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REVERSE CFIUS V1: PROPOSED U.S. OUTBOUND INVESTMENT RESTRICTIONS FOR HI-TECH SECTORS IN CHINA, HONG KONG, AND MACAU

On August 9, 2023, the Biden Administration finally issued a long-anticipated **Executive Order** targeting outbound investments in sensitive sectors in China, Macau and Hong Kong. The same day, the Treasury Department ("Treasury") issued a corresponding Advance Notice of Proposed Rulemaking ("the ANPRM" or "Proposed Rule") describing the contours of proposed implementing regulations.^[1]

The EO, entitled "Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern" ("the Outbound Investment EO" or "EO"),^[2] directs Treasury to issue regulations requiring "United States persons" to refrain from some, and provide notification of other, investments involving parties associated with China, Hong Kong, or Macau, and engaged in certain activities related to advanced semiconductors, super-computers, quantum computers/sensors/networks/communications and artificial intelligence (AI). If finalized in their current form, the EO and implementing regulations will primarily affect U.S. person investors, joint venturers, and debt financiers, but will also reach foreign entities owned 50 percent or more by U.S. persons, and foreign entities

engaged in investments "knowingly directed" by U.S. persons. Consequences of non-compliance could be severe, including voiding of improper investments, civil financial penalties exceeding \$350,000 or twice the value of the investment, or criminal penalties and jail time for willful violations.

The ANPRM invites industry input on over 80 questions regarding the scope of the proposed regulations. Relevant comments outside the scope of the questions are also invited. **The Proposed Rule has potentially very significant consequences for U.S. outbound investment, and industry should take advantage of the opportunity to inform Treasury's thinking on the issue and formulation of the final rule.** Feedback on the Proposed Rule must be submitted within 45 days of the official publication of the ANPRM in the Federal Register – i.e., **by September 28, 2023**. Electronic submission via <https://www.regulations.gov> is encouraged, although submission by mail is also possible. Important instructions for preserving the confidentiality of any business confidential information including in comments are set out in the ANPRM and should be carefully reviewed.

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¹ The Proposed Rule was initially released in unpublished form and then formally published in the Federal Register on August 14, at **88 FR 54961**. Treasury has also collected materials relevant to the EO and proposed rulemaking on its new **Outbound Investment Program webpage**.

² The EO was immediately released on the White House website and then formally published in the Federal Register, as Executive Order 14105, on August 14, 2023, at **88 FR 54867**.

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In the following pages, we first provide a bottom line on the types of investments that would be subject to regulation if the Proposed Rule were to become final as written. We then provide a more detailed summary of the EO and Proposed Rule. The ANPRM is a little hard to navigate, so to save our readers' scrolling fingers (and patience!), we also provide, as appendices, a quick reference chart listing key definitions in the EO and the ANPRM, and a consolidated list of the 83 questions on which Treasury specifically invited comment.

If you would like assistance in drafting and submitting commentary or have questions about how to prepare to comply with the forthcoming regulations, please contact a member of **Wiggin and Dana's International Trade Compliance team**. Although this rulemaking applies to certain specific products and technologies, it may serve as a template for future application of the outbound investment rule to other critical and emerging technologies (see **Critical and Emerging Technologies List Update issued by the White House in February 2022**).

1. Bottom Line: Prohibited and Notifiable Investments Under the Proposed Rule

Putting together all the pieces and boiling it down to focus on the investments parties will need to focus on, as currently envisioned by Treasury, the proposed regulations would either prohibit or require notification to Treasury of equity acquisitions, debt financing with convertible equity, and creation of new entities and joint ventures that satisfy the following criteria:

- (1) Made after the effective date of the implementing regulations; ^[3]
- (2) Made by, or ordered, decided, approved, or otherwise caused, by U.S. persons (including persons located in the United States) or a U.S. person's 50% or more owned foreign subsidiary (excluding situations where the U.S. person's involvement is limited to 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);
- (3) Provided directly or indirectly to any of the following:
 - Individuals who are citizens or permanent residents of China, Hong Kong, or Macau – and who are not also U.S. persons;
 - Entities organized under the laws of, or having a principal place of business in, China, Hong Kong, or Macau;
 - Government entities of China, Hong Kong, or Macau;
 - Parties owned, controlled, directed by, or acting for or on behalf of the governments of China, Hong Kong, or Macau;
 - Entities in which parties described above individually or collectively hold a direct or indirect ownership interest of 50 percent or more;

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³ The ANPRM states that the program will not apply retroactively, but warns that, after the effective date of the regulations, Treasury may request information about investments satisfying the definition of "covered transactions" that were completed or agreed to after the date of the EO but before the final regulations "to better inform the development and implementation of the program." The ANPRM also states that Treasury is considering how to treat follow-on investments related to original investments that occurred prior to the effective date of the implementing regulations. Therefore, investors should be carefully considering investments, debt financings, and joint ventures in process now. Indeed, separate from the EO and the Proposed Rule, the House Select Committee on the Chinese Communist Party has recently issued a number of public demands to U.S. entities for information regarding a range of alleged recent investments, ventures and partnerships involving China, creating reputational and other risks that companies should consider. (Links to the Select Committee letters are provided in Section 3F, at the end of this Advisory.)

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- Any entity that has direct or indirect subsidiaries or branches that fall within the foregoing categories, where such subsidiaries or branches individually or collectively make up more than 50 percent of the entity's consolidated revenue, net income, capital expenditure, or operating expenses.
- (4) If the U.S. person knows or reasonably should know that the target (or its subsidiaries or branches described above) is or will be engaged in any of the following activities:

Category	Specified Activity	Consequences
Integrated Circuits	Development or production of electronic design automation software designed to be exclusively used for integrated circuit design.	PROHIBITION
Integrated Circuits	Development or production of front-end semiconductor fabrication equipment designed to be exclusively used for the volume fabrication of integrated circuits.	PROHIBITION
Integrated Circuits	Design of integrated circuits that exceed the thresholds in Export Control Classification Number (ECCN) 3A090, or integrated circuits designed for operation at or below 4.5 Kelvin.	PROHIBITION
Integrated Circuits	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.	PROHIBITION
Integrated Circuits	Packaging of integrated circuits that support the three-dimensional integration of integrated circuits, using silicon vias or through mold vias, where "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.	PROHIBITION

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Category	Specified Activity	Consequences
Supercomp.	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.	PROHIBITION
Quantum Comp.	Production of a quantum computer, dilution refrigerator, or two-stage pulse tube cryocooler, where "Quantum computer" is defined as a computer that performs computations that harness the collective properties of quantum states, such as superposition, interference, or entanglement.	PROHIBITION
Quantum Comp.	Development of a quantum sensing platform designed to be exclusively used for military end uses, government intelligence, or mass-surveillance end uses.	PROHIBITION
Quantum Comp.	Development of a quantum network or quantum communication system designed to be exclusively used for secure communications, such as quantum key distribution.	PROHIBITION
AI	Development of software that incorporates an AI system and is designed to be exclusively used (or, possibly, depending on the direction Treasury takes in finalizing the regulations after notice and comment, "primarily used") for military, government intelligence, or mass-surveillance end uses, where "AI system" means an engineered or machine-based system, designed to operate with varying levels of autonomy, that can, for a given set of objectives, generate outputs such as predictions, recommendations, or decisions influencing real or virtual environments.	PROHIBITION
Integrated Circuits	Design, fabrication, or packaging of integrated circuits that are outside the scope of the transaction prohibitions described above.	NOTIFICATION
AI	Development of software that incorporates an AI system and is designed to be exclusively used (or, possibly, depending on the direction Treasury takes in finalizing the regulations after notice and comment, "primarily 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.	NOTIFICATION

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FOR HI-TECH SECTORS IN CHINA, HONG KONG, AND MACAU**2. The Executive Order**

The EO directs Treasury to issue regulations requiring “United States persons” to (1) refrain from engaging in certain investments involving “covered foreign persons” (prohibited transactions), and (2) notify Treasury about other investments involving such persons (notifiable transactions).

The focus of the EO are investments in parties associated with a “country of concern” – defined by the EO as the People’s Republic of China, Hong Kong, and Macau – but only to the extent that those parties are engaged in certain activities involving “covered national security technologies”, which the EO identifies as “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.”

Foreign investors also need to pay careful attention to the EO and Proposed Rule, because the EO also directs Treasury to regulate outbound investments by foreign entities, if United States persons “knowingly direct” those investments, or if the foreign person is controlled by a United States person.

The EO does not impose a deadline for issuance of the regulations. However, it directs Treasury to report within one year of issuing regulations, and annually thereafter, on the effectiveness of the measures and on any recommended modifications or creation or expansion of other federal programs to address the threat to national security identified in the EO.

3. The Proposed Rule/ANPRM

The ANPRM describes Treasury’s proposal for regulations implementing the EO. The Proposed Rule provides a number of important clarifications regarding the scope of the restrictions on outbound investment, narrowing certain aspects of the EO, while adopting broad definitions of other terms.

The Proposed Rule is complex but, boiling it down, outbound U.S. investments in advanced technology companies associated with China, Hong Kong, and Macau that would either be prohibited or require notification to Treasury could be identified by asking four questions about a proposed transaction:

- (1) Whether the investment transaction is a “covered transaction,” as defined?
- (2) Whether the investment is made by, or – with important limitations discussed below – ordered, decided, approved, or otherwise caused, by U.S. persons (including persons located in the United States) or a U.S. person’s 50% or more owned foreign subsidiary?
- (3) Whether the investment target is an entity associated in relevant ways with China, Hong Kong, or Macau? and
- (4) Whether the investment target is engaged in specified activities relating to advanced semiconductors, supercomputers, quantum computers/sensors/networks/communications or artificial intelligence (AI)?

We examine each of the following criteria, and then discuss the consequences if an investment is subject to the regulations.

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The ANPRM proposes a definition of “covered transaction” that would be used to define both prohibited and notifiable transactions. Under the proposed rule, “covered transaction” would be defined as follows:

- (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.

With the inclusion of debt financing and joint ventures, the scope of “covered transactions” is significantly broader than reported in the broader press – which focused on venture capital or private equity investments – although not surprising to those familiar with the United States’ in-bound foreign investment (CFIUS) regime.

The ANPRM proposes a number of important exclusions from the definition of “covered transaction.”

First, the ANPRM states that Treasury “does not intend the definition of “covered transaction” ... 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.”

Second, the ANPRM proposes a definition of “Excluded Transaction” that does not include the interpretively excluded items listed above, but would exempt certain important categories of transactions that otherwise would fall within the definition of “covered transaction,” as detailed in the box pictured below.

In summary, the transactions that would be included or excluded from the scope of “covered transactions” are as follows:

INCLUDED

- ✓ Acquisition of an equity interest or contingent equity interest in a covered foreign person
- ✓ Provision of debt financing to a covered foreign person where such debt financing is convertible to an equity interest
- ✓ Greenfield investment that could result in the establishment of a covered foreign person
- ✓ 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

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- ✘ University-to-university research collaborations
- ✘ Contractual arrangements for the procurement of material inputs for any of the covered national security technologies or products (such as raw materials)
- ✘ Intellectual property licensing arrangements
- ✘ Services secondary to a transaction, including the following examples set forth in the rule: bank lending; processing, clearing, or sending of payments by a bank; underwriting; debt rating; prime brokerage; global custody; equity research or analysis

EXCLUDED BY SEPARATE DEFINITION OF "EXCLUDED TRANSACTION"

- ✘ A transaction made pursuant to a binding, uncalled capital commitment entered into before the date of the EO (August 9, 2023)
- ✘ An investment into a publicly traded security (with "security" defined as set forth in section 3(a)(10) of the Securities Exchange Act of 1934) that does not afford any rights that go beyond standard minority shareholder protections (including board seat, observer seat, board nomination rights, or any other involvement beyond the voting of shares, in substantive business decisions, management, or strategy)
- ✘ An investment 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 that does not afford any rights beyond standard minority shareholder protections (see above)
- ✘ An investment made as a limited partner into a venture capital fund, private equity fund, fund of funds, or other pooled investment funds, where (1) the investment is below a *de minimis* threshold as yet to be determined, and (2) the limited partner's contribution is solely capital into a limited partnership structure and (3) the limited partner cannot make managerial decisions, is not responsible for any debts beyond its investment, 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 does not otherwise have any rights that go beyond standard minority shareholder protections (see above)
- ✘ 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
- ✘ An intracompany transfer of funds from a U.S. parent company to a subsidiary located in a country of concern

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If a transaction is captured by the regulations, the Proposed Rule contemplates a waiver process for “exceptional circumstances,” where the Government determines that a particular transaction 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.” Such waivers would have to be requested before the transaction occurs and would require detailed documentation. Retroactive waivers would not be available.

B. Whether the investment is made or directed by a U.S. Person. (Foreign investors beware, the regulations would capture some activity by foreign persons too.)

As directed by the EO, the Proposed Rule would regulate the conduct of “United States persons”, and the Proposed Rule would adopt the EO’s very standard definition of 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.”

However, the EO also directs Treasury to regulate outbound investments by foreign entities, if United States persons “knowingly direct” those investments, or if the foreign person is “controlled by” a United States person.

The Proposed Rule would take a relatively narrow view of when a foreign entity is “controlled by” a United States person, defining the term “controlled foreign entity” as a foreign entity in which a U.S. person owns,

directly or indirectly, a 50 percent or greater interest. Accordingly, a U.S. person’s 50 percent or greater subsidiaries would be subject to the same prohibitions and notification requirements as their U.S. parent. As required by the EO, U.S. parents would have the responsibility to take “all reasonable steps” to ensure compliance by their controlled foreign entities. The Proposed Rule states that Treasury is considering whether and how to define “all reasonable steps” and indicates that Treasury would consider “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.”

With respect to regulating transactions “knowingly directed” by U.S. persons, the ANPRM proposes to define “knowingly” to mean that “the U.S. person had actual knowledge, or should have known, about the conduct, the circumstance, or the result,” and to define “directing” to mean that a U.S. person “orders, decides, approves, or otherwise causes” performance of the subject transaction. Importantly, because “U.S. person” is defined to include any person located in the United States, transactions by foreign parties could become subject to the rules if ordered, decided, approved, or otherwise caused by a non-U.S. manager temporarily located in the United States at the time of the decision/approval, etc.

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The Proposed Rule imposes meaningful limits on the circumstances in which U.S. person “direction” would subject foreign party investments to regulation by excluding “certain identified conduct that is attenuated from the risks to U.S. national security,” 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.” It also provides the following examples of activities that would and would not be regulated under the “knowingly directed” rubric:

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.

Regulated

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.

Regulated

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.

Regulated

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.

Not Regulated

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.

Not Regulated

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.

U.S. Bank’s conduct
Not Regulated, but
U.S. Payor’s conduct
Regulated

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The EO directs Treasury to regulate outbound investment in “covered foreign persons” which the EO defines as persons (i) “of a country of concern” – defined as China and its special administrative regions of Hong Kong and Macau – and (ii) “engaged in activities ... involving one or more covered national security technologies and products.” Identifying problematic investment targets therefore requires consideration of two factors: (1) the target’s connection to China, Hong Kong, or Macau, and (2) the target’s involvement in certain advanced technology-related activities. This section focuses on the first factor: the target’s connection to China, Hong Kong, or Macau.

The Proposed Rule would significantly expand the EO’s definition of a “covered foreign person” to encompass not only (i) a person of a country of concern that is engaged in an identified activity with respect to a covered national security technology or product, but also (ii) a person of a country of concern that a U.S. person *knows or should know will be* engaged in such activity, and (iii) a person that has *direct or indirect subsidiaries that fall into one of the above-referenced categories* and that, individually or in the aggregate, comprise more than 50 percent of that person’s consolidated revenue, net income, capital expenditure, or operating expenses.

A “person of a country of concern” would in turn be defined as: (i) 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; (ii) 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; (iii) 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 (iv) any entity in which a person or persons identified in items (i) through (iii) holds individually or in the aggregate, directly or indirectly, an ownership interest equal to or greater than 50 percent. (This definition tracks the definition in the EO, except that it limits coverage of entities based on ownership to situations where one or more persons of a country of concern hold interests of 50 percent or more).

Putting this together, investments would require further analysis under the rule if they involve targets that have the following connections to China, Hong Kong, or Macau:

- Target is an individual who is a citizen or permanent resident of China, Hong Kong, or Macau – and who is not also a U.S. person;
- Target is an entity organized under the laws of, or having a principal place of business in, China, Hong Kong, or Macau;
- Target is a government entity of China, Hong Kong, or Macau;
- Target is owned, controlled, directed by, or acting for or on behalf of the governments of China, Hong Kong, or Macau;
- Target is an entity in which parties described above individually or collectively hold a direct or indirect ownership interest of 50 percent or more; or

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- Target is an entity that has direct or indirect subsidiaries or branches that fall within the foregoing categories, where such subsidiaries or branches individually or collectively make up more than 50 percent of the entity's consolidated revenue, net income, capital expenditure, or operating expenses.

Accordingly, one key implication of the definition of covered foreign person proposed in the ANPRM is that it would lead to regulation of investments in certain entities located outside China, Hong Kong, or Macau. In some cases, such entities would be captured based on majority-ownership by individuals or entities of China, Hong Kong, or Macau, but in other cases the catch would be harder to identify, being based on a target having direct or indirect subsidiaries that are organized in those countries and that contribute more than 50 percent of the target's net income, capital expenditure, or operating expenses.

Clearly, significant diligence will be required to accurately identify such risks.

D. Whether the investment target is engaged in specified activities relating to advanced semiconductors, supercomputers, quantum computers/sensors/networks/comms or artificial intelligence (AI).

The second element necessary to make a target into a "covered foreign person" is that the target be engaged in identified activity with respect to a covered national security technology or product. The ANPRM takes a limited and targeted approach to this criterion. It does so not by proposing a revised definition of covered national security technologies or products, but rather by identifying specific categories of business activity by targets that will trigger either a prohibition on investment or a notification requirement, as follows (note, this table is the same as the one provided in the bottom-line summary at the top of this Advisory, but is reproduced here for ease of reference):

Category	Specified Activity	Consequences
Integrated Circuits	Development or production of electronic design automation software designed to be exclusively used for integrated circuit design.	PROHIBITION
Integrated Circuits	Development or production of front-end semiconductor fabrication equipment designed to be exclusively used for the volume fabrication of integrated circuits.	PROHIBITION
Integrated Circuits	Design of integrated circuits that exceed the thresholds in Export Control Classification Number (ECCN) 3A090, or integrated circuits designed for operation at or below 4.5 Kelvin.	PROHIBITION

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Category	Specified Activity	Consequences
Integrated Circuits	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.	PROHIBITION
Integrated Circuits	Packaging of integrated circuits that support the three-dimensional integration of integrated circuits, using silicon vias or through mold vias, where "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.	PROHIBITION
Supercomp.	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.	PROHIBITION
Quantum Comp.	Production of a quantum computer, dilution refrigerator, or two-stage pulse tube cryocooler, where "Quantum computer" is defined as a computer that performs computations that harness the collective properties of quantum states, such as superposition, interference, or entanglement.	PROHIBITION
Quantum Comp.	Development of a quantum sensing platform designed to be exclusively used for military end uses, government intelligence, or mass-surveillance end uses.	PROHIBITION

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Category	Specified Activity	Consequences
Quantum Comp.	Development of a quantum network or quantum communication system designed to be exclusively used for secure communications, such as quantum key distribution.	PROHIBITION
AI	Development of software that incorporates an AI system and is designed to be exclusively used (or, possibly, depending on the direction Treasury takes in finalizing the regulations after notice and comment, "primarily used") for military, government intelligence, or mass-surveillance end uses, where "AI system" means an engineered or machine-based system, designed to operate with varying levels of autonomy, that can, for a given set of objectives, generate outputs such as predictions, recommendations, or decisions influencing real or virtual environments.	PROHIBITION
Integrated Circuits	Design, fabrication, or packaging of integrated circuits that are outside the scope of the transaction prohibitions described above.	NOTIFICATION
AI	Development of software that incorporates an AI system and is designed to be exclusively used (or, possibly, depending on the direction Treasury takes in finalizing the regulations after notice and comment, "primarily 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.	NOTIFICATION

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REVERSE CFIUS V1: PROPOSED U.S. OUTBOUND INVESTMENT RESTRICTIONS
FOR HI-TECH SECTORS IN CHINA, HONG KONG, AND MACAU**D. The Investment is Subject to the Regulations.
Now What?**

The Proposed Rule would require parties to refrain from engaging in any prohibited investment, as described above.

For investments that trigger notification requirements, the Proposed Rule provides the following details:

- Timing of notification:
 - No later than 30 days following the closing of a covered transaction. (However, the calls for comment included in the ANPRM make it clear that Treasury might instead require prior notification of a covered transaction (i.e., pre-closing), or might change the proposed 30-day period for a post-closing notification.)
- Content of notification:
 - (i) the identity of the person(s) engaged in the transaction, including 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.

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REVERSE CFIUS V1: PROPOSED U.S. OUTBOUND INVESTMENT RESTRICTIONS
FOR HI-TECH SECTORS IN CHINA, HONG KONG, AND MACAU

- Manner of notification:
 - Via a portal hosted on the Treasury Department's website
 - Information provided would be exempt from public disclosure except as required by law and/or if for:
 - (i) relevant to any administrative or judicial action or proceeding, including the issuance of any penalties;
 - (ii) reporting to Congress or to any duly authorized committee or subcommittee of Congress;
 - (iii) 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) relevant to any enforcement action under the Order and implementing regulations;
 - (v) the parties have consented that the information be disclosed to third parties.
- Treasury is considering encouraging joint filings by the U.S. party and covered foreign persons. The calls for comment indicate that Treasury is aware there could be more complex scenarios, for example, involving multiple U.S. parties, and is eager to hear more from industry on this point.

In addition to abstaining from prohibited investments and making timely notification of other covered investments, the ANPRM indicates that recordkeeping obligations will attach, but does not provide any details.

E. Violations and Consequences

Under the Proposed Rule, parties would commit a violation of the regulations by: (i) undertaking a prohibited transaction; (ii) failing to make timely notification of a transaction for which notification is required; or (iii) making material misstatements or omissions in material submitted to Treasury. Causing a violation, and conspiracy, evasion, and attempts would also be actionable.

However, unlike certain other regulatory regimes, such as U.S. sanctions, which adopt a strict liability approach, under which parties may be held civilly liable even for unwitting violations, the ANPRM indicates that Treasury "is considering conditioning obligations under the regulations on a person's 'knowledge'." The ANPRM further indicates that Treasury would adopt a definition of "knowledge" similar to that in the Export Administration Regulations (EAR), which the ANPRM says would mean that "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." Further, the same knowledge standard would apply in cases where a prohibition or notification requirement depends on the end use of a covered national security technology or product.

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REVERSE CFIUS V1: PROPOSED U.S. OUTBOUND INVESTMENT RESTRICTIONS FOR HI-TECH SECTORS IN CHINA, HONG KONG, AND MACAU

In terms of enforcement, the Proposed Rule would empower Treasury to nullify, void, or otherwise compel the divestment of any prohibited transaction entered into after the effective date of the implementing regulations. In addition, Treasury could impose civil penalties up to the maximum permitted under the International Emergency Economic Powers Act (IEEPA) (currently the greater of \$356,579 or twice the value of the violative transaction, subject to annual adjustment for inflation) for: (i) undertaking a prohibited transaction; (ii) failure to timely notify a transaction for which notification is required; (iii) material misstatements or omissions in material submitted to Treasury. Conspiracy to violate, evasion, causing a violation, or attempting to violate would also be actionable. Willful violations would expose the parties to criminal liability, involving referral to the Department of Justice, fines of up to \$1,000,000 and imprisonment (for natural persons) for up to twenty years.

F. What Should Investors and Companies that Engage in Possible Covered Transactions Do Now?

As this rulemaking is broad, novel and may serve as the template for later controls extending to similar transactions in other product and technology areas (see the **Critical and Emerging Technologies List**), companies and investors are advised to closely consider all possible impacts and to consider offering timely comments to Treasury, directly or through industry associations.

Although the Proposed Rule is not final and therefore not yet in effect, companies should already be carefully considering any investments, joint ventures, or debt financings

involving entities associated with China, Hong Kong, or Macau. First, since July, a number of U.S. entities have received letters from the Select Committee on the Chinese Communist Party about their investments and ventures in China, including four venture capital firms regarding their investments in AI, quantum computing, and semiconductors in China,^[4] a leading university regarding a joint institute,^[5] and a leading automotive company about a battery partnership.^[6] These requests may go beyond the scope of the Proposed Rule, and may create reputational and other risks that companies should evaluate. Second, the Proposed Rule notes that, while the final rule will not be retroactive, after the effective date of the regulations, Treasury may request information about investments satisfying the definition of “covered transactions” that were completed or agreed to after the date of the EO but before the final regulations “to better inform the development and implementation of the program.” The ANPRM also states that Treasury is considering how to treat follow-on investments related to original investments that occurred prior to the effective date of the implementing regulations. It follows that China-related investment decisions that companies make now should be carefully evaluated.

Our **International Trade Compliance Team** is highly skilled at applying complex regulatory regimes to your existing and planned business operations. We can assist you in providing input in response to the ANPRM, conducting a risk assessment for your company, and advising on actions to consider in enhancing procedures and controls that will provide early notice and effective handling of potential covered transactions.

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⁴ Available at <https://selectcommitteeontheccp.house.gov/media/letters/letters-venture-capital-firms-funding-problematic-prc-companies>.

⁵ Available at <https://selectcommitteeontheccp.house.gov/media/letters/letter-uc-berkeley-joint-institute-linked-chinese-military>.

⁶ Available at <https://selectcommitteeontheccp.house.gov/media/letters/letter-ford-chinese-battery-partnership>.

REVERSE CFIUS V1: PROPOSED U.S. OUTBOUND INVESTMENT RESTRICTIONS FOR HI-TECH SECTORS IN CHINA, HONG KONG, AND MACAU

Appendix 1: Comparison of Key Definitions in the EO and the Proposed Rule

Key Term	Definition in the EO	Definition in the Proposed Rule
United States person	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.	Same
Controlled foreign entity	Foreign entity controlled by a United States person	Foreign entity in which a U.S. person owns, directly or indirectly, a 50 percent or greater interest.
Covered foreign person	Design, fabrication, or packaging of integrated circuits that are outside the scope of the transaction prohibitions described above	<p>(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</p> <p>(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.</p>
Person of a country of concern	<p>(1) any individual that is not a United States person and is a citizen or permanent resident of a country of concern;</p> <p>(2) any entity organized under the laws of a country of concern or with a principal place of business in a country of concern;</p> <p>(3) the government of each 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</p> <p>(4) any entity owned by a person identified [in the preceding subparagraphs]."</p>	<p>(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;</p> <p>(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;</p> <p>(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</p> <p>(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.</p>

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REVERSE CFIUS V1: PROPOSED U.S. OUTBOUND INVESTMENT RESTRICTIONS FOR HI-TECH SECTORS IN CHINA, HONG KONG, AND MACAU

Key Term	Definition in the EO	Definition in the Proposed Rule
Covered national security technologies and products	“Sensitive technologies and products in the semi-conductors 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 ... Where applicable, “covered national security technologies and products” may be limited by reference to certain end-uses of those technologies or products.”	Not directly defined in ANPRM, but problematic activities of targets in the relevant sectors are described in Sections III.G, H, and I of the ANPRM, which described proposed prohibited and notifiable transactions based on the activities of the investment target.
Covered Transaction	Not defined in the EO. Defined in the ANPRM as follows: 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.	
Excepted Transaction	Not defined in the EO. Defined in the ANPRM as follows: 1.a. An investment: i. into a publicly traded security, with “security” defined as set forth in section 3(a)(10) of the Securities Exchange Act of 1934; or ii. into an index fund, mutual fund, exchange-traded fund, or a similar instrument (including associated derivatives) offered by an investment company as defined in the section 3(a)(1) of the Investment Company Act of 1940 or by a private investment fund; or iii. made as a limited partner into a venture capital fund, private equity fund, fund of funds, or other pooled investment funds, in each case where: A. the limited partner’s contribution is solely capital into a limited partnership structure and the limited partner cannot make managerial decisions, is not responsible for any debts beyond its investment, and does not have the ability (formally or informally) to influence or participate in the fund’s or a covered foreign person’s decision making or operations; and B. the investment is below a <i>de minimis</i> threshold to be determined by the Secretary. 1.b. Notwithstanding [Paragraph] 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. 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; 3. An intracompany transfer of funds from a U.S. parent company to a subsidiary located in a country of concern; 4. A transaction made pursuant to a binding, uncalled capital commitment entered into before the date of the Order.	

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REVERSE CFIUS V1: PROPOSED U.S. OUTBOUND INVESTMENT RESTRICTIONS FOR HI-TECH SECTORS IN CHINA, HONG KONG, AND MACAU

Appendix 2: Questions Posed by Treasury for Industry Comment

A. U.S. Person

1. 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.

B. Covered Foreign Person; Person of a Country of Concern

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 [of the ANPRM]?
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” **[Wiggin note: Item (2) is as follows: 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]**? 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?

C. Covered Transactions

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 [of the ANPRM]?
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.

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REVERSE CFIUS V1: PROPOSED U.S. OUTBOUND INVESTMENT RESTRICTIONS FOR HI-TECH SECTORS IN CHINA, HONG KONG, AND MACAU

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? **[Wiggin note: Prongs (3) and (4) are as follows: “(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.”]** 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 [of the ANPRM].)

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”?

D. Excepted Transactions

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 [of the ANPRM]?

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REVERSE CFIUS V1: PROPOSED U.S. OUTBOUND INVESTMENT RESTRICTIONS FOR HI-TECH SECTORS IN CHINA, HONG KONG, AND MACAU

20. What, if any, unintended consequences could result from the definition [of covered transaction and/or excepted transaction] 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.

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25. Additionally with respect to item 3 [of “excepted transaction”], 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?

E. Covered National Security Technologies and Products

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 [of the ANPRM]. **[Wiggin note, this is the Section defining prohibited and notifiable activities relating to integrated circuits and supercomputers.]** 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? **[Wiggin Note: The EAR define “Electronic Computer-Aided Design” software under ECCN 3D006, as “a category of ‘software’ tools used for designing, analyzing, optimizing, and validating the performance of an integrated circuit or printed circuit board.”]**

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? **[Wiggin note: The EAR define “Supercomputer” in Part 772.1 as follows: “A computing “system” having a**

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collective maximum theoretical compute capacity of 100 or more double-precision (64-bit) petaflops or 200 or more single-precision (32-bit) petaflops within a 41,600 ft³ or smaller envelope. Note 1 to "Supercomputer": The 41,600 ft³ envelope corresponds, for example, to a 4x4x6.5 ft rack size and therefore 6,400 ft² of floor space. The envelope may include empty floor space between racks as well as adjacent floors for multi-floor systems. Note 2 to "Supercomputer": Typically, a 'supercomputer' is a high-performance multi-rack system having thousands of closely coupled compute cores connected in parallel with networking technology and having a high peak power capacity requiring cooling elements. They are used for computationally intensive tasks including scientific and engineering work. Supercomputers may include shared memory, distributed memory, or a combination of both.]

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.

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REVERSE CFIUS V1: PROPOSED U.S. OUTBOUND INVESTMENT RESTRICTIONS FOR HI-TECH SECTORS IN CHINA, HONG KONG, AND MACAU

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?

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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?

F. Knowledge Standard

49. How could this standard be clarified for the purposes of this program? What, if any, alternatives should be considered? **[Wiggin note: the standard in question is the "knowledge" standard described in Section III.J of the ANPRM.]**

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.

G. Notification Requirements; Form, Content, and Timing

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.

[Wiggin note: This question relates to the information that would be required when submitting notification of a covered transaction, as described in Section III.K of the ANPRM.]

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?

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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?

H. Knowingly Directing Transactions

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?

I. Controlled Foreign Entities – Obligations of U.S. Persons

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? **[Wiggin note: This question refers to the proposed obligation of a US Person to take reasonable steps to prevent prohibited transactions by its 50 percent or more owned foreign subsidiaries.]**

J. National Interest Exemption

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?

K. Compliance; Record-Keeping

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?

L. Penalties

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?

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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?

M. Overarching and Additional Inquiries

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?

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.