U.S. Chamber of Commerce

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September 28, 2023

Via regulations.gov (Docket ID TREAS-DO-2023-0009)

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

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

Dear Ms. Sharma:

The U.S. Chamber of Commerce (the "Chamber") welcomes the opportunity to comment on the advance notice of proposed rulemaking ("ANPRM") regarding the Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern published on August 14, 2023, by the Department of the Treasury's Office of Investment Security to implement the Executive Order 14105 of August 9, 2023, on "Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern" (the "EO").

The Chamber strongly supports protecting U.S. national security and appreciates the Administration's efforts to develop a thoughtful regime that safeguards American national security and economic leadership without unnecessarily restricting beneficial U.S. business activity. The Chamber is sober about the growing set of national security concerns with the People's Republic of China that affect the commercial environment for our members, including military-civil fusion, China's prioritization of security over growth as manifested in new laws and regulations covering counter-espionage and data, and the overall absence of rule of law and transparency.

That said, it is the first time that the United States has sought to regulate and control outbound capital flows and other investments for national security reasons. The shape of the ultimate rules, in turn, will set a floor for how the United States approaches these issues going forward, and also will set a benchmark for other aligned economies that are considering outbound investment screening.

To that end, it is imperative that the implementing regulations are narrowly tailored to target specific national security concerns in a transparent, efficient, and predictable manner. The rules should be clear so that businesses can make appropriate plans for compliance; they should not be

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so burdensome from a resource and timing standpoint as to trigger a chilling effect on broader U.S. business activity; and they should be delicately designed to minimize unintended consequences.

While the ANPRM does not contemplate an OFAC-based approach to regulating outbound investment, the Chamber opposes an approach that focuses on the use of the Specially Designated National (SDN) tool to regulate outbound foreign investment to China. Such an approach would be highly destabilizing to global supply chains and have significant adverse impacts on U.S. businesses, consumers, and the broader U.S. economy, while failing to achieve the legitimate U.S. national security goals of curbing capital and associated technology flows in covered areas that support China's military modernization and surveillance efforts.

The Chamber also notes that there should be multilateral coordination with other allies on outbound screening. A go-it-alone approach by the U.S. government, or one that is uncoordinated and adds layers of regulations, risks having a disproportionate and counterproductive effect on U.S. companies by limiting their ability to operate in large markets while foreign competitors operate without similar restrictions. The Chamber calls upon the Biden Administration, supported by the Congress, to redouble efforts to align with allies and partners on the scope of outbound investment screening so that U.S. firms are not disadvantaged vis-à-vis their foreign competitors.

To reduce the risk of a disproportionate effect – and advance the goals of having clear, workable rules that can be implemented — the Chamber believes it is imperative that the Treasury Department focus on ensuring that the existing scope of the EO and proposed regulations are implemented with sufficient experience before entertaining any possible expansion. The Chamber further submits that the Administration should not add any technologies or expand the scope until it is clear that key allies and economic partners have implemented compatible mechanisms covering a similar breadth of jurisdiction. Even then, the U.S. government should carefully consider the risk that capital from other jurisdictions will replace U.S. investment, defeating the policy benefits of the EO. In that regard, the Chamber believes that large global funds that are managed and organized by U.S. firms should not be prejudiced, relative to their foreign competitors, in their ability to access U.S. capital. Accordingly, Treasury should work to ensure that U.S. firms are not unfairly disadvantaged under the EO, which could be accomplished by adding an exception for completely passive investments up to a certain threshold (*e.g.*, 15 percent), whether the U.S. person involved is directing the investment as an asset manager or participating as a limited partner.

As described further below, the Chamber believes that a successful outbound investment screening program will depend on a measured process that helps to resolve ambiguities and clear, appropriately scoped definitions and exceptions that facilitate compliance. Specifically, the Chamber respectfully recommends that the Treasury Department consider implementing the following actions, among others, as part of the rulemaking process for the EO.

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I. Process

Even with the clearest of definitions and exceptions, there will be ambiguities. The Chamber anticipates that the greatest ambiguities around compliance will be in the following areas, which will create inconsistencies in application, and risk chilling business activity that should not raise concerns while, in other areas, undercutting the effectiveness of the regulations to advance U.S. national security interests and economic leadership. The Chamber is therefore recommending that Treasury consider installing additional safety valves in the process to prevent potential ambiguities from leading to unintended consequences.

1. ***The notification process should be narrowly tailored and calibrated to reflect the goals of the program.***

The ANPRM indicates that Treasury is considering requiring U.S. persons to furnish a significant amount of information as part of a required notification. The ANPRM proposes several data collection elements that seem beyond the scope of the immediate objective of the program. For example, it would require the U.S. person to furnish information about its own "primary business activities and plans for growth" in general, including presumably unrelated to its plans with respect to the covered foreign person. The notification process should not give the U.S. government carte blanche to inquire into U.S. companies and their business activities and future plans, unrelated to the covered transaction or covered foreign person at issue. Treasury should ensure that the requirements of the notification process are streamlined to align more closely with the vision of an efficient notify-and-go system.

As the Chamber also has noted publicly in other contexts, certain information on Chinese parties is becoming more challenging to obtain given new Chinese laws and regulations covering counter-espionage and data as well as ongoing raids on U.S. due diligence firms in China. Given this, while the Chamber recognizes and supports that diligence is a necessary element of compliance, the Chamber also believes that it is important – and consistent with having an appropriately tailored and reasonable regulatory framework – for the Treasury Department to make clear in any regulations that clear and demonstrable efforts by U.S. persons to ascertain truthful information from target companies in these circumstances will be a mitigating factor for a penalty if it is later discovered that the investee entity was a covered foreign person engaged in covered activities.

2. ***Clarify the scope of "knowingly direct" and the associated compliance burden on U.S. persons vs. their (non-U.S.) employers.***

With respect to the "knowingly direct" requirement, the ANRPM defines "directing" broadly to mean "ordering, deciding, approving, or otherwise causing to be performed." This raises a number of ambiguities, including:

a) At what stage (*e.g.*, internal deliberations, informal engagements, negotiations, signing, closing) of a transaction is a U.S. person considered to have "directed" a covered transaction?

b) Will this requirement pierce the corporate veil and reach individual U.S. board directors or beneficial owners who may have not have a role in a covered transaction other than via their vote on the board, which may or may not be a deciding vote (*e.g.*, scenario where a board of a foreign company votes 8-2 to approve a covered transaction, and the U.S.-citizen board member voted to approve)?

c) Where a U.S. person in a foreign company "knowingly directs" a transaction, does the prohibition or notification obligation fall on the individual, non-U.S. employer (i.e., company) or both? In other words, who would be responsible for filing a notification: the company or the employee? For a prohibited transaction, how would the penalties apply to the individual vs. the company that undertook the transaction?

d) Who is responsible for a missed notification, or for undertaking a prohibited transaction in a circumstance where a "U.S. person" knowingly directed the covered transaction (i.e. the entity is a foreign company and therefore not a U.S. person, but the individual involved is a U.S. person)?

As these questions reflect, "direct" is too broad and, as currently devised, would pierce the corporate veil and potentially require U.S. board members on foreign companies to violate their duty of loyalty. We recommend that Treasury consider a "but for" standard, whereby a U.S. person is deemed to have "directed" a covered transaction only if the transaction would not have occurred but for his or her involvement.

With respect to the knowledge standard generally, Treasury should provide guidance in the final rule regarding what information transaction parties "reasonably should know" and what amount of due diligence Treasury would consider "reasonable and appropriate" in assessing a party's compliance with the EO. In providing this guidance, Treasury should account for the fact that the information available to transaction parties and the ability to conduct due diligence will vary significantly from transaction to transaction.

3. *Establish an advisory opinion process whereby transaction parties can submit a description of a proposed transaction to Treasury, and within a defined time period, Treasury is required to provide an advisory opinion regarding whether the described transaction is prohibited or notifiable (or neither).*

The ANPRM potentially underestimates the gray area between prohibited and notifiable transactions and places the full risk on parties to err on the side of caution, which could result in a presumption of prohibition where there are ambiguities. The U.S. government has never regulated outbound investments before, and it is not realistic to believe that the government will be able to avoid all unintended consequences of the rules. To ensure that the EO is administered in a manner that does not unintentionally harm U.S. interests, Treasury should establish an advisory opinion process whereby transaction parties can submit a description of a proposed transaction to Treasury, and within a defined reasonable time period, Treasury is required to provide an advisory opinion regarding whether the described transaction is prohibited, notifiable, neither, or requires additional information. For example, if a U.S. company believed that a transaction could fall in the prohibited category due to potential ambiguities in the interpretation of certain technology parameters, but Treasury provided guidance that the proposed transaction fell in the notifiable category, then the U.S. company could proceed with a formal notification and undertake the transaction, instead of presuming that the transaction would be prohibited.

Advisory opinions could be published to provide guidance to other transaction parties, in such form and in circumstances where publication would not reveal non-public information about the underlying transaction, including the identity of transacting parties. Such a process could help reduce, where appropriate, the need for a two-step review process that includes both an initial screening via the advisory opinion mechanism and a formal notification and review.

A consultation or advisory opinion mechanism would need to be nimble because investors often face fierce competition to participate in funding rounds and ultimately are required to operate on the target company's timelines for proposed investments.

4. *Adopt a formal authorization or licensing process to authorize certain, otherwise prohibited transactions.*

Beyond granting "national interest exemptions" in extraordinary circumstances, Treasury does not propose in the ANPRM to create a formal licensing or authorization process for transactions that otherwise would be prohibited. Given the potentially broad application of the EO, there should be a formal licensing process to allow transaction parties to apply for authorization to enter into transactions that otherwise would be prohibited, rather than relying on ad hoc "national interest exemptions" issued by Treasury.

An authorization process could be combined with the advisory opinion process described above such that transaction parties could submit a proposed transaction to Treasury and request confirmation that the transaction is not subject to the EO or, in the alternative, for authorization to proceed with the transaction.

For example, in the absence of a formal authorization process, a U.S. person with existing ownership interests in a covered foreign person in a prohibited category would not be able to sell to any other U.S. persons (i.e., because U.S. persons are prohibited from undertaking the transaction) and will be disadvantaged in an exit scenario. In that circumstance, a U.S. person may have to sell their existing interest at steep discount to Chinese buyers, or other foreign competitors who are not subject to the requirements of the program, neither of which would advance U.S. national security.

5. ***Establish a process by which parties to the transaction can mitigate the national security risks associated with the transaction in order to avoid divestment.***

The EO provides authority for Treasury to nullify, void, or otherwise compel divestment of any prohibited transaction. If the program works perfectly, divestments would not be required because prohibited transactions would not occur in the first place.

However, there may be transactions where the line is unclear, resulting in U.S. companies undertaking and submitting notifications for transactions that were prohibited. In such circumstances, the ANPRM currently does not provide an off-ramp other than divestment. Where possible, Treasury should consider establishing an appropriately resourced process to address identified national security risks through mitigation, with divestment as a final resort for transactions for which a U.S. company submitted a notification in good faith.

II. Definitions

The ANPRM sets out a framework for implementation of the EO, including proposed definitions for key terms that determine how the EO's requirements will be applied and which parties will be subject to jurisdiction. At a high level, jurisdiction will turn on whether a "U.S. person" is undertaking a "covered transaction" with a "covered foreign person" engaged in activities involving "covered national security technologies and products." Terms like "covered transaction," "covered foreign person," and "U.S. person" are defined in specific ways that have implications for which businesses are subject to the requirements and should be calibrated to preempt potential ambiguities.

6. ***Clarify that the obligation to comply with the EO applies only to the U.S. person undertaking the covered transaction.***

Treasury proposes in the ANPRM to prohibit or require a notification for a "covered transaction," meaning "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 final rule should make clear that the obligation to comply with any prohibition or notification requirement under the EO – and liability for non-compliance therewith – reside solely with the "U.S. person" undertaking a covered transaction, or knowingly directing a prohibited transaction. The obligation should not extend to other parties involved in the transaction, such as the person selling an equity interest or a third party otherwise involved in the transaction, for example, as an advisor, underwriter, source of debt financing, sponsor, arranger, issuer, or in any other capacity as a U.S. financial institution acting in an intermediary or other capacity.

Extending the scope of the EO's obligations to third parties also would create practical problems for Treasury in implementing and enforcing the EO. Financial institutions in particular likely will not have the information required for a notification to Treasury, or certain information may not be accurate, despite the financial institution's best efforts to obtain the information and verify its accuracy. For that reason, not only would Treasury potentially be forced to review multiple notifications regarding a single transaction, but notifications from third parties not undertaking the transaction could be incomplete or unintentionally inaccurate. Such additional notifications also would be redundant, given that the U.S. person that is undertaking the covered transaction would be obligated to comply with the EO, and likewise would have the greatest access to information required to provide a complete and useful notice to Treasury.

We also believe the approach we propose is consistent with Treasury's intent as reflected in the ANPRM, which provides that "the policy intent of this program is not to implicate "...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" unless undertaken as part of an effort to evade these rules. While we understand that Treasury intends not to target these types of transactions, it is critical that the final rule be unambiguous on this point in order to provide the financial services industry with certainty and to avoid unintended consequences.

7. *Clarify the scope of "indirect" transactions.*

The ANPRM offers a proposed definition of "covered transaction" to include "direct" as well as "indirect" transactions. This is in addition to the distinction between "direct" and indirect" that is proposed to be incorporated in the definition of "covered foreign person."

Including "indirect" in the definition, in the fashion proposed, is too vague and will make planning for and complying with this rule challenging. To give an example of the complexities, U.S. companies maintain minority investments worldwide, including through completely passive equity interests (*e.g.*, below 15 percent) in portfolio companies, which themselves could independently take indirect investments in other companies. The original investing U.S. party may have limited control or visibility into the chain of investments or activities by minority-owned entities that each may have indirect involvement (including through minority stakes) in other entities that are several degrees of separation removed from the original investor.

The Chamber recognizes that Treasury is trying to "close loopholes," as the ANPRM states, and the Chamber also appreciates the government's efforts to use a "knowledge" standard as a guardrail to limit unintended or unfair consequences. Nevertheless, the potential scope of coverage for "indirect" investments is expansive and impracticable, and we encourage the Treasury Department to more clearly define or clarify the scope of "indirect" transactions.

8. *Clarify the scope of "greenfield investments" and "joint ventures."*

"Covered transaction" is currently defined to include "greenfield investment that could result in the establishment of a covered foreign person" and the "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 inclusion of "could" introduces expansive interpretive applications that are difficult for parties to evaluate. We recommend that Treasury replace "could result in the establishment of" with "has a demonstrated business objective to establish" – a more concrete term that is used, for example, in certain parts of the regulations of the Committee on Foreign Investment in the United States ("CFIUS").

9. *Clarify that a "joint venture" is a "covered transaction" only to the extent related to a covered national security technology or product.*

Prong 4 of the "covered transaction" definition appears to cover a U.S. person entering into a joint venture with a covered foreign person, even if that joint venture is unrelated to covered national security technologies and products. For example, a joint venture with a Chinese party to manufacture coffee mugs could be covered if the Chinese party is separately engaged in developing an artificial intelligence ("AI") system to control robotic systems. Capturing these types of joint ventures would go beyond the national security risks the regulations are intended to target. It also would discourage U.S. companies from pursuing joint ventures that could benefit the United States due to the risk of entering into a covered transaction and the burden of conducting due diligence on potential joint venture partners, which would be considerable given that many companies across industries are increasingly engaged in AI alongside their standard business activities.

The Chamber recommends that Treasury consider limiting prong 4 to the "establishment of a joint venture, wherever located, that is formed with a covered foreign person and *related to covered national security technologies and products* or will result in the establishment of a covered foreign person." This would also be a clarification that brings the "joint venture" prong into closer alignment with the definition of "covered foreign person," which indicates that a Chinese entity is only a "covered foreign person" to the extent engaged in a covered national security technologies and product.

10. *Define "engaged in."*

In the definition of "covered foreign person," the ANPRM proposes no further definition for the term "engaged in activity involving," which can be read expansively to cover any engagement in activity (direct or indirect) that even minimally touches, incorporates, or interacts with any of the technologies or products identified in the ANPRM. As an example of the challenges the current ambiguity raises, consider a situation in which an enterprise from a country of concern engages in the manufacture of appliances that incorporate microelectronics (as nearly all contemporary appliances do). That enterprise may employ a single engineer engaged in generic research on integrated circuit design. As more industries and enterprises incorporate computing, chips, and AI into their core business, the likelihood of enterprises employing some staff or resources engaged in these technologies increases significantly, such that the term "covered foreign person" could apply ubiquitously, absent further guidance on the definition of "engaged in."

To add further clarity, Treasury should consider defining the specific activities to include, for example, the "development, production, design, fabrication, packaging, assembly, or installation" of a covered national security technology or product. In addition, Treasury also should evaluate establishing a *de minimis* threshold that excludes from the definition of "covered foreign person" entities that engage in covered technologies or products in only a very limited manner. Without a clear threshold for "engagement," the scope of the program could be expansively construed to cover a sweeping range of companies for which the implementation of AI, for instance, may only be ancillary. This would, in turn, complicate the program from both an enforcement and compliance perspective.

Treasury could seek to clarify the scope in a number of ways, such as:

a) A qualification to the definition of "covered foreign person" that provides that definition will only apply to entities "primarily" or "substantially" engaged in a covered activity. This could be further refined, as needed, for example by providing that entities will satisfy the threshold if their engagement in the covered activity is, or is intended to become, a meaningful independent line of business that incorporates revenue and quantitative thresholds connected to the covered activity. This would close a potential loophole that could otherwise apply to pre-revenue companies.

b) The definition of covered foreign person suggests that the EO would apply to a covered transaction involving an entity that is not itself engaged in a covered activity only if it has subsidiaries or branches that are covered foreign persons that comprise more than 50 percent of the parent company's consolidated revenue, net income, capital expenditure, or operating expenses. However, as noted in Item 7 above, the inclusion of "indirect" in the definition of a covered transaction suggests that the EO also could apply to an investment in a company that is not itself engaged in a covered activity, but where such investee company has a minority investment in a third company that is a covered foreign person, under the logic that the U.S. person would be making an "indirect" investment in the covered foreign person through the non-covered foreign person. We do not read this to be Treasury's intent in including "indirect" in the definition of covered transactions, but Treasury should clarify this point in the final rule.

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

11. *Remove "should know."*

A "covered foreign person" means a "person of a country of concern" that is engaged in, or 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. The knowledge standard (i.e., constructive knowledge) is already incorporated in the definition of "know." The inclusion of "should know" is duplicative and introduces further subjectivity to the standard. Treasury should, therefore, consider removing "should know" from the definition.

12. *Clarify scope of U.S. person as applied to foreign nationals in the United States*

The term "U.S. person" is currently defined to include "any person in the United States," *i.e.*, regardless of citizenship. It is also defined to include "any United States citizen" anywhere in the world. These formulations, though appropriate in the OFAC sanctions context, do not translate well to the outbound investment context where both U.S. and foreign senior executives may transit in and out of the United States and could be subject to the requirements of the program, simply by virtue of the timing of their investment decisions relative to the time of travel.

For example, there is a need to clarify at which point a foreign national (*e.g.*, an executive of a foreign company) who was "in" the United States becomes and ceases to be a U.S. person. Once a foreign national is in the United States, at what point relative to their entry would they have to "knowingly direct" covered transactions to be subject to the requirements of the program? Do these requirements cease to apply when such a person leaves the country? Treasury should seek to address these ambiguities in the implementing regulations to minimize unintended consequences.

13. *Where possible, prioritize harmonization with the Export Administration Regulations ("EAR") and other regulatory regimes.*

The parameters for "semiconductors and microelectronics" contain highly technical specifications, some of which, but not all, reference other regulatory authorities such as the EAR. Harmonization of definitions, especially those of a technical nature, should align with the definitions outlined in the EAR. We believe that such an action would be consistent with the requirements of Executive Order 13563 of January 18, 2011 which states: *Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules. In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization (emphasis added).*

It would not make sense to have restrictions on transferring technology, but no restrictions on investing in the same technology, or vice-versa. This sort of clarity and consistency also is important for business planning and compliance, since compliance functions, which are core to business planning, will now need to incorporate outbound investment. For example, it is not clear why the ANPRM separately calls out "4.5 Kelvin" as a technical specification for the prohibited category, while referencing the EAR for certain other parameters. As companies are likely to be affected by different regulatory regimes with various overlaps, it is imperative that the terminology be consistent to prevent confusion and potentially conflicting application.

14. _Adopt a more precisely defined definition of "AI systems."_

The ANPRM proposes to define "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." This proposed definition of "AI systems" is overly broad and risks capturing all software and other engineered products that generate outputs that can be used to support real world decisions, from a computer spreadsheet program to a traditional calculator. Such a broad definition could cause confusion, stifle innovation outside the narrow AI activities targeted by the regulations, and be unmanageable for Treasury.

15. _Adopt a "dual-use application" qualifier to clarify the scope of AI systems in the notifiable category._

Some of the AI end uses Treasury proposes targeting for notifications – such as cybersecurity applications, digital forensic tools, and the control of robotic systems – are overly broad and could cover a wide variety of AI solutions intended for civilian uses. With respect to the list of end uses for which an "AI system" would require notification, the Chamber recommends incorporating the qualifier "with dual-use application" into the definition.

For example, an AI system with "digital forensic tools" as an end use, without the addition of "dual-use application," could be covered by the definition even if it were only capable of being used for civilian, non-military purposes. Likewise, there are many "robotic systems" that are used for non-military purposes (*e.g.*, cleaning, factory automation, assembly). Are the regulations intended to require notification of investments in all those companies if they are not dual-use? Without the concept of "dual-use application" in defining the range of end use applications in AI systems, the notification requirements could become overly extensive and inadvertently encompass various companies that only develop technologies for civilian use, especially as the AI applications continue to expand.

Relatedly, the broad potential prohibition for mass surveillance is undefined and could be read to apply to legitimate — and in some cases — government-mandated activities such as suspicious activity monitoring and reporting by financial institutions. Treasury should consider qualifying this as "government" mass surveillance or by another means that does not sweep in bona fide fraud prevention and other beneficial monitoring of customer activity.

III. Exceptions

16. ***Activities that would not fall within the scope of "covered transaction" should expressly be consolidated with the ANRPM's formally proposed "excepted transaction" definition for clarity, and expanded to include certain additional categories.***

The ANPRM notes that it does not "intend" for the definition of "covered transaction" to apply to certain activities, such as intellectual property licensing arrangements. We appreciate the administration's attention to such exceptions and support its consistency with national security concerns articulated in the executive order.

For clarity, Treasury should expressly formalize these exclusions as jurisdictional exceptions and consolidate all such exclusions under the formally defined term, "excepted transactions." In particular, it is essential that the rule expressly exclude contractual arrangements, procurement, imports or exports, including transportation or carriage of material inputs for any of the covered national security technologies or products (such as raw materials). Such transfers of physical items are already subject to U.S. export control regulations. It is also essential that any final rule formally exclude "intellectual property licensing arrangements" which are not investments, and which are necessary to ensure that U.S. companies are compensated when foreign parties utilize their patented technology.

It will also be useful — both for U.S. industry and for U.S. economic leadership — for any final rule to expand the list of "non-covered transactions" to include additional transactions that are common in the marketplace but do not entail equity participation of the kind envisioned in the "covered transaction" definition (and thus presumably not intended to be included). These include:

a) Revenue- or profit-sharing arrangements, or commission-based relationships, for example where a U.S. person acts as a distributor or marketing agent for products of a covered foreign person (or vice versa), and where such products are not themselves covered national security technologies and products;

b) Research engagements by U.S. persons with universities (sponsorships, scholarships, competitions, and similar activities), where results of such research will be published or transferred to U.S. entities or their subsidiaries;

c) Payments under "bounty" programs wherein U.S. persons offer payment to entities that investigate and report (to the U.S. person) vulnerabilities in software code or security systems developed or employed by the U.S. person; payments made by U.S. persons for the use of, or the reservation of access to, a covered entity's production capacity (e.g., chipmaking or other manufacturing capacity).

d) Transfer of technology or other items for which a U.S. person has obtained an export license from the Department of Commerce, and where information about an investment relationship is already disclosed as part of the license application.

17. *Clarify that the scope of "covered transactions" does not include services provided by financial institutions.*

Treasury notes in the ANPRM that it is considering explicitly excluding such scenarios where a U.S. bank processes or facilitates a covered transaction by a U.S. person (*see* Scenario 4). Treasury also indicates in the ANPRM that it "does not intend for the definition of 'covered transaction' under consideration to apply to [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], *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" (emphasis added). It is helpful to understand that Treasury does not intend for the EO to apply to such secondary transactions, but the italicized text introduces ambiguity about whether any secondary transactions – such as those undertaken by financial institutions – actually would be excluded from the scope of the EO. We encourage Treasury to address this in its ultimate rules.

Consider, for example, a scenario in which a U.S. financial institution is underwriting an issuance of equity. Because underwriting an issuance of equity involves the U.S. financial institution acquiring such equity from its client before selling it, the bank would be required to determine whether its client is a covered foreign person – even if its client is incorporated in the United States or otherwise outside of China, because it could be Chinese-owned or derive more than 50 percent of its revenue from covered foreign person subsidiaries – and, if the U.S. financial institution's client is a covered foreign person, the bank would be subject to a prohibition or a notification requirement because the underwriting transaction would meet the definition of a covered transaction (i.e., the acquisition of equity by a U.S. person from a covered foreign person).

Understanding that Treasury is focused on primary investment transactions by U.S. persons, not secondary transactions and other services provided by third party financial institutions that may facilitate covered transactions or involve financial products related to a covered transaction, Treasury should make explicit that transactions undertaken by financial institutions that are not the primary investment in the covered foreign person are excepted from the scope of the EO, regardless of whether they meet the definition of a covered transaction. In the alternative, in order to provide certainty to the U.S. financial industry and its customers, Treasury should make explicit that the following specific types of transactions constitute "excepted transactions":

- Processing, settling, clearing, or sending of payments, and any other functions necessary for proper functioning of existing markets by any entity (not just banks), including cash transactions such as opening bank accounts and facilitating payments pursuant to client instructions, direct custody services, foreign exchange services, and passive holding services;

- Any transaction in which a bank or other financial services provider would acquire equity or collateral for a limited period of time, such as prime brokerage, underwriting, book-running, market making, sponsoring or supporting a company to issue American depository receipts or global depository receipts, and as part of a foreclosure process;

- All lending activities by banks and non-bank entities, including trade financing, factoring, and loan guarantees;

- Acting as a trustee, investment manager, or paying agent for a non-U.S. fund;

- Mergers and acquisitions ("M&A") advisory services, and agency and trust services associated with M&A;

- The issuance and trading of swaps and derivatives that may be transacted on an over-the-counter or on an exchange-traded or centrally-cleared basis, including, but not limited to, swaps (such as credit default swaps and total return swaps), forwards, options, and any other product traded under a master agreement or other similar agreement that provides for the netting of payment or contractual obligations owed by the respective parties to such agreement upon an event of default or similar termination event by a party thereto (e.g., ISDA Master Agreement, Master Securities Forward Transaction Agreement, Customer Clearing Agreement, together with Cleared OTC Derivatives Addendum thereto, or Global/Master Repurchase Agreement) or any structured, equity- or credit-linked note that has substantially the same effect as a derivative (issued by a person that is not a Covered Foreign Person); and

- Leasing of real property and the provision of software as a service, infrastructure as a service, and other "as a service" business models.

It is important that these transactions are enumerated explicitly in the final rule as "excepted transactions" to provide U.S. financial institutions and their clients with certainty that these types of transactions are not potentially prohibited or subject to a notification requirement under the EO. Excluding these types of transactions from the scope of "covered transactions" simply by omitting them from the definition of "covered transactions," or indicating that Treasury does not intend for the definition to apply to these types of activities "so long as they do not involve any of the definitional elements of a 'covered transaction,'" does not provide sufficient clarity. That approach may lead U.S. financial institutions to determine they are required to assess in every circumstance whether a transaction of the types described above could constitute a "covered transaction," which would increase compliance costs astronomically for financial institutions that may undertake millions of these types of transactions every day, with no corresponding policy benefit.

18. *Clarify that intracompany transfers/investments in existing subsidiaries that are already "covered foreign persons" are excluded from jurisdiction, at least with respect to already covered areas.*

The ANPRM currently proposes to exclude intracompany transfer of funds from a U.S. parent company to a subsidiary located in a country of concern as an "excepted transaction." The ANPRM further contemplates that U.S. persons be required, with respect to entities they control (including their subsidiaries), 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."

Intracompany transactions between U.S. parents and their existing covered foreign person subsidiaries are common and an important element of U.S. businesses' global competitiveness. While the Chamber understands that intracompany transfers could play a role in helping accelerate Chinese indigenous development, technology transfers among related entities are already subject to export controls, and capital transactions between a parent and subsidiary would not entail any additional "intangible benefit" to the receiving entity, since any such benefit would already exist by virtue of the foreign entity's affiliation with and ownership by its U.S. parent.

At a minimum, Treasury should clarify that intracompany investments in existing joint ventures and/or wholly owned subsidiaries in China that are already "covered foreign persons" are – to the extent that the investment is in the existing covered activity -- expressly excluded from jurisdiction, including with respect to the "greenfield investments" and "joint venture" prongs of the "covered transaction" definition and the proposed U.S. person obligations for "controlled foreign entities." In other words, the clarification would confirm that so long as an intracompany investment does not result in a *new* covered foreign person (which would then be subject to the existing "covered transaction" definition) or a new covered activity, it would not trigger requirements under the program for the U.S. parent. For example, if Company A has existing advanced integrated circuit packaging that would otherwise be covered by the regulations, further investment in that packaging capability would be excluded, but new investment in a new covered activity capability – such as a fabrication capability – would be covered. Otherwise, the ANRPM would have the effect of retroactively penalizing U.S. companies for already existing "covered foreign person" subsidiaries and capabilities that predated the EO.

19. *Clarify the scope of retroactive application and "follow-on" transactions that may be subject to jurisdiction.*

Treasury should provide a clear definition of "follow-on transactions" to assist companies in determining what activities would be in scope. For instance, a contract signed in 2020 giving a U.S. company the right to purchase or sell a subsidiary connected to a Chinese company should not be restricted by rules created years after the original deal was signed.

With respect to any follow-on transaction in venture capital fundraising, restricting follow-on investments would explicitly disadvantage firms that invested with the intent of participating in a follow-on investment or firms seeking to engage in a pro-rata investment, which maintains but does not increase the amount of ownership interest. Treasury should allow a specific carve-out for pro-rata follow-on investments, which would not increase an investment firm's ownership interest in a target company and would not provide the investment firm with any new rights as a result of the follow-on pro-rata investment and, accordingly, would not contribute to any incremental national security risk.

Treasury also should expressly confirm in the final rule that a U.S. person would not be required to divest or unwind a transaction if, following consummation of the transaction, the counterparty later became a covered foreign person, i.e., after the U.S. person made their investment.

20. *Consider broadening applicability of de minimis threshold, currently applicable only to certain LP investments.*

The ANRPM notes that the rationale for a *de minimis* threshold is that "transactions above a threshold are more likely to involve the conveyance of intangible benefits." However, as currently drafted, the definition of "excepted transactions" does not include any *de minimis* threshold for investments by a venture capital fund, private equity fund, fund of funds or other pooled investment fund in a covered foreign person that are completely passive. The *de minimis* threshold currently also would not apply to the general partners managing the investment vehicles for those limited partner funds. The Chamber believes that this would create an imbalance that could be addressed by implementing a more broadly applicable *de minimis* threshold.

Specifically, under prong 1a(iii), the *de minimis* exception is currently only being considered for the funds that a "limited partner" makes into one of those investing vehicles. Treasury should also consider expressly excluding investments that result in the acquisition of 15 percent or less of the outstanding voting interest in a covered foreign person if the transaction is solely for the purpose of passive investment. This threshold would apply not only to LP investments, but also generally to all

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transactions, including involving venture capital funds, private equity funds, fund of funds, or other pooled investment funds as well as the U.S. general partners of such funds, so long as their investments are passive and do not involve the "conveyance of intangible benefits." "Passivity" could be further defined as described in Item 21 below.

21. *Clarify the scope of passive investments that would not be subject to jurisdiction.*

The ANPRM proposes to exclude from jurisdiction certain passive investments, such as in publicly traded securities, index funds, mutual funds, or made as a limited partner into a certain investment funds. In parallel, it also clarifies that investments that confer certain rights, such as "membership or observer rights on…the board of directors" would be deemed to exceed "standard minority shareholder protections" and therefore subject to the requirements of the program.

Treasury should specifically except from the program's coverage U.S. investments into publicly traded securities,[1] including an exception for swaps, futures, and any other instruments that reference publicly traded securities. As noted above, Treasury should also consider expressly excluding investments that result in the acquisition of 15 percent or less of the outstanding voting interest in a covered foreign person if the transaction is solely for the purpose of passive investment. For clarity, Treasury could also enumerate a non-exhaustive list of rights that would be deemed "minority shareholder protections" (*e.g.*, anti-dilution and other basic economic protections), in line with certain parts of the CFIUS regulations (31 C.F.R. § 800.208(c)).

22. *Exclude certain corporate restructuring transactions from jurisdiction.*

U.S. companies frequently engage in legal entity restructuring for a variety of legal or tax reasons, even if the ultimate ownership or underlying activities taking place in the country do not change. However, under the ANPRM's current construct, a U.S. person with existing ownership interests (i.e., predating the EO) in a covered foreign person in a prohibited or notifiable category would not be able to undertake routine corporate internal restructurings without triggering new obligations under the proposed program, even though such restructurings would not result in a change in beneficial U.S. ownership. The Chamber believes that it would be consistent with the goals of the program to exclude such internal restructuring transactions that do not result in a new beneficial U.S. owner (*e.g.*, the introduction of new holding entities that do not change the ultimate ownership structure or result in a new ultimate "U.S. person" acquiring an interest in a covered foreign person). In the absence of such an exception, the program could undermine the competitiveness of U.S.

[1] Executive Order 14032: "the term "publicly traded securities" includes any "security," as defined in section 3(a)(10) of the Securities Exchange Act of 1934, Public Law 73–291 (as codified as amended at 15 U.S.C. 78c(a)(10)), denominated in any currency that trades on a securities exchange or through the method of trading that is commonly referred to as "over-the-counter," in any jurisdiction."

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companies from a corporate and tax perspective and, in practice, would have the effect of retroactively applying the EO to ownership interests predating the EO.

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