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DEPARTMENT OF THE TREASURY**

Office of Investment Security

31 CFR Chapter VIII

[Docket ID TREAS-DO-2023-0009]

RIN 1505-AC82

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

AGENCY: Office of Investment Security, Department of the Treasury.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Executive Order of August 9, 2023, “Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern” (the Order), directs the Secretary of the Treasury (the Secretary) to issue regulations that identify categories of transactions involving technologies and products that may contribute to the threat to the national security of the United States identified under the Order and require United States persons to notify the Department of the Treasury (the Treasury Department) of each such transaction; and identify categories of transactions involving technologies and products that pose a particularly acute national security threat to the United States and prohibit United States persons from engaging in such transactions.

This advance notice of proposed rulemaking (ANPRM) seeks public comment on various topics related to the implementation of the Order.

DATES: Written comments on this ANPRM must be received by [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted through one of two methods:

- **Electronic Submission:** Comments may be submitted electronically through the Federal Government eRulemaking portal at <https://www.regulations.gov>.
- **Mail:** Send to U.S. Department of the Treasury, Attention: Meena R. Sharma, Acting Director, Office of Investment Security Policy and International Relations, 1500 Pennsylvania Avenue NW, Washington, DC 20220.

We encourage comments to be submitted via <https://www.regulations.gov>. Please submit comments only and include your name and company name (if any) and cite “Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern” in all correspondence.

Anyone submitting business confidential information should clearly identify the business confidential portion at the time of submission, file a statement justifying nondisclosure and referring to the specific legal authority claimed, and provide a non-confidential version of the submission. For comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters “BC.” Any page containing business confidential information must be clearly marked “BUSINESS CONFIDENTIAL” on the top of that page. The corresponding non-confidential version of those comments must be clearly marked “PUBLIC.” The file name of the non-confidential version should begin with the character “P.” Any submissions with file names that do not begin with either a “BC” or a “P” will be

assumed to be public and will be posted without change, including any business or personal information provided, such as names, addresses, email addresses, or telephone numbers.

To facilitate an efficient review of submissions, the Treasury Department encourages but does not require commenters to: (1) submit a short executive summary at the beginning of all comments; (2) provide supporting material, including empirical data, findings, and analysis in reports or studies by established organizations or research institutions; (3) consistent with the questions below, describe the relative benefits and costs of the recommended approach; and (4) refer to the numbered question(s) herein to which each comment is addressed.

The Treasury Department welcomes interested parties' submissions of written comments discussing relevant experiences, information, and views. Parties wishing to supplement their written comments in a meeting may request to do so, and the Treasury Department may accommodate such requests as resources permit. Additionally, in consultation with the Departments of Commerce and State, the Treasury Department expects to seek additional opportunities to engage in discussions with certain stakeholders, including foreign partners and allies.

FOR FURTHER INFORMATION CONTACT: Meena R. Sharma, Acting Director, Office of Investment Security Policy and International Relations, at U.S. Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20220; telephone: (202) 622-3425; email: OIS.Outbound.Regulations@treasury.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On August 9, 2023, the President issued the Order pursuant to his authority under the Constitution and the laws of the United States, including the International Emergency Economic Powers Act (IEEPA), the National Emergencies Act, and section 301 of Title 3,

United States Code. In the Order, the President declared a national emergency and determined the need for action due to the policies and actions of countries of concern which seek to, among other things, exploit U.S. outbound investments to develop sensitive technologies and products critical for military, intelligence, surveillance, and cyber-enabled capabilities. In an Annex to the Order, the President identified one country, the People's Republic of China (PRC), along with the Special Administrative Region of Hong Kong and the Special Administrative Region of Macau, as a country of concern. The President may modify the Annex to the Order and update the list of countries of concern in the future.

Advanced technologies and products that are increasingly developed and financed by the private sector form the basis of next-generation military, intelligence, surveillance, and cyber-enabled capabilities. For example, certain advanced semiconductors and microelectronics, quantum information technologies, and artificial intelligence (AI) systems will underpin military innovations that improve the speed and accuracy of military decision-making, planning, and logistics; enable the compromise of encryption and other cybersecurity controls; and advance mass surveillance capabilities. The potential military, intelligence, surveillance, and cyber-enabled applications of these technologies and products pose risks to U.S. national security particularly when developed by a country of concern such as the PRC in which the government seeks to (1) direct entities to obtain technologies to achieve national security objectives; and (2) compel entities to share or transfer these technologies to the government's military, intelligence, surveillance, and security apparatuses. The PRC government explicitly seeks to advance these technologies and to ensure that new innovations simultaneously benefit its military and commercial aims. The PRC government is aggressively pursuing these objectives to confer a decisive advantage to its military, intelligence, surveillance, and cyber-enabled services. The PRC

government is also encouraging a growing number of PRC entities to undertake military research and development, including weapons production, which exploit private investments in pursuit of this goal.

U.S. investments are often more valuable than capital alone because they can also include the transfer of intangible benefits. Investors from the United States often lend support to the companies in which they invest, and these could include PRC entities that are developing technology with military end uses. Intangible benefits that often accompany U.S. investments and help companies succeed include enhanced standing and prominence, managerial assistance, access to investment and talent networks, market access, and enhanced access to additional financing. Certain investments from the United States into a country of concern can be exploited to accelerate the development of sensitive technologies or products in ways that negatively impact the strategic military position of the United States. Such investments, therefore, risk exacerbating this threat to U.S. national security.

Cross-border investment creates valuable economic opportunities and promotes competitiveness, innovation, and productivity. For these reasons, the United States has and will continue to champion open and rules-based investment.

The United States has undertaken efforts to enhance existing policy tools and develop new policy initiatives aimed at maintaining U.S. leadership in technologies critical to national security, while preventing the exploitation of our open economic ecosystem in ways that could undermine our national security. Nevertheless, there remain instances where the risks presented by U.S. investments enabling countries of concern to develop critical military, intelligence, surveillance, or cyber-enabled capabilities are not sufficiently addressed by existing tools. Accordingly, the Order directs the Secretary to establish a program to prohibit or require notification concerning certain types of outbound investments by United States persons into certain entities located in or subject to the

jurisdiction of a country of concern, and certain other entities owned by persons of a country of concern, involved in discrete categories of advanced technologies and products.

The Order has two primary components that serve different objectives with respect to the relevant technologies and products. The first component requires the Secretary to prohibit certain types of investment by a United States person in a covered foreign person whose business involves certain categories of advanced technologies and products. The second component requires notification to the Secretary regarding certain types of investments by a United States person in a covered foreign person whose business involves other categories of technologies and products. The focus of both components is on investments that could enhance a country of concern's military, intelligence, surveillance, or cyber-enabled capabilities through the advancement of technologies and products in particularly sensitive areas.

II. Program Overview

The Treasury Department is considering implementation of the Order through the establishment of a program that would (1) prohibit certain types of investment by United States persons into certain entities located in or subject to the jurisdiction of a country of concern, and certain other entities owned by persons of a country of concern, with capabilities or activities related to defined technologies and products; and (2) require submission of a notification to the Secretary by United States persons for certain types of investment into certain entities located in or subject to the jurisdiction of a country of concern, and certain other entities owned by persons of a country of concern, with capabilities or activities related to defined technologies and products. The Treasury Department does not contemplate that the program will entail a case-by-case review of U.S. outbound investments. Rather, the Treasury Department expects that the transaction

parties will have the obligation to determine whether a given transaction is prohibited, subject to notification, or permissible without notification.

Importantly, the program is not intended to impede all U.S. investments into a country of concern or impose sector-wide restrictions on United States person activity. The high-level categories of the technologies and products that are the focus of the program, as enumerated in the Order, are: (1) semiconductors and microelectronics, for which the Treasury Department is considering a prohibition on transactions related to certain advanced technologies and products, and considering a notification requirement related to other technologies and products; (2) quantum information technologies, for which the Treasury Department is considering a prohibition on transactions related to certain technologies and products; and (3) AI systems, for which the Treasury Department is considering a notification requirement for transactions related to certain technologies and products with specific end uses and is considering a prohibition in certain other cases, as discussed herein.

The Treasury Department anticipates that transactions covered by the program would include certain acquisitions of equity interests (*e.g.*, mergers and acquisitions, private equity, and venture capital), greenfield, joint ventures, and certain debt financing transactions by United States persons. Given the focus on transactions that could aid in the development of technological advances that pose a risk to U.S. national security, the Treasury Department expects to create a carveout or exception for specific types of transactions, such as certain investments into publicly-traded securities or into exchange-traded funds.

It is not proposed that the program provide for retroactive application of the provisions related to the prohibition of certain transactions and the notification of others. However, the Treasury Department may, after the effective date of the regulations, request

information about transactions by United States persons that were completed or agreed to after the date of the issuance of the Order to better inform the development and implementation of the program.

The Treasury Department, in consultation with the Department of Commerce and, as appropriate, other executive departments and agencies, will evaluate the program after an initial period of no longer than one year following the effective date of the implementing regulations to consider whether adjustments to the program are warranted.

III. Issues for Comment

The Treasury Department welcomes comments and views from a wide range of stakeholders on all aspects of how the Secretary should implement this new program under the Order. The Treasury Department is particularly interested in obtaining information on the topics discussed below.

Note that this ANPRM does not necessarily identify the full scope of potential approaches the Treasury Department might ultimately undertake in regulations to implement the Order.

A. Overview.

The Order frames the key terms that will be developed through rulemaking. Accordingly, United States persons may either be required to notify the Treasury Department of, or be prohibited from undertaking, a transaction with a “covered foreign person” – that is, a “person of a country of concern” (per the President’s designation of a country of concern in the Annex to the Order) that is engaged in certain defined activities involving “covered national security technologies and products” that may contribute to the threat to the national security of the United States. These requirements would not apply to a United States person engaged in an “excepted transaction.” Definitions under

consideration for these and related terms are discussed below, along with questions on which the Treasury Department seeks comment.

B. U.S. person.

The Order authorizes the Secretary to prohibit or require notification of instances where a “United States person” engages in a covered transaction. The Order defines a “United States person” as 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.

The Treasury Department is considering adopting the Order’s definition of the term “United States person” without elaboration or amendment and referring to it as a “U.S. person.” The Treasury Department expects the regulations to apply to U.S. persons wherever they are located.

The ANPRM seeks comment on this topic including:

1. In what ways, if any, should the Treasury Department elaborate or amend the definition of “U.S. person” to enhance clarity or close any loopholes? What, if any, unintended consequences could result from the definition under consideration?
2. Are there additional factors that the Treasury Department should consider when determining whether an individual or entity is a “U.S. person”? Please explain.

C. Covered foreign person; person of a country of concern.

The Order requires the Treasury Department to prohibit or require notification of certain transactions by a U.S. person into a “covered foreign person.” The Treasury Department is considering elaborating upon the definition of a “covered foreign person” in the Order to mean (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. (For more information on the knowledge standard under consideration, see subsection J below.)

Further, the Treasury Department is considering elaborating upon the definition for the term “person of a country of concern” mentioned in the Order to mean *(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.*

The Treasury Department intends that the definitions of “covered foreign person” and “person of a country of concern” together provide clarity and predictability within the scope of the authorities granted by the Order while avoiding major loopholes and unintended consequences. For example, item (2) of the definition of “covered foreign person” is intended to capture parent companies whose subsidiaries and branches engage in activities related to a covered national security technology or product. (Meanwhile, item (1) would capture such subsidiaries and branches themselves as covered foreign persons.) In addition, item (4) of the definition of “person of a country of concern” is intended to

capture entities located outside of a country of concern that are majority-owned by persons of a country of concern.

The ANPRM seeks comment on this topic including:

3. Should the Treasury Department further elaborate in any way on the definitions of “covered foreign person” and “person of a country of concern” to enhance clarity or close any loopholes?

4. What additional information would be helpful for U.S. persons to ascertain whether a transaction involves a “covered foreign person” as defined in section III.C?

5. What, if any, unintended consequences could result from the definitions under consideration? What is the likely impact on U.S. persons and U.S. investment flows? What is the likely impact on persons and investment flows from third countries or economies? If you believe there will be impacts on U.S. persons, U.S. investment flows, third-country persons, or third-country investment flows, please provide specific examples or data.

6. What could be the specific impacts of item (2) of the definition of “covered foreign person”? What could be the consequences of setting a specific threshold of 50 percent in the categories of consolidated revenue, net income, capital expenditures, and operating expenses? Are there other approaches that should be considered with respect to U.S. person transactions into companies whose subsidiaries and branches engage in the identified activity with respect to a covered national security technology or product?

7. What analysis or due diligence would a U.S. person anticipate undertaking to ascertain whether they are investing in a covered foreign

person? What challenges could arise in this process for the investor and what clarification in the regulations would be helpful? How would U.S. persons anticipate handling instances where they attempt to ascertain needed information but are unable to, or receive information they have doubts about? What contractual or other methods might a U.S. person employ to enhance certainty that a transaction they are undertaking is not a covered transaction?

8. What other recommendations do you have on how to enhance clarity or refine the definitions, given the overall objectives of the program?

D. Covered transactions.

The Order requires the Secretary to promulgate regulations defining “prohibited transactions” and “notifiable transactions.” These are distinct concepts and the scope of each is discussed below in connection with specific “covered national security technologies and products.”

The Treasury Department is considering using a single term, “covered transaction,” that would apply to the definition of both prohibited and notifiable transactions. Specifically, the Treasury Department is considering defining the term “covered transaction” to mean *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.* The Treasury Department intends this definition to be forward-looking, and not to cover transactions and the fulfillment of uncalled, binding capital commitments with cancellation

consequences made prior to the issuance of the Order. The Treasury Department may, after the effective date of the regulations, request information about transactions by U.S. persons that were completed or agreed to after the date of the issuance of the Order to better inform the development and implementation of the program.

The Treasury Department is considering including “indirect” transactions as “covered transactions” in order to close loopholes that would otherwise result, and to clarify that attempts to evade prohibitions on certain transactions cannot find safe harbor in the use of intermediary entities that are not “U.S. persons” or “covered foreign persons,” as defined. Examples of such conduct could include, but would not be limited to, a U.S. person knowingly investing 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.

The Treasury Department does not intend the definition of “covered transaction” under consideration to apply to the following activities, so long as they do not involve any of the definitional elements of a “covered transaction” and are not undertaken as part of an effort to evade these rules: 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.

The definition of “covered transaction” under consideration would also exclude “excepted transactions,” as discussed in this ANPRM.

The Order describes additional activities that are, or may be, prohibited. In particular, any conspiracy formed to violate the regulations and any action that evades, has

the purpose of evading, causes a violation of, or attempts to violate the Order or any regulation issued thereunder is prohibited.

In addition, the Order provides authority to the Secretary to prohibit U.S. persons from “knowingly directing transactions” that would be prohibited transactions pursuant to the Order if engaged in by a U.S. person.

The Order also provides authority to the Secretary to require U.S. persons to “take all reasonable steps to prohibit and prevent any transaction by a foreign entity controlled by such United States person that would be a prohibited transaction if engaged in by a United States person.” With respect to notifiable transactions, the Order provides authority to the Secretary to require U.S. persons to provide notification of “any transaction by a foreign entity controlled by such United States person that would be a notifiable transaction if engaged in by a United States person.” (For more information on the obligations of U.S. persons with respect to controlled foreign entities, see subsection M below.)

The ANPRM seeks comment on this topic including:

9. What modifications, if any, should be made to the definition of “covered transaction” under consideration to enhance clarity or close any loopholes?
10. What additional information would be helpful for U.S. persons to ascertain whether a transaction is a “covered transaction” as defined in section III.D?
11. What, if any, unintended consequences could result from the definition of “covered transaction” under consideration? What is the likely impact on U.S. persons and U.S. investment flows? What is the likely impact on persons and investment flows from third countries or economies? If you believe there will be impacts on U.S. persons, U.S. investment flows, third-

country persons, or third-country investment flows, please provide specific examples or data.

12. How, if at all, should the inclusion of “debt financing to a covered foreign person where such debt financing is convertible to an equity interest” be further refined? What would be the consequences of including additional debt financing transactions in the definition of “covered transaction”?

13. The Treasury Department is considering how to treat follow-on transactions into a covered foreign person and a covered national security technology or product when the original transaction relates to an investment that occurred prior to the effective date of the implementing regulations. What would be the consequences of covering such follow-on transactions? If you believe certain follow-on transactions should or should not be covered, please provide examples and information to support that position.

14. How could the Treasury Department provide clarity on the definition of an “indirect” covered transaction? What are particular categories that should or should not be covered as “indirect” covered transactions, and why?

15. How could prongs (3) and (4) of the “covered transaction” definition under consideration be clarified in rulemaking such that a U.S. person can ascertain whether a greenfield or joint venture investment “could result” in the establishment of a covered foreign person? What are the impacts and consequences if a knowledge standard, actual or constructive, is used as part of these prongs? What are the impacts and consequences if a foreseeability

standard is used as part of these prongs? (For more information on the knowledge standard under consideration, see subsection J below.)

16. Please specify whether and how any of the following could fall within the considered definition of “covered transaction” such that additional clarity would be beneficial given the policy intent of this program is not to implicate these activities unless undertaken as part of an effort to evade these rules:

- University-to-university research collaborations;
- Contractual arrangements or the procurement of material inputs for any of the covered national security technologies or products;
- 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; and
- Equity research or analysis.

17. Are there other secondary or intermediary services incident to a transaction where there may be questions about whether they fall within the definition of “covered transaction”? What are these situations and what are the reasons they should or should not be within the definition of a “covered transaction”?

E. Excepted transactions.

Certain transactions may fall within the definition of “covered transaction” as set forth in section III.D but, due to the nature of the transaction, present a lower likelihood of concern. With an interest in minimizing unintended consequences and focusing on transactions that present a higher risk, the Treasury Department is considering a category of transactions that would be “excepted transactions” and thus excluded from the definition of “covered transaction.” The definition under consideration for “excepted transaction” is:

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.

The objective of item 1. of the definition of “excepted transaction” under consideration is to carve out certain transactions that are unlikely to involve the transfer of both capital and additional benefits to a covered foreign person. With respect to item 1.a.iii, the Treasury Department is considering whether the exception should only apply to investors or investments into funds beneath a defined threshold, based on one or more benchmarks such as the size of the limited partner’s investment in the fund or the size of the limited partner itself. The rationale for this approach is that transactions above a threshold are more likely to involve the conveyance of intangible benefits such as those often associated with larger institutional investors, including standing and prominence, managerial assistance, and enhanced access to additional financing.

The objective of item 2. under consideration is to carve out buyouts of country of concern ownership, which eliminates the opportunity and incentive for a U.S. person to lend support to a covered foreign person. The objective of item 3. is to avoid unintended interference with the ongoing operation of a U.S. subsidiary in a country of concern when that U.S. subsidiary meets the definition of a covered foreign person, although the Treasury

Department anticipates that the definition of a “covered transaction” under consideration would not apply to most routine intracompany actions such as the sale or purchase of inventory or fixed assets, the provision of paid services, the licensing of technology, or the provision of loans, guarantees, or other obligations. (The subsidiary, as a covered foreign person, would still be covered by the relevant provisions as it relates to other U.S. persons, and the U.S. parent would have other obligations as related to an entity that it controls – see subsection M for more information.) The objective of item 4. is to avoid penalizing U.S. persons who have entered into binding agreements prior to the date of the Order.

The ANPRM seeks comment on this topic including:

18. What modifications, if any, should be made to the definition of “excepted transaction” under consideration to enhance clarity or close any loopholes?

19. What information would a U.S. person need to obtain to ascertain whether a transaction is an “excepted transaction” as defined in section III.E?

20. What, if any, unintended consequences could result from the definition under consideration? What is the definition’s likely impact on U.S. persons and U.S. investment flows? What is the likely impact on persons and investment flows from third countries or economies? If you believe there will be impacts on U.S. persons, U.S. investment flows, third-country persons, or third-country investment flows, please provide specific examples or data.

21. What other types of investments, if any, should be considered “excepted transactions” and why? Are there any transactions included in the definition

under consideration that should not be considered “excepted transactions,” and if so, why?

22. The Treasury Department is considering the appropriate scope of item 1.a.iii of “excepted transaction,” which carves out from program coverage certain transactions by U.S. persons made as a limited partner where the investment is below a de minimis threshold. The goal of the qualifier in item 1.a.iii.B is to exclude from the “excepted transaction” carveout those transactions in excess of a set threshold, which would be set at a high level, where there is a greater likelihood of additional benefits being conveyed, and the U.S. limited partner knows or should have known that the venture capital fund, private equity fund, fund of funds, or other pooled investment fund into which the U.S. person is investing as a limited partner, itself invests in one or more covered foreign persons. The Treasury Department is considering defining such a threshold with respect to one or more factors such as the size of the U.S. limited partner’s transaction, and/or the total assets under management of the U.S. limited partner. The concern is the enhanced standing and prominence that may be associated with the size of the transaction or the investor, and increased likelihood of the conveyance of intangible benefits to the covered foreign person. What are the considerations as to the impact of this potential limitation on U.S. investors, and in particular, categories of U.S. investors that may invest in this manner as limited partners? If the Treasury Department includes a threshold based on the size of the U.S. limited partner’s investment in the fund, what should this threshold be, and why? If the Treasury Department includes a threshold based on assets under management, what should this threshold be, and why?

What are the costs and benefits to either of these approaches? What other approaches should the Treasury Department consider in creating a threshold, above which the “excepted transaction” exception would not apply – for example, what would be the considerations if the threshold size was with respect to the limited partner’s investment as a percentage of the fund’s total capital?

23. When investing as a limited partner into a financing vehicle that involves the pooling of funds from multiple investors with the intent to engage in multiple transactions – such as a venture capital or private equity fund – what, if any, covenants, contracts, or other limitations could a U.S. investor attach to their capital contribution to ensure the U.S. investor’s capital is not invested in a covered transaction, even if the fund continues to invest in covered transactions? What burdens would this create for U.S. investors? If such limitations existed or were required, how might investment firms change how they raise capital from U.S. investors, if at all?

24. With respect to item 3. of “excepted transaction,” regarding intracompany transfers of funds from a U.S. parent company to a subsidiary located in a country of concern, the Treasury Department is interested in understanding how frequently such intracompany transfers would meet the definition of a “covered transaction.” What would be the impact if the exception were applicable only to relevant subsidiaries that were established as a subsidiary of the U.S. parent before the date of the Order versus also including subsidiaries established at any time in the future? Note that an exception for intracompany transfers from the parent company

would not change the status of the subsidiary as a covered foreign person for purposes of receiving investments from other U.S. persons.

25. Additionally with respect to item 3., the Treasury Department is considering defining the parent-subsidiary relationship as one in which a U.S. person's ownership interest is equal to or greater than 50 percent. What are the costs and benefits to this approach?

F. Covered national security technologies and products: overview.

As discussed in section III.D, the Treasury Department is considering defining the term "covered transaction" based on an investment by a U.S. person in or resulting in a covered foreign person. The Order directs the Treasury Department to focus on transactions that include certain covered national security technologies or products. Accordingly, the Treasury Department is considering defining the term "covered foreign person" using a further reference to an identified activity with respect to a designated covered national security technology or product. Thus, the Treasury Department is interested in developing clearly defined and well understood definitions with respect to each designated covered national security technology and product as well as the identified activity linking the foreign person to the technology or product.

The Order defines the term "covered national security technologies and products" to mean sensitive technologies and products in the semiconductors and microelectronics, quantum information technologies, and artificial intelligence sectors that are critical for the military, intelligence, surveillance, or cyber-enabled capabilities of a country of concern, as determined by the Secretary in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies. Where applicable, "covered national security technologies and products" may be limited by reference to certain end uses of those technologies or products.

The Treasury Department is considering regulations that would define specific covered national security technologies and products for purposes of notifiable transactions and prohibited transactions based on a description of the technology or product and the relevant activities, capabilities, or end uses of such technology or product, as applicable. U.S. persons undertaking a transaction with a covered foreign person engaged in activities with respect to the technology or product based on the definition would be subject to the program.

The notification requirement will 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. The notifications will be helpful in highlighting trends with respect to related capital flows as well as inform future policy development. The definitions under consideration were crafted with these objectives in mind.

The prohibitions under consideration would be narrowly tailored restrictions on specific, identified areas to prevent U.S. persons from investing in the development of technologies and products that pose a particularly acute national security threat.

G. Covered national security technology or product: semiconductors and microelectronics.

Consistent with the Order, the Treasury Department is considering a prohibition on U.S. persons undertaking certain transactions involving covered foreign persons engaged in activities involving sub-sets of advanced semiconductor and microelectronic technologies and products. Additionally, the Treasury Department is considering requiring notification by U.S. persons for certain other transactions involving covered foreign persons engaged in other semiconductor and microelectronic technologies and products.

The U.S. Government is concerned with the development of semiconductor and microelectronic technology, equipment, and capabilities that will enable the production and certain uses of integrated circuits that will underpin military innovations that improve the speed and accuracy of military decision-making, planning, and logistics, among other things. The prohibition under consideration is focused on three concerns: (i) specific technology, equipment, and capabilities that enable the design and production of advanced integrated circuits or enhance their performance; (ii) advanced integrated circuit design, fabrication, and packaging capabilities; and (iii) the installation or sale to third-party customers of certain supercomputers, which are enabled by advanced integrated circuits. The Treasury Department is also considering a notification requirement for design, fabrication, and packaging of other integrated circuits. The notification requirement is intended to increase the U.S. Government's visibility into the volume and nature of investments and inform future policy decisions.

Specifically, the Treasury Department is considering a prohibition on U.S. persons undertaking a transaction with a covered foreign person engaged in activities involving:

Technologies that Enable Advanced Integrated Circuits

- *Software for Electronic Design Automation: The development or production of electronic design automation software designed to be exclusively used for integrated circuit design.*
- *Integrated Circuit Manufacturing Equipment: The development or production of front-end semiconductor fabrication equipment designed to be exclusively used for the volume fabrication of integrated circuits.*

Advanced Integrated Circuit Design and Production

- *Advanced Integrated Circuit Design: The design of integrated circuits that exceed the thresholds in Export Control Classification Number (ECCN) 3A090 in*

supplement No. 1 to 15 CFR part 774 of the Export Administration Regulations (EAR), or integrated circuits designed for operation at or below 4.5 Kelvin.

- *Advanced Integrated Circuit Fabrication: The fabrication of integrated circuits that meet any of the following criteria: (i) logic integrated circuits using a non-planar transistor architecture or with a technology node of 16/14 nanometers or less, including but not limited to fully depleted silicon-on-insulator (FDSOI) integrated circuits; (ii) NOT-AND (NAND) memory integrated circuits with 128 layers or more; (iii) dynamic random-access memory (DRAM) integrated circuits using a technology node of 18 nanometer half-pitch or less; (iv) integrated circuits manufactured from a gallium-based compound semiconductor; (v) integrated circuits using graphene transistors or carbon nanotubes; or (vi) integrated circuits designed for operation at or below 4.5 Kelvin.*
 - *“Fabrication of integrated circuits” is defined as the process of forming devices such as transistors, poly capacitors, non-metal resistors, and diodes, on a wafer of semiconductor material.*
- *Advanced Integrated Circuit Packaging: The packaging of integrated circuits that support the three-dimensional integration of integrated circuits, using silicon vias or through mold vias.*
 - *“Packaging of integrated circuits” is defined as the assembly of various components, such as the integrated circuit die, lead frames, interconnects, and substrate materials, to form a complete package that safeguards the semiconductor device and provides electrical connections between different parts of the die.*

Supercomputers

- *Supercomputers: The installation or sale to third-party customers of a supercomputer, which are enabled by advanced integrated circuits, that can provide a theoretical compute capacity of 100 or more double-precision (64-bit) petaflops or 200 or more single-precision (32-bit) petaflops of processing power within a 41,600 cubic foot or smaller envelope.*

In addition, the Treasury Department is considering a requirement for U.S. persons to notify the Treasury Department if undertaking a transaction with a covered foreign person engaged in activities involving any of the below:

- *Integrated Circuit Design: The design of integrated circuits for which transactions involving U.S. persons are not otherwise prohibited in section III.G.*
- *Integrated Circuit Fabrication: The fabrication of integrated circuits for which transactions involving U.S. persons are not otherwise prohibited in section III.G.*
- *Integrated Circuit Packaging: The packaging of integrated circuits for which transactions involving U.S. persons are not otherwise prohibited in section III.G.*

The ANPRM seeks comment on this topic including:

26. Where possible, please provide empirical data about trends in U.S. investment into country of concern entities engaged in the activities described in section III.G. Based on this data, are there emerging trends with respect to U.S. outbound investments in semiconductors and microelectronics in countries of concern that would not be captured by the definitions in section III.G? If so, what are they?

27. Please identify any areas within this category where investments by U.S. persons in countries of concern may provide a strategic benefit to the United States, such that continuing such investment would benefit, and not impair, U.S. national security. Please also identify any key factors that affect the

size of these benefits (*e.g.*, do these benefits differ in size depending on the application of the technology or product at issue?). Please be specific and where possible, provide supporting material, including empirical data, findings, and analysis in reports or studies by established organizations or research institutions and indicate material that is business confidential per the instructions at the beginning of this ANPRM.

28. What modifications, if any, should be made to the definitions under consideration to enhance clarity or close any loopholes? Please provide supporting rationale(s) and data, as applicable, for any such proposed modification.

29. With respect to the definition of “Electronic Design Automation Software,” would incorporation of a definition, including one found in the EAR, be beneficial? If so, how? Practically speaking, how would a focus on software for the design of particular integrated circuits – *e.g.*, fin field-effect transistors (FinFET) or gate-all-around field effect transistors (GAAFET) – be beneficial? If so, how could such a focus be incorporated into the definition?

30. Should the Treasury Department consider additional existing definitions from other U.S. Government regulations or programs? Should the Treasury Department consider any industry definitions that may be relevant? If so, please note any additional specific definitions, with citations, that the Treasury Department should consider in this category.

31. How might the Treasury Department further clarify when transactions into entities engaged in activities involving semiconductors and

microelectronics in countries of concern would be prohibited, and when they would be allowed but require notification?

32. In what ways could the definition of “Supercomputer” be clarified? Are there any alternative ways to focus this definition on a threshold of computing power without using the volume metric, such that it would distinguish supercomputers from data centers, including how to distinguish between low latency high-performance computers and large datacenters with disparate computing clusters? Are there any other activities relevant to such supercomputers other than the installation or sale of systems that should be captured?

H. Covered national security technology or product: quantum information technologies.

The Order states that the regulations will define “covered national security technologies and products” to include sensitive technologies and products in the quantum information technologies category.

The U.S. Government is concerned with the development and production of quantum information technologies and products that enable capabilities that could compromise encryption and other cybersecurity controls and jeopardize military communications, among other things. To address these concerns, the Treasury Department is considering a prohibition that would focus on specific and advanced quantum information technologies and products, or with respect to end uses. In the case of quantum sensors, the end-use provisions seek to distinguish from use cases in civilian fields such as medicine and geology, and in the case of quantum networking systems, they seek to avoid capturing quantum systems with no relevance to secure communications or systems related

to classical encryption. The Treasury Department is currently not considering a separate notification requirement for quantum information technologies.

The Treasury Department is considering a prohibition on U.S. persons undertaking a transaction with a covered foreign person engaged in activities involving:

- *Quantum Computers and Components: The production of a quantum computer, dilution refrigerator, or two-stage pulse tube cryocooler.*
 - *“Quantum computer” is defined as a computer that performs computations that harness the collective properties of quantum states, such as superposition, interference, or entanglement.*
- *Quantum Sensors: The development of a quantum sensing platform designed to be exclusively used for military end uses, government intelligence, or mass-surveillance end uses.*
- *Quantum Networking and Quantum Communication Systems: The development of a quantum network or quantum communication system designed to be exclusively used for secure communications, such as quantum key distribution.*

The ANPRM seeks comment on this topic including:

33. Where possible, please provide empirical data about trends in U.S. investment into country of concern entities engaged in quantum information technologies as described in section III.H. Please identify any technologies notable for the high volume or frequency of outbound investment activity or for the low volume or frequency of outbound investment activity. Based on this data, are there U.S. outbound investment trends in quantum information technologies in countries of concern that would not be captured by the definitions in section III.H? If so, what are they?

34. Please identify any areas within this category where investments by U.S. persons in countries of concern may provide a strategic benefit to the United States, such that continuing such investment would benefit, and not impair, U.S. national security. Please also identify any key factors that affect the size of these benefits (*e.g.*, do these benefits differ in size depending on the application of the technology or product at issue?). Please be specific and where possible, provide supporting material, including empirical data, findings, and analysis in reports or studies by established organizations or research institutions, and indicate material that is business confidential per the instructions at the beginning of this ANPRM.

35. With respect to the definition of “Quantum Computers and Components,” would any further specificity be beneficial and, if so, what, and why? Are there existing definitions from other U.S. Government regulations or programs that are not reflected in section III.H and should be considered? Please provide specificity.

36. In defining “Quantum Sensors,” the policy objective is to avoid covering quantum sensors designed for commercial uses such as medical and geological applications. As such, the definition under consideration references certain end uses that have national security implications. What are the costs and benefits or unintended consequences with this approach? What alternative frameworks or definitions, if any, should the Treasury Department consider, and why?

37. With respect to “Quantum Sensors” and “Quantum Networking and Quantum Communication Systems,” what could be the impact of the language “designed to be exclusively used”? How would the alternative

formulation “designed to be primarily used” change the scope? Is there another approach that should be considered?

38. Additionally, with respect to “Quantum Networking and Quantum Communications Systems,” the definition is intended to cover quantum cryptography. Are there other clarifications or enhancements that should be made to this definition? What might inadvertently be captured that was not intended as noted in section III.H?

39. Are there other areas of quantum information technologies that should be considered as an addition or alternative to the definitions in section III.H? Please be specific and where possible, provide supporting material, including empirical data, findings, and analysis in reports or studies by established organizations or research institutions.

I. Covered national security technology and product: AI systems.

The Order states that the regulations will define “covered national security technologies and products” to include sensitive technologies and products in the AI systems category.

The U.S. Government is concerned with the development of AI systems that enable the military modernization of countries of concern – including weapons, intelligence, and surveillance capabilities – and that have applications in areas such as cybersecurity and robotics. The policy objective is to cover U.S. investment into entities that develop AI systems that have applications that pose significant national security risks without broadly capturing entities that develop AI systems intended only for consumer applications or other civilian end uses that do not have national security consequences. To address these concerns, the Treasury Department is considering a notification requirement and a potential prohibition.

Whether for purposes of a notification or prohibition, the Treasury Department is considering defining “AI system” as *an engineered or machine-based system that can, for a given set of objectives, generate outputs such as predictions, recommendations, or decisions influencing real or virtual environments. AI systems are designed to operate with varying levels of autonomy.* Covered foreign persons engaging in the development of software that incorporates an AI system with certain applications or end uses would be within scope.

If the Treasury Department were to pursue a prohibition in this category, a potential approach is to focus on U.S. investments into covered foreign persons engaged *in 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.* Alternatively, “primarily used” could take the place of “exclusively used.”

The Treasury Department is considering a requirement for U.S. persons to notify the Treasury Department if undertaking a transaction with a covered foreign person engaged *in 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 devices that can intercept live conversations without the consent of the parties involved; non-cooperative location tracking (including international mobile subscriber identity (IMSI) Catchers and automatic license plate readers); or facial recognition.* Alternatively, “primarily used” could take the place of “exclusively used.”

AI is a fast-changing technology area with novel aspects. The Treasury Department welcomes comments on this category, including specific suggestions for additional approaches or definitions that should be considered in light of the national security concerns stated in section III.I.

The ANPRM seeks comment on this topic including:

40. Where possible, please provide empirical data about trends in U.S. investment into country of concern entities engaged in AI systems as described in section III.I. Please identify any technologies notable for the high volume or frequency of outbound investment activity or for the low volume or frequency of outbound investment activity. Based on this data, are there U.S. outbound investment trends in software that incorporates an AI system in countries of concern that would not be captured by the definitions in section III.I? If so, what are they?

41. Please identify any areas within this category where investments by U.S. persons in countries of concern may provide a strategic benefit to the United States, such that continuing such investment would benefit, and not impair, U.S. national security. Please also identify any key factors that affect the size of these benefits (*e.g.*, do these benefits differ in size depending on the application of the technology or product at issue?). Please be specific and where possible, provide supporting material, including empirical data, findings, and analysis in reports or studies by established organizations or research institutions and indicate material that is business confidential per the instructions at the beginning of this ANPRM.

42. As stated in section III.I, the Treasury Department is considering a single definition of an “AI system” whether for purposes of a notification or prohibition. Are there any changes or clarifications that should be made to the definition of “AI system”? What are the consequences and impacts of such a definition? Please provide supporting rationale(s) and data, as applicable, for any such proposed modification.

43. Given the nature of AI, the Treasury Department is considering the scope of transactions subject to notification and a prohibition by reference to certain end uses of the technologies or products that have national security implications. What are the general policy and practical considerations with an approach related to AI systems designed to be used for specific end uses? What alternative frameworks, if any, should the Treasury Department consider, and why?

44. With respect to AI systems designed to be used for specific end uses, what are the impacts or consequences of including the following end uses:

- Military;
- Government intelligence;
- Mass-surveillance;
- Cybersecurity applications;
- Digital forensics tools;
- Penetration testing tools;
- Control of robotic systems;
- Surreptitious listening devices that can intercept live conversations without the consent of the parties involved;
- Non-cooperative location tracking (including IMSI catchers and automatic license plate readers); or
- Facial recognition?

Should any of these items be clarified? Are there other end uses that should be considered?

45. To make sure the development of the software that incorporates an AI system is sufficiently tied to the end use, two primary alternatives are under consideration: “designed to be exclusively used” and “designed to be primarily used.” What are the considerations regarding each approach? Is there another approach that should be considered?

46. The Treasury Department is interested in ways to structure this element of the program that may increase efficiency for U.S. persons in

evaluating covered transactions. One approach may be to focus on transactions involving entities engaged in the development of software incorporating AI systems that are also identified on an existing list under a different U.S. Government program that has similar national security underpinnings. What are the considerations as to whether such an approach would be beneficial or not and why? What list or lists, if any, should the Treasury Department consider?

47. What analysis or considerations would a U.S. person anticipate undertaking to ascertain whether investments in this category are covered? In what manner would the investor approach this via due diligence with the target? What challenges could arise in this process for the investor and what clarification in the regulations would be helpful? How would U.S. persons anticipate handling instances where they attempt to ascertain the information but are unable to, or receive information they have doubts about?

48. What, if any, additional considerations not discussed in section III.I should the Treasury Department be aware of in considering a prohibition and notification framework as it relates to AI systems? What if any alternate frameworks should the Treasury Department consider, and why?

J. Knowledge standard.

The Treasury Department is considering regulations that condition a person's obligations on that person's knowledge of relevant circumstances – *e.g.*, where the U.S. person has actual or constructive knowledge that the covered foreign person is engaged in, or will foreseeably be engaged in, certain activity regarding the technology or product. One approach under consideration is to adopt a definition similar to that found in the EAR at

15 CFR 772.1, where “knowledge” means knowledge of a circumstance (including variations such as “know,” “reason to know,” or “reason to believe”) including not only positive knowledge that the circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of a person’s conscious disregard of facts known to that person and is also inferred from a person’s willful avoidance of facts.

The Treasury Department is considering adopting this knowledge standard across this program as described herein. This would mean that to be covered by the regulations, a U.S. person would need to know, or reasonably should know based on publicly available information and other information available through a reasonable and appropriate amount of due diligence, that it is undertaking a transaction involving a covered foreign person and that the transaction is a covered transaction. This knowledge standard would also apply to end uses as applicable to some of the definitions of covered national security technologies and products.

The ANPRM seeks comment on this topic including:

49. How could this standard be clarified for the purposes of this program?

What, if any, alternatives should be considered?

50. Is this due diligence already being done by U.S. persons in connection with transactions that would be covered transactions – *e.g.*, for other regulatory purposes, prudential purposes, or otherwise? If so, please explain. What, if any, third-party services are used to perform due diligence as it relates to transactions involving the country of concern or more generally?

51. What are the practicalities of complying with this standard? What, if any, changes to the way that U.S. persons undertake due diligence in a

country of concern would be required because of this standard? What might be the cost to U.S. persons of undertaking such due diligence? Please be specific.

K. Notification requirements; form, content, and timing.

The Order states that the regulations shall identify categories of notifiable transactions that may contribute to the threat to the national security of the United States identified under the Order and require U.S. persons to notify the Treasury Department of each such transaction.

The Treasury Department is considering requiring U.S. persons to furnish information in the form of a notification for applicable covered transactions in semiconductors and microelectronics and AI systems that includes, but is not limited to: (i) the identity of the person(s) engaged in the transaction and nationality (for individuals) or place of incorporation or other legal organization (for entities); (ii) basic business information about the parties to the transaction, including name, location(s), business identifiers, key personnel, and beneficial ownership; (iii) the relevant or expected date of the transaction; (iv) the nature of the transaction, including how it will be effectuated, the value, and a brief statement of business rationale; (v) a description of the basis for determining that the transaction is a covered transaction – including identifying the covered national security technologies and products of the covered foreign person; (vi) additional transaction information including transaction documents, any agreements or options to undertake future transactions, partnership agreements, integration agreements, or other side agreements relating to the transaction with the covered foreign person and a description of rights or other involvement afforded to the U.S. person(s); (vii) additional detailed information about the covered foreign person, which could include products, services, research and development, business plans, and commercial and government relationships

with a country of concern; (viii) a description of due diligence conducted regarding the investment; (ix) information about previous transactions made by the U.S. person into the covered foreign person that is the subject of the notification, as well as planned or contemplated future investments into such covered foreign person; and (x) additional details and information about the U.S. person, such as its primary business activities and plans for growth.

With regard to the time frame in which U.S. persons must file notifications, the Treasury Department is considering requiring that notifications be filed no later than 30 days following the closing of a covered transaction.

Information would be collected via a portal hosted on the Treasury Department's website to allow U.S. persons to electronically file notifications. The Treasury Department is considering the appropriate confidentiality requirements and restrictions around the disclosure of any information or documentary material submitted or filed with the Treasury Department pursuant to the implementing regulations. The Treasury Department is considering an approach whereby any information or documentary material submitted or filed would not be made public unless required by law, except that the following could be disclosed: (i) information relevant to any administrative or judicial action or proceeding, including the issuance of any penalties; (ii) information to Congress or to any duly authorized committee or subcommittee of Congress; (iii) information important to the national security analysis or actions of the Treasury Department to any domestic government entity, or to any foreign governmental entity of a United States ally or partner, under the exclusive direction and authorization of the Secretary, only to the extent necessary for national security purposes, and subject to appropriate confidentiality and classification requirements; (iv) information relevant to any enforcement action under the

Order and implementing regulations; and (v) information that the parties have consented to be disclosed to third parties.

The ANPRM seeks comment on this topic including:

52. How could the categories of information requested be clarified? Where might there be anticipated challenges or difficulties in furnishing the requested information? Please be specific and explain why.

53. What additional information, if any, should the Treasury Department collect in support of the objectives of this program and informing future policy development?

54. If there are multiple U.S. persons involved in a transaction, would there be benefit to a process that allows a combined notification or should each U.S. person be required to make a separate notification?

55. What are the considerations with respect to a certification requirement as to the accuracy of the information based on the knowledge of the U.S. person?

56. The Treasury Department is considering encouraging joint filings by the relevant U.S. person and covered foreign person. How might joint filings enhance the fidelity of the information provided? What practicalities should be considered?

57. Should the Treasury Department require prior notification of a covered transaction (*i.e.*, pre-closing) or permit post-closing notification within a specified period, such as 30 days? What are the anticipated consequences and impacts of these alternatives? Should the notification period be shorter or longer, and why?

58. How could the specific information requirements affect transaction activity, if at all? Please be specific.

59. How should the Treasury Department address the scenario where a transaction for which notification was provided was actually a prohibited transaction? How should the Treasury Department consider options such as ordering divestment and/or the issuance of civil monetary penalties?

60. How should the Treasury Department address the scenario where a U.S. person is unable to gain the knowledge necessary to meaningfully respond to the information requirements? What might a U.S. person do in such a circumstance?

61. Would U.S. persons ordinarily rely on legal counsel to assemble and submit the required information for notification? What factors might inform parties' decision as to whether to engage legal counsel?

L. Knowingly directing transactions.

The Order states that “the Secretary [of the Treasury] may prohibit United States persons from knowingly directing transactions if such transactions would be prohibited transactions pursuant to this order if engaged in by a United States person.” Pursuant to this authority, the Treasury Department is considering defining “knowingly” for purposes of this provision in the Order to mean that the U.S. person had actual knowledge, or should have known, about the conduct, the circumstance, or the result. And the Treasury Department is considering defining “directing” to mean that a U.S. person *orders, decides, approves, or otherwise causes to be performed a transaction that would be prohibited under these regulations if engaged in by a U.S. person*. The Treasury Department is considering excluding from this definition certain identified conduct that is attenuated from the risks to U.S. national security identified in the Order, including the provision of a

secondary, wraparound, or intermediary service or services such as third-party investment advisory services, underwriting, debt rating, prime brokerage, global custody, or the processing, clearing, or sending of payments by a bank, or legal, investigatory, or insurance services.

This approach is narrower than the authority afforded to the Treasury Department under the Order. The Treasury Department intends to use the authority to tailor the regulations to prevent loopholes and target the identified national security threat by prohibiting U.S. person activity such as:

- Scenario 1: A U.S. person General Partner manages a foreign fund that undertakes a transaction that would be prohibited if performed by a U.S. person.
- Scenario 2: A U.S. person is an officer, senior manager, or equivalent senior-level employee at a foreign fund that undertakes a transaction at that U.S. person's direction when the transaction would be prohibited if performed by a U.S. person.
- Scenario 3: Several U.S. person venture partners launch a non-U.S. fund focused on undertaking transactions that would be prohibited if performed by a U.S. person.

By contrast, the Treasury Department currently does not intend “knowingly directing” transactions to cover scenarios such as those described below, and is considering explicitly excluding them from this prohibition:

- Scenario 4: A U.S. bank processes a payment from a U.S. person into a covered foreign person as part of that U.S. person's engagement in a prohibited transaction. (Note, while the U.S. bank's activity would not be prohibited, the U.S. person's would be.)
- Scenario 5: A U.S. person employed at a foreign fund signs paperwork approving the foreign fund's procurement of real estate for its operations. The same fund invests into a person of a country of concern that would be a prohibited transaction if performed by a U.S. person.
- Scenario 6: A U.S. person serves on the management committee at a foreign fund, which makes an investment into a person of a country of concern that would be a prohibited transaction if performed by a U.S. person. While the management committee reviews and approves all investments made by the fund, the U.S. person has recused themselves from the particular investment.

The ANPRM seeks comment on this topic including:

62. What modifications, if any, should be made to the proposed definition of “knowingly directing” to enhance clarity or close any loopholes?
63. What, if any, unintended consequences could result from the proposed definition? What is the proposed definition’s likely impact on U.S. persons and U.S. investment flows? If you believe there will be impacts on U.S. persons and U.S. investment flows, please provide specific examples or data.
64. What, if any, alternate approaches should the Treasury Department consider in order to prevent the conduct enumerated in scenarios 1, 2, and 3 in section III.L?
65. If you believe any additional secondary or intermediate services not discussed in section III.L should be explicitly excluded from consideration, please explain why a given service should be excluded.
66. Are there other advisory or other similar services provided in the context of foreign investment into a country of concern in the technology and product areas described in this ANPRM that may pose a threat to U.S. national security and should therefore be considered?

M. Controlled foreign entities – obligations of U.S. persons.

The Order states that the Secretary may require U.S. persons to: (1) “provide notification to the Department of the Treasury of any transaction by a foreign entity controlled by such United States person that would be a notifiable transaction if engaged in by a United States person”; and (2) “take all reasonable steps to prohibit and prevent any transaction by a foreign entity controlled by such United States person that would be a prohibited transaction if engaged in by a United States person.”

These two components serve different objectives, but they are implemented using a similar mechanism that places responsibility with the U.S. parent, and they share certain definitions and concepts. Pursuant to this authority, the Treasury Department is considering rules that would place certain obligations on U.S. persons related to foreign entities that they control. The Treasury Department is considering defining a “controlled foreign entity” as a foreign entity in which a U.S. person owns, directly or indirectly, a 50 percent or greater interest.

Further, the Treasury Department is considering whether and how to define “all reasonable steps.” These could include factors such as (i) relevant binding agreements between a U.S. person and the relevant controlled foreign entity or entities; (ii) relevant internal policies, procedures, or guidelines that are periodically reviewed internally; (iii) implementation of periodic training and internal reporting requirements; (iv) implementation of effective internal controls; (v) a testing and auditing function; and (vi) the exercise of governance or shareholder rights, where applicable.

The ANPRM seeks comment on this topic including:

67. What are the considerations as to whether a foreign entity is a “controlled foreign entity” of a U.S. person, as the Treasury Department is considering defining it? What if any changes should be made to the definition of “controlled foreign entity” to make its scope and application clearer? Why? What, if any, changes should be made to broaden or narrow it? Why?

68. What, if any, changes should be made to the factors informing “all reasonable steps” in order to make its scope and application clearer? Why? What would be the consequences and impacts of adopting these factors?

N. National interest exemption.

The Order authorizes the Secretary to “exempt from applicable prohibitions or notification requirements any transaction or transactions determined by the Secretary, in consultation with the heads of relevant agencies, as appropriate, to be in the national interest of the United States.”

While the Treasury Department is not considering a case-by-case determination on an individual transaction basis as to whether the transaction is prohibited, must be notified, or is not subject to the program, the Treasury Department likely would need to review the facts and circumstances of the individual transaction subject to consideration for a national interest exemption.

The Treasury Department is considering exempting from prohibition certain transactions in exceptional circumstances where the Secretary determines, in consultation with the heads of relevant departments and agencies, as appropriate, and in her sole discretion, that a particular transaction that would otherwise be a prohibited transaction should be permitted because it either (i) provides an extraordinary benefit to U.S. national security; or (ii) provides an extraordinary benefit to the U.S. national interest in a way that overwhelmingly outweighs relevant U.S. national security concerns.

The Secretary may request detailed documentation from the relevant U.S. person(s) involved in such proposed transaction(s) in order to consider whether to grant an exemption. The Treasury Department is not considering granting retroactive waivers or exemptions (*i.e.*, waivers or exemptions after a prohibited transaction has been completed).

The ANPRM seeks comment on this topic including:

69. What would be the consequences and impacts of allowing for exemptions for certain transactions that ordinarily would be prohibited? What, if any, additional or alternate criteria should be enumerated for an exemption?

70. What should the Treasury Department require from the U.S. person to substantiate the need for an exemption from the prohibition?

O. Compliance; record-keeping.

The Treasury Department wishes to achieve widespread compliance, and to gather the information necessary to administer and enforce the program, without unduly burdening U.S. persons or discouraging transactions the program is not intended to address. The Treasury Department therefore seeks comment on the compliance and record-keeping controls that may be put in place under the program.

The ANPRM seeks comment on this topic including:

71. What new compliance and recordkeeping controls will U.S. persons anticipate needing to comply with the program as described in this ANPRM? To what extent would existing controls for compliance with other U.S. Government laws and regulations be useful for compliance with this program?

72. What additional information will U.S. persons need to collect for compliance purposes as a result of this program?

P. Penalties.

The Order requires the Secretary to investigate, in consultation with the heads of relevant agencies, as appropriate, violations of the Order or the regulations and pursue available civil penalties for such violations. The Order also explicitly prohibits “any conspiracy formed to violate” the Order or implementing regulations as well as “any action that evades, has the purpose of evading, causes a violation of, or attempts to violate” the Order or implementing regulations. It authorizes the Secretary to “refer potential criminal violations of this order or the regulations issued under this order to the Attorney General.”

Further, under the Order, consistent with IEEPA, the Secretary can “nullify, void, or otherwise compel the divestment of any prohibited transaction entered into after the effective date” of the implementing regulations. The Treasury Department would not use this authority to unwind a transaction that was not prohibited at the time it was completed.

The Treasury Department is considering penalizing the following with a civil penalty up to the maximum allowed under IEEPA: (i) material misstatements made in or material omissions from information or documentary material submitted or filed with the Treasury Department; (ii) the undertaking of a prohibited transaction; or (iii) the failure to timely notify a transaction for which notification is required.

The ANPRM seeks comment on this topic including:

73. How, if at all, should penalties and other enforcement mechanisms (such as ordering the divestment of a prohibited transaction) be tailored to the size, type, or sophistication of the U.S. person or to the nature of the violation?

74. What factors should the Treasury Department analyze when determining whether to impose a civil penalty, as well as the amount?

75. What transaction data sources should the Treasury Department use to monitor compliance with this program?

76. What process should the Treasury Department institute in the event of a required divestment order?

Q. Overarching and additional inquiries.

The Treasury Department welcomes comments and views from a wide range of stakeholders on all aspects of how the Secretary should implement the Order. A non-exclusive list of overarching and additional questions for comment is below:

77. The Order identifies semiconductors and microelectronics, quantum information technologies, and AI systems as technologies and products covered by this program because of their critical role in enhancing the military, intelligence, surveillance, or cyber-enabled capabilities of countries of concern in ways that threaten the national security of the United States. Are there questions about why and how these categories fit into the objectives of the program? Are there specific technologies and products that should be considered and not already discussed in this ANPRM?

78. In light of the Order, what structural features should this program include that are not already previewed in this ANPRM, and why?

79. What would be the major risks or obstacles to the effective operation of the program, as proposed? Where possible, please provide supporting material, including empirical data, findings, and analysis in reports or studies by established organizations or research institutions, to illustrate these risks.

80. How significant are the anticipated costs and burdens of the regulations the Treasury Department is proposing? What types of U.S. businesses or firms (*e.g.*, small businesses) would be particularly burdened by the program? How can such burdens be alleviated, consistent with the stated objectives of the program?

81. The Treasury Department is interested in exploring public insights and supporting literature associated with outbound investment, to complement our own research to date. Have researchers (including in the fields of political science, international relations, national security law, economics, corporate finance, and other related fields) studied the national security

costs and benefits of U.S. investment in countries of concern? Please provide any insights (and supporting literature) that characterize these costs and benefits and/or provides conclusions about net effects.

82. How might firms approach compliance related to regulations issued under this Order? What types of requirements would lead to higher compliance costs for firms? What alternatives would result in lower compliance costs? Are there any baseline costs that firms would face regardless of choices the Treasury Department makes during rulemaking? Where possible, please quantify these costs (rough estimates or ranges are helpful as well).

83. The Treasury Department is interested in understanding the risks of evasion and avoidance; how might U.S. persons or investment targets evade or avoid these regulations, and how should the Treasury Department account for these possible behaviors in the design of the program?

Paul M. Rosen,
Assistant Secretary for Investment Security.