equity interest or contingent equity interest; certain debt financing that is convertible to an equity interest or that affords certain rights to the lender; the conversion of a contingent equity interest; a greenfield investment or other corporate expansion; a joint venture; and certain investments as a limited partner (LP) or equivalent in a non-U.S. person pooled investment fund.

- ***Involving covered foreign persons:*** The proposed rule would apply to certain transactions by a U.S. person that also involve a covered foreign person – that is, a person of a country of concern that is engaged in a covered activity related to defined sub-sets of technologies and products. Under the proposed rule, a person of a country of concern would include an individual who is a citizen or permanent resident of a country of concern (and not a U.S. citizen or permanent resident of the United States); an entity that is organized under the laws of a country of concern, headquartered in, incorporated in, or with a principal place of business in a country of concern; the government of a country of concern; or an entity that is directly or indirectly majority-owned by any persons or entities in any of the aforementioned categories. Additionally, the proposed rule would include certain transactions involving an entity than has a voting interest, board seat, or equity interest in a covered foreign person where more than 50 percent of one of several key financial metrics of the entity is attributable to such covered foreign person. In the Outbound Order, the President identifies the People's Republic of China, along with the Special Administrative Region of Hong Kong and the Special Administrative Region of Macau, as a country of concern.

- ***Excepted transactions:*** Treasury proposes excepting certain types of transactions from the rule's coverage, as summarized below, provided that such transactions do not afford a U.S. person certain rights that are not standard minority shareholder protections.
  - ***Publicly traded securities:*** An investment by a U.S. person in a publicly traded security or a security issued by an investment company, such as an index fund, mutual fund, or exchange-traded fund;
  - ***Certain LP investments:*** A U.S. person's investment of a certain size made as a limited partner or equivalent in a venture capital fund, private equity fund, fund of funds, or other pooled investment fund;
  - ***Buyouts of country of concern ownership:*** A U.S. person's full buyout of all country of concern ownership of an entity, such that the entity would not constitute a covered foreign person following the transaction;
  - ***Intracompany transactions:*** An intracompany transaction between a U.S. parent and a majority-controlled subsidiary to support ongoing operations or other non-covered activities;
  - ***Pre-Outbound Order binding commitments:*** A transaction fulfilling a binding, uncalled, capital commitment entered into prior to August 9, 2023;
  - ***Certain syndicated debt financings:*** Where the U.S. person, as a member of a lending syndicate, acquires a voting interest in a covered foreign person upon default and the U.S. person cannot initiate any action vis-à-vis the debtor and does not have a lead role in the syndicate; and
  - ***Third country measures:*** Certain transactions involving a person of a country or territory outside of the United States may be excepted transactions where the Secretary of the Treasury determines that the country or territory is addressing national security concerns posed by outbound investment and the transaction is of a type for which associated national security concerns are likely to be adequately addressed by the actions of that country or territory.

- ***National interest exemption:*** Under the proposed rule, a U.S. person could seek an exemption from the application of the prohibition or notification requirement on the basis that a transaction is in the national interest of the United States.

- ***Notification requirements:*** A U.S. person subject to the notification requirement under the proposed rule would be required to file a notification form with Treasury that includes information related to the transaction such as details about the U.S. person, the covered transaction, relevant national security technologies and products, and the covered foreign person. The NPRM proposes that a notification must be filed no later than 30 days after a transaction is completed or, where a U.S. person acquires actual knowledge after the completion date of a transaction that the transaction would have been a covered transaction if such knowledge had been possessed at the time of the transaction, no later than 30 days after the U.S. person's acquisition of such knowledge.

<u>National Security Technologies and Products</u>

The NPRM also provides proposed scoping of the sub-sets of national security technologies and products identified in the Outbound Order that would be subject to the regulations:

- ***Semiconductors and microelectronics:***
    - ***Prohibited transactions:*** Treasury proposes a prohibition on covered transactions related to electronic design automation software; certain fabrication and advanced packaging tools; the design, fabrication, or packaging of certain advanced integrated circuits; and supercomputers.
    - ***Notifiable transactions:*** Treasury proposes a notification requirement for covered transactions related to the design, fabrication, or packaging of integrated circuits not otherwise covered by the prohibited transaction definition.

- ***Quantum information technologies:***
    - ***Prohibited transactions:*** Treasury proposes a prohibition on covered transactions related to the development of quantum computers and production of critical components; the development or production of certain quantum sensing platforms; and the development or production of quantum networking and quantum communication systems.

- ***Certain artificial intelligence (AI) systems:***
    - ***Prohibited transactions:*** Treasury proposes a prohibition on covered transactions related to the development of any AI system designed to be exclusively used for, or intended to be used for, certain end uses. The NPRM also proposes alternatives for a prohibition on covered transactions related to the development of any AI system that is trained using a specified quantity of computing power, and trained using a specified quantity of computing power using primarily biological sequence data.
    - ***Notifiable transactions:*** Treasury proposes a notification requirement for covered transactions related to the development of any AI system not otherwise covered by the prohibited transaction definition, where such AI system is designed or intended to be used for certain end uses or is trained using a specified quantity of computing power (set below the levels in the prohibited transaction definition).

Violations

The proposed rule outlines the penalty and disclosure framework for violations:

- ***Penalties:*** A violation would be subject to civil and criminal penalties as set forth in the International Economic Emergency Powers Act (IEEPA). In the event of a violation, Treasury is authorized to impose civil penalties and could also refer criminal violations to the Attorney General.

- ***Divestment:*** The Secretary of the Treasury could take any action authorized under IEEPA to nullify, void, or otherwise require divestment of any prohibited transaction.

- ***Voluntary self-disclosure:*** The proposed rule provides a process for a U.S. person to submit a voluntary self-disclosure if they believe their conduct may have resulted in a violation of any part of the proposed rule. Such self-disclosure would be taken into consideration during Treasury's determination of the appropriate response to the self-disclosed violation.

The NPRM seeks public comment on the entirety of the proposed rule and specifically asks questions for consideration and feedback related to the definitions and other elements of the program. The public will have until August 4, 2024 to provide comments, and Treasury encourages feedback to inform the development of the final regulatory text which will be issued at a later date.

The NPRM can be accessed via https://home.treasury.gov/policy-issues/international/outbound-investment-program.

Frequently Asked Questions

Why is Treasury issuing these regulations?

The Outbound Order directs the Secretary of the Treasury, in consultation with other departments and agencies, to promulgate rules and regulations, including prescribing definitions of terms as necessary to implement the Outbound Order and administer the new program. The NPRM proposes draft regulatory text that includes specific requirements for U.S. persons and reflects Treasury's consideration of public comments received in response to its August 2023 ANPRM. The issuance of the ANPRM was an optional step by Treasury to seek early stakeholder participation in the rulemaking process. The public provided comments on the ANPRM that informed the development of the NPRM. While the NPRM does not itself implement the Outbound Order, it provides the public an additional opportunity to contribute to the formation of the new program by commenting on the proposed regulatory text. Among other things, Treasury seeks input on the sub-sets of national security technologies and products related to semiconductors and microelectronics, quantum information technology, and AI systems as described in the NPRM.

Treasury welcomes comments from a wide range of stakeholders on all aspects of how the Secretary of the Treasury should implement this new program. Treasury will carefully consider this input before issuing a final rule at a later date.

Additional information is available at: https://home.treasury.gov/policy-issues/international/outbound-investment-program

What is an NPRM?

An NPRM is a proposed rule intended to provide the public with details on a proposed regulatory program, in this case, the outbound investment security program, and solicit public feedback to inform the development of the final regulations.

When does the rule take effect?

The NPRM is proposed regulatory text for public consideration and does not itself implement the Outbound Order. Treasury will carefully consider comments submitted during the NPRM comment period to develop a final rule that will implement the Outbound Order and will set an effective date.

When does the public comment period on the proposed rule end?

Written comments on the NPRM may be submitted during the public comment period, ending on Sunday, August 4, 2024.

Who may submit comments during the public comment period and how?

Any person, including businesses and organizations, may submit comments electronically through the Federal Government's eRulemaking Portal at https://www.regulations.gov. Comments may be submitted anonymously or with attribution.

What are the key differences between the NPRM and ANPRM?

In evaluating public comments to the August 2023 ANPRM and considering feedback from stakeholders, allies and partners, and consulting with relevant U.S. Government departments and agencies, Treasury refined its approach to implementation of the Outbound Order. Key areas that have evolved since the ANPRM include:

- The scope of coverage of transactions involving AI systems;
- The knowledge standard (which describes the knowledge a U.S. person must have about certain facts and circumstances related to a transaction to trigger obligations under the proposed rule);
- The scope of the prohibition on U.S. persons "knowingly directing" certain transactions;

- An exception for transactions involving persons of third countries that have similar measures aimed at outbound investments as designated by the Secretary of the Treasury; and

- The scope of LP investments that would be covered by the proposed rule and those that would be excepted.

Can U.S. persons still invest in a country of concern?

This proposed rule does not prohibit all investment activity in countries of concern. The Outbound Order is narrowly targeted at certain types of investments in country of concern entities and related to sensitive technologies and products critical for military, intelligence, surveillance, or cyber-enabled capabilities. The approach in Treasury's NPRM is focused on discrete categories of transactions involving sub-sets of technologies and products in an effort to protect national security, maximize compliance, and minimize unintended consequences. The NPRM also proposes exceptions for certain transactions, including those in publicly-traded securities, certain LP investments, and intracompany transactions between U.S. parents and controlled foreign entities. The United States supports an open investment environment where consistent with the protection of U.S. national security.

Would this program set-up a screening process or case-by-case review of investments?

No. Consistent with the Outbound Order, U.S. persons are prohibited from undertaking certain transactions and are required to notify Treasury of certain other transactions. There will not be a case-by-case review of transactions. As proposed, the relevant U.S. person undertaking a transaction would have the obligation to determine whether the given transaction is prohibited, permissible but subject to notification, or not covered by the rule because either it is an excepted transaction or it is not within the jurisdiction set forth under the NPRM. A U.S. person could seek a national interest exemption from the notification requirement or prohibition set out in the NPRM by following the process described.

How will U.S. individuals and companies be expected to comply with this program?

As the NPRM describes in detail, the proposed rule would place certain requirements on U.S. persons, including recordkeeping and notification requirements. The proposed rule would also establish a prohibition on certain U.S. person transactions. Treasury anticipates that U.S. persons should be able to comply with the proposed rule through a reasonable transactional due diligence process.

Are U.S. nationals working at foreign entities going to be impacted?

Under the proposed rule, U.S. persons would be prohibited from knowingly directing transactions by non-U.S. entities that the U.S. person knows at the time of the transaction would be prohibited if engaged in by a U.S. person. The proposed rule would not restrict a U.S. person from generally working at any entity that receives investment, nor would it restrict a U.S. person from working at an entity making such an investment.

Are technology licensing, consulting, or procurement contracts covered?

Under the proposed rule, certain transactions that involve the acquisition of equity, provision of debt financing that is convertible to equity or that carries certain rights, greenfield investments or other corporate expansions, the creation of joint ventures, or certain LP investments would be covered. Activities that do not meet the definition of a covered transaction would not be subject to the program except where they are undertaken to evade or avoid the proposed rule.

Will Treasury publish a list of designated covered foreign persons under the program?

Treasury does not anticipate publishing a list of entities designated as covered foreign persons. Instead, Treasury would expect a U.S. person to conduct a reasonable and diligent inquiry to determine whether a transaction is covered under the rule including whether any covered foreign persons are involved.

What are the penalties for violations of the program?

The Outbound Order authorizes the Secretary of the Treasury to investigate violations of the regulations, including pursuing civil penalties available under IEEPA and referring criminal violations to the Attorney General. The Secretary of the Treasury may also, as appropriate, take action authorized under IEEPA to nullify, void, or otherwise compel the divestment of any prohibited transaction.

Is Treasury working with U.S. allies and partners?

Treasury, working with the U.S. Department of State, has engaged with U.S. allies and partners regarding the important national security goals of the Outbound Order. The Outbound Order, ANPRM, and NPRM reflect discussions with the G7 and other ally and partner engagements.

Treasury is encouraged by the interest and attention given to this issue by allies and partners, including in the recent G7 Apulia Leaders' Communiqué. Treasury also notes that the European Commission and United Kingdom have begun processes to consider whether and how to address outbound investment risks.

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