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**DEPARTMENT OF THE TREASURY**

**Office of Investment Security**

**31 CFR Part 850**

**RIN 1505-AC82**

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

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

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule sets forth regulations that would implement Executive Order 14105 of August 9, 2023, “Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern,” which declares a national emergency to address the threat to the United States posed by countries of concern, which seek to develop and exploit sensitive technologies or products critical for military, intelligence, surveillance, or cyber-enabled capabilities. The proposed rule would (1) require United States persons to provide notification to the U.S. Department of the Treasury regarding certain transactions involving persons of a country of concern who are engaged in activities involving certain national security technologies and products that may contribute to the threat to the national security of the United States; and (2) prohibit United States persons from engaging in certain other transactions involving persons of a country of concern who are engaged in activities involving certain other national

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security technologies and products that pose a particularly acute national security threat to the United States. This notice of proposed rulemaking (NPRM) seeks public comment on various topics related to the implementation of Executive Order 14105. In accordance with 5 U.S.C. 553(b)(4), a summary of this rule may be found at <https://www.regulations.gov>.

**DATES:** Written comments must be received by August 4, 2024.

**ADDRESSES:** Written comments on this proposed rule may be submitted through one of two methods:

- *Electronic Submission:* Comments may be submitted electronically through the Federal Government eRulemaking portal at <https://www.regulations.gov>. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt, and enables the Department of the Treasury to make the comments available to the public.
- *Mail:* Send to U.S. Department of the Treasury, Attention: Meena R. Sharma, Director, Office of Investment Security Policy and International Relations, 1500 Pennsylvania Avenue NW, Washington, DC 20220.

The Department of the Treasury encourages comments to be submitted via <https://www.regulations.gov>. Please submit comments only and include your name and organization name (if any) and cite “Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern” in all correspondence. All comments submitted in response to this NPRM, including attachments and other supporting material, will be

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made public, including any personally identifiable or confidential business information that is included in a comment. Therefore, commenters should submit only information that they wish to make publicly available. Commenters who wish to remain anonymous should not include identifying information in their comments.

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

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On August 9, 2023, the President issued Executive Order 14105, “Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern” (the Outbound Order), pursuant to his authority under the Constitution and the laws of the United States, including the International Emergency Economic Powers Act (IEEPA), the National Emergencies Act, and section 301 of title 3, United States Code (U.S.C.). In the Outbound Order, the President found that the advancement by countries of concern in sensitive technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities of such countries constitutes a threat to the national security of the United States, which has its source in whole or substantial part outside the United States, and that certain U.S. investments risk

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exacerbating this threat. In response, the President declared a national emergency to deal with this threat.

The Outbound Order identifies three sectors of national security technologies and products to be covered by the program: semiconductors and microelectronics, quantum information technologies, and artificial intelligence. As described in the Outbound Order, countries of concern are exploiting or have the ability to exploit certain U.S. outbound investments, including certain intangible benefits that often accompany U.S. investments and that help companies succeed. In an Annex to the Outbound Order, the President identified one country, the People's Republic of China (PRC), along with the Special Administrative Region of Hong Kong and the Special Administrative Region of Macau, as a country of concern. The President may modify the Annex to the Outbound Order and update the list of countries of concern.

Advanced technologies and products that are increasingly developed and financed by the private sector form the basis of next-generation military, intelligence, surveillance, or cyber-enabled capabilities. As stated in the Outbound Order, advancements in sensitive technologies and products in the areas of semiconductors and microelectronics, quantum information technologies, and artificial intelligence will accelerate the development of advanced computational capabilities that will enable new applications that pose significant national security risks, such as the development of more sophisticated weapons systems, breaking of cryptographic codes, and other applications that could provide a country of concern with military advantages. The potential military, intelligence, surveillance, or cyber-enabled applications of these technologies and

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products pose risks to U.S. national security, particularly when developed in or by a country of concern in which the government seeks to (1) direct entities to obtain technologies to achieve national security objectives; and (2) compel entities to share or transfer these technologies to the government's military, intelligence, surveillance, or security apparatuses.

U.S. investments are often more valuable than the capital alone because they can also include the transfer of intangible benefits. Intangible benefits that often accompany U.S. investments and help companies succeed include: enhanced standing and prominence, managerial assistance, access to investment and talent networks, market access, and enhanced access to additional financing. Certain investments by United States persons into a country of concern can be exploited to accelerate the development of sensitive technologies or products—including military, intelligence, surveillance, or cyber-enabled capabilities—in ways that negatively impact the national security of the United States. Such investments, therefore, risk exacerbating this threat to U.S. national security.

The Outbound Order has two primary components that serve distinct but related objectives with respect to the relevant technologies and products. The first component requires notification to the Secretary of the Treasury (the Secretary) regarding certain types of investments by a United States person in a covered foreign person engaged in covered activities pertaining to specified categories of technologies and products. The second component requires the Secretary to prohibit certain types of investment by a United States person in a covered foreign person engaged in covered activities pertaining to other specified categories of advanced technologies and products.

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Both components focus on investments that could enhance a country of concern's military, intelligence, surveillance, or cyber-enabled capabilities through the advancement of technologies and products in particularly sensitive areas.

The Outbound Order directs the Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies, to issue, subject to public notice and comment, regulations that, among other things, require *U.S. persons* to submit information to the Department of the Treasury regarding *notifiable transactions* and prohibit U.S. persons from engaging in *prohibited transactions*. Under section 10(a) of the Outbound Order, the President authorizes the Secretary to promulgate rules and regulations, including elaborating upon the definitions contained in the Outbound Order. The Secretary's promulgation of regulations under the Outbound Order is consistent with the President's authority to "issue such regulations, including regulations prescribing definitions, as may be necessary for the exercise" of authorities granted under IEEPA (50 U.S.C. 1704) and the President's authority to designate and empower the head of any department or agency in the executive branch to perform any function which is vested in the President by law (3 U.S.C. 301).

The Outbound Order instructs the Secretary to identify in such regulations categories of notifiable transactions that involve covered national security technologies and products that the Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies, determines may contribute to the threat to the national security of the United States identified in the Outbound Order. The Outbound Order also instructs the Secretary to

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identify categories of prohibited transactions that involve technologies and products that the Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies, determines pose a particularly acute national security threat to the United States. Consistent with the Outbound Order, the Secretary may exempt from the notification requirement or prohibition any transaction determined by the Secretary, in consultation with the heads of relevant agencies, as appropriate, to be in the national interest of the United States. Additionally, the Outbound Order requires the Secretary to investigate, in consultation with the heads of relevant agencies, as appropriate, violations of the Outbound Order or the regulations and pursue civil penalties for such violations.

## **II. Advance Notice of Proposed Rulemaking**

Concurrent with the issuance of the Outbound Order, on August 9, 2023, the Department of the Treasury issued an Advance Notice of Proposed Rulemaking, 88 FR 54961 (August 14, 2023) (ANPRM), to provide transparency and clarity about the intended scope of the program and solicit early stakeholder participation in the rulemaking process. The ANPRM outlined key concepts under consideration and sought public comment on a range of topics related to the implementation of the Outbound Order.

The Department of the Treasury received 60 public comment letters in response to the ANRPM, many from business associations that represent a wide variety of stakeholders across industries as well as from individuals and companies in the financial services, legal, and technology sectors. These comments are available on the public rulemaking docket at

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<https://www.regulations.gov> (Docket TREAS-DO-2023-0009). The Department of the Treasury considered each comment in developing this proposed rule. In general, comments focused on enhancing the clarity of the scope of the program and the definitions under consideration, aligning the program where possible with other relevant U.S. Government programs, and supporting program development in a targeted manner to reduce unintended consequences for U.S. competitiveness. The key issues raised in the comments are discussed in the next section within the discussion of the proposed rule.

### **III. The Proposed Rule**

#### *A. Scope and Structure of the Proposed Rule*

The United States has long maintained an open investment policy and supports cross-border investment where consistent with the protection of United States national security interests. As discussed in the Outbound Order, certain United States investments may accelerate the development of sensitive technologies and products in countries that develop them to counter United States and allied capabilities. The Department of the Treasury has scoped the proposed rule to focus on the types of U.S. investments that present a likelihood of conveying both capital and intangible benefits that can be exploited to accelerate the development of sensitive technologies or products critical for military, intelligence, surveillance, or cyber-enabled capabilities of such countries in ways that negatively impact the national security of the United States. With an interest in minimizing unintended consequences and addressing the national security risks posed by countries of concern developing technologies that are critical to the next generation of military,



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intelligence, surveillance, or cyber-enabled capabilities, the proposed rule includes detailed definitions and descriptions of terms and elements to appropriately scope coverage and facilitate compliance by United States persons. At the same time, the proposed rule seeks to avoid loopholes that could undermine the national security objectives of the Outbound Order. The Department of the Treasury seeks public input on how the proposed rule can best meet these important objectives.

Consistent with the Outbound Order, the proposed rule would place certain obligations upon any *U.S. person* in connection with a *covered transaction* involving or resulting in the establishment of a *covered foreign person*. The proposed definition of *covered foreign person* focuses on the person's relationship to a *country of concern* and involvement in one or more *covered activity* related to certain national security technologies and products. A *covered transaction* may be a *prohibited transaction*, meaning it could not legally be undertaken, or it may be a *notifiable transaction*, meaning that it would be permitted under the proposed rule, but a *U.S. person* would need to submit specified information about the transaction to the Department of the Treasury. A *U.S. person* would also have certain obligations under the proposed rule in connection with certain transactions undertaken by any non-*U.S. person* entity that it controls, referred to as a *controlled foreign entity*. Additionally, under the proposed rule, a *U.S. person* would be prohibited from *knowingly directing* a transaction that would be prohibited if undertaken by a *U.S. person*. These and other terms are defined in Subpart B of the proposed rule.

The Outbound Order and the proposed rule seek to complement existing authorities and tools of the U.S. Government, including export controls and inbound investment reviews.

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However, the proposed rule would not entail a case-by-case review by the Department of the Treasury of *covered transactions* or any other transactions, nor would it establish a licensing process where a *U.S. person* would seek prior authorization for a *covered transaction*. The proposed rule would not establish comprehensive sanctions with respect to a particular jurisdiction or an entire sector. Nor would the proposed rule treat transactions as within its scope solely because they are denominated in U.S. dollars. Rather, as proposed, the relevant *U.S. person* undertaking a transaction would have the obligation to determine whether the given transaction is prohibited, permissible but subject to notification, or not covered by the rule because either it is an *excepted transaction* or it is not within the jurisdiction set forth under the proposed rule. A *U.S. person* could seek a national interest exemption from the notification requirement or prohibition set out in this rule by following the process described in § 850.502 and further discussed below.

As noted in the ANPRM, it is not proposed that the program provide for retroactive application of the provisions related to the prohibition of certain transactions and the notification of others. However, the Department of the Treasury may, after the effective date of the regulations, request information about transactions by *U.S. persons* that were completed or agreed to after the date of the issuance of the Outbound Order to better inform the development and implementation of the program.

In section IV, the Department of the Treasury seeks comment from stakeholders with respect to the proposed rule, accompanied by empirical data or other specific information wherever

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possible. The Department of the Treasury invites comments on the range of proposals in the proposed rule, and particularly as related to the specific provisions discussed in this section III.

## *B. Discussion of the Proposed Rule*

### *Subpart A—General*

This subpart includes a general discussion of the proposed rule’s scope, how the proposed rule relates to other laws and regulations, proposed guidance on how to interpret and apply certain terms and provisions, the application of the knowledge standard in certain circumstances, and, consistent with the Outbound Order, the role of the heads of other relevant agencies in the implementation and administration of the proposed rule.

With respect to the knowledge standard specifically, because a *U.S. person* must determine whether a transaction is a *prohibited transaction*, a *notifiable transaction*, or not covered under the proposed rule, the standard by which a *U.S. person’s* knowledge of the relevant facts and circumstances is assessed is an important aspect of the rule. The ANPRM discussed that the Department of the Treasury was considering adopting a knowledge standard across this program, which would have meant that for a transaction potentially to be covered by the regulations, a *U.S. person* would need to know, or reasonably should know, based on information publicly available or available through reasonable and appropriate due diligence, that it is undertaking a transaction involving a covered foreign person and that the transaction is a *covered transaction*. Some commenters to the ANPRM stated that it would be difficult to ascertain when a *U.S. person* should know that a transaction is a *covered transaction*. At the same time, to reduce the risk of

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circumvention or evasion, the Department of the Treasury seeks to preserve flexibility to inquire into the facts and circumstances of a *U.S. person's* transaction, for example if a *U.S. person* failed to undertake due diligence or deliberately avoided learning certain facts.

In light of these considerations, the proposed rule specifies that certain provisions, including in the definition of *covered transaction*, would apply only if a *U.S. person* has *knowledge* of the relevant facts or circumstances at the time of a transaction. The proposed definition of *knowledge* would include any the following: actual knowledge that a fact or circumstance exists or is substantially certain to occur, an awareness of a high probability of a fact or circumstance's existence or future occurrence, or reason to know of a fact or circumstance's existence. The proposed definition of *covered transaction* would generally require the *U.S. person* to *know* (or in some circumstances, to intend) at the time of a transaction that the transaction involves a *covered foreign person*, will result in the establishment of a *covered foreign person* (in the case of a greenfield, brownfield, or a joint venture investment), or will result in a *person of a country of concern's* engagement in a new *covered activity* (in the case of a business pivot). The Department of the Treasury is not proposing to hold a *U.S. person* liable for a transaction that has all of the other attributes of a *covered transaction* but that the *U.S. person* did not *know* at the time (which includes not having reason to know at the time) was involved with or would result in a *covered foreign person*. If a *U.S. person* failed to conduct a reasonable and diligent inquiry at the time of a transaction and undertook the transaction where a particular fact or circumstance indicative of a *covered transaction* was present, the Department of the Treasury may find in the course of

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determining compliance with the proposed rule that the *U.S. person* had reason to know of such fact or circumstance (and therefore, for purposes of the proposed rule, *knew*). To provide clarity, the proposed rule includes some of the factors that the Department of the Treasury will consider in assessing whether a *U.S. person* undertook such an inquiry, as applicable. These include efforts to obtain information and contractual assurances that should be obtainable through a reasonable transactional due diligence process with respect to the determination of a transaction's status as a *covered transaction* or relevant entity's status as a *covered foreign person*.

The Department of the Treasury has considered the practical application of this approach. More specifically, if a *U.S. person* has undertaken a reasonable and diligent inquiry and still does not have knowledge of a fact or circumstance relevant to whether a transaction involves or would result in a *covered foreign person* in a way that would render the transaction a *covered transaction*, the Department of the Treasury ordinarily (absent other circumstances) would not attribute *knowledge* of that fact or circumstance to such *U.S. person* even if the transaction has all of the other attributes of a *covered transaction*. Additionally, if a *U.S. person* failed to undertake a reasonable and diligent inquiry but the transaction in question does not involve a *covered foreign person*, the Department of the Treasury would not hold the *U.S. person* liable for the lack of a reasonable and diligent inquiry.

Commenters to the ANPRM requested a range of additional items from the Department of the Treasury that would assist a *U.S. person* in complying with the program such as including examples, making available answers to frequently asked questions, and publishing a list of entities

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designated as a *covered foreign person*. To illustrate the application of certain terms and facilitate understanding of this proposed rule, the Department of the Treasury has included a number of examples in the discussion section at Subpart B below, which are numbered sequentially to facilitate public comment. These examples are provided for informational purposes and should not be construed to alter the meaning of the text of the proposed regulations. Additionally, the Department of the Treasury anticipates making available answers to certain frequently asked questions as the program is implemented.

*Subpart B—Definitions*

*§ 850.202—AI system.*

One of the categories of covered national security technologies and products in the Outbound Order is sensitive technologies and products in the artificial intelligence (AI) sector. As discussed in the ANPRM, the U.S. Government is concerned with the development of *AI systems* that enable the military modernization of countries of concern—including weapons, intelligence, and surveillance capabilities—including those that have applications in areas such as cybersecurity and robotics. The policy objective is to cover U.S. investment into entities that develop *AI systems* that have applications that pose, or have the potential to pose, significant national security risks without broadly capturing investments into entities that develop *AI systems* intended only for consumer applications or other civilian end uses that do not have potential national security consequences. To address these concerns, the proposed rule would have a notification requirement (see the definition of *notifiable transaction*) and a prohibition (see the definition of *prohibited*

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*transaction)* with respect to investments in entities engaged in certain *covered activities* involving *AI systems*.

The ANPRM provided an initial definition for “AI system” as “an engineered or machine-based system that can, for a given set of objectives, generate outputs such as predictions, recommendations, or decisions influencing real or virtual environments. AI systems are designed to operate with varying levels of autonomy.”

Commenters to the ANPRM requested that the Department of the Treasury align terms with other U.S. Government programs where possible. After the Outbound Order and ANPRM were published, the President issued Executive Order 14110, “Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence” on October 30, 2023 (the AI Order), which, among other things, establishes new standards for AI safety and security. The AI Order provides definitions for the terms “artificial intelligence” and “AI system” which this proposed rule incorporates in the definition of *AI system*. The Department of the Treasury invites comments on the proposed definition of *AI system*.

*§ 850.206—Controlled foreign entity.*

The proposed rule would define *controlled foreign entity* as an entity of which a *U.S. person* is a *parent*, meaning a *U.S. person* directly or indirectly holds more than 50 percent of the outstanding voting interest or voting power of the board of the entity; is a general partner, managing member, or equivalent of the entity; or, if the entity is a pooled investment fund, is an investment adviser to any such fund. The proposed rule would place obligations on a *U.S. person*



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to take all reasonable steps to prohibit and prevent its *controlled foreign entity* from undertaking a transaction that would be a *prohibited transaction* if undertaken by a *U.S. person*, and to notify the Department of the Treasury if the *controlled foreign entity* undertakes a transaction that would be a *notifiable transaction* if undertaken by a *U.S. person*. This approach is intended to address a potential loophole whereby a *U.S. person* that is a *parent* of a non-*U.S. person* entity could use such an entity to undertake an investment that would otherwise be a *covered transaction* if undertaken by the *U.S. person* directly. Additionally, this approach is aimed at increasing U.S. Government visibility into these transactions or in some cases, limiting the flow of capital and intangible benefits through an entity closely tied to and often influenced by a *U.S. person* that is a *parent*, which would be contrary to the objectives of the Outbound Order. In assessing whether the *parent* has taken all reasonable steps, the Department of the Treasury would consider certain factors with respect to a *U.S. person* and its *controlled foreign entity*, including the existence and implementation of periodic training and reporting requirements with respect to compliance with the proposed regulations and the implementation of internal controls. The Department of the Treasury would assess compliance based on a consideration of the totality of relevant facts and circumstances, including whether such steps were reasonable given the size and sophistication of the *parent*. Generally, if the *U.S. person* has taken steps, including those described in § 850.302(b), that were reasonable given, for example, the size and sophistication of the *U.S. person*, the *U.S. person* would be found in compliance with the proposed rule.

The definition of *controlled foreign entity* is intended to draw a bright line so that a *U.S.*



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*person* could easily ascertain whether an entity is its *controlled foreign entity*. In determining whether a *U.S. person* indirectly holds voting interest or voting power of the board via a tiered ownership structure for purposes of this provision, where the relationship between an entity and another entity is that of a *parent* and subsidiary, the voting interest or voting power of the board of a subsidiary would be fully attributed to the *parent*. By contrast, if an entity holds 50 percent or less of another entity's voting interest or voting power of the board—that is, if the relationship is not a *parent*-subsidiary relationship—then the indirect downstream holdings of voting interest or voting power of the board, as applicable, attributed to the first entity would be determined proportionately.

If a *U.S. person* holds both direct and indirect holdings in the same entity, the direct and indirect holdings of the *U.S. person's* voting interest or voting power of the board, as applicable, would be aggregated. For the avoidance of doubt, each of these metrics (voting interest or voting power of the board) would be evaluated independently from the other. For example, if an entity has 20 percent of its voting interest and 15 percent of its voting power of the board each held by a *U.S. person*, these percentages would not be combined to equal 35 percent.

The following examples illustrate the application of the proposed definition of *controlled foreign entity*:

- (1) *Example 1.* A *U.S. person* holds more than 50 percent of the voting interest of the non-*U.S. person* Company A, and Company A holds more than 50 percent of the voting interest of the non-*U.S. person* Company B. Each of Company A

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and Company B would be a *controlled foreign entity* of the *U.S. person*, because the *U.S. person* directly holds more than 50 percent of Company A's voting interest, so Company A's holding of more than 50 percent of Company B is fully attributed to the *U.S. person*.

(2) *Example 2.* A *U.S. person* holds a 25 percent voting interest of the non-*U.S. person* Company C, and Company C holds 60 percent of the voting interest of the non-*U.S. person* Company D. The *U.S. person* indirectly holds 15 percent of the voting interest of Company D. Company D would not be a *controlled foreign entity* of the *U.S. person* because the *U.S. person* only indirectly holds 15 percent of the voting interest of Company D.

(3) *Example 3.* A *U.S. person* holds more than 50 percent of the voting interest of non-*U.S. person* Company E and 10 percent of the voting interest of the non-*U.S. person* Company F. Company E also holds 41 percent of the voting interest of Company F. Companies E and F would each be a *controlled foreign entity* of the *U.S. person* because the *U.S. person* directly holds more than 50 percent of Company E and has an aggregated voting interest (direct and indirect) of more than 50 percent of Company F (10 percent directly and 41 percent indirectly).

(4) *Example 4.* A *U.S. person* holds 49 percent of the voting interest of Company G; Company G holds 52 percent of the voting interest in Company H; and

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Company H holds 30 percent of the voting interest of non-U.S. person Company I. Since Company G holds more than 50 percent of the voting interest in Company H, Company G is a *parent* of Company H and Company H's 30 percent interest in Company I is fully attributed to Company G. The U.S. person's indirect interest in Company I is therefore 14.7 percent, which is calculated by multiplying the U.S. person's 49 percent interest in Company G and Company G's 30 percent interest in Company I. Company I is not a *controlled foreign entity* of the U.S. person.

The Department of the Treasury invites comments regarding this definition, including considerations with respect to coverage of entities established outside of the United States.

*§ 850.208—Covered activity.*

The proposed rule identifies activities that would provide the relevant nexus between the *covered foreign person* and the covered national security technologies and products described in the Outbound Order. The Outbound Order defines the term “covered national security technologies and products” to mean sensitive technologies and products in the semiconductors and microelectronics, quantum information technologies, and AI sectors that are critical for the military, intelligence, surveillance, or cyber-enabled capabilities of a country of concern, as determined by the Secretary of the Treasury in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies. The Outbound Order further states that, where

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applicable, “covered national security technologies and products” may be limited by reference to certain end uses of those technologies or products.

The three primary definitions in the proposed rule implementing the term “covered national security technologies and products” are *covered activity*, *notifiable transaction*, and *prohibited transaction*. The term *covered activity* would mean, in the context of a particular transaction, any of the activities referred to in the definition of *notifiable transaction* in § 850.217 or *prohibited transaction* in § 850.224. The Department of the Treasury invites comments on the approach in the proposed rule to incorporating specific covered national security technologies and products in the definitions of *notifiable transaction* and *prohibited transaction* based on a description of the technology or product and the relevant activities, capabilities, or end uses of such technology or product, as applicable, and any alternative approaches that should be considered.

The proposed definitions of *notifiable transaction* and *prohibited transaction* would identify specific *covered activities* relevant to the technology or product within each category. Some such *covered activities* would relate to semiconductors and microelectronics technology, equipment, and capabilities that enable the production and certain uses of integrated circuits that underpin current and future military innovations that improve the speed and accuracy of military decision-making, planning, and logistics, among other things; as well as that enable mass surveillance or other cyber-enabled capabilities. The proposed rule would also address *covered activities* related to quantum information technologies and products that enable capabilities that could compromise encryption and other cybersecurity controls and jeopardize military

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communications, among other things. In the case of a quantum sensing platform or quantum network, the end-use provision avoids covering use cases in strictly civilian fields. Finally, the proposed rule would address *covered activities* related to certain *AI systems* that have applications that pose or have the potential to pose significant national security risk. The proposed rule would not seek to broadly capture *AI systems* intended only for commercial applications or other civilian end uses and that do not have potential national security consequences, as discussed further below.

Those *covered activities* with respect to technologies and products that pose a particularly acute national security threat are incorporated into the definition of *prohibited transaction*. Those *covered activities* with respect to technologies and products that may contribute to the threat to the national security of the United States are incorporated into the definition of *notifiable transaction*. The scope of *prohibited transaction* and the scope of *notifiable transaction* are intended to be distinct and not overlap. The Department of the Treasury intends that the notification requirement will increase the U.S. Government's visibility into *U.S. person* transactions involving the relevant technologies and products and that these notifications will be helpful in highlighting aggregate sector trends and related capital flows as well as informing future policy development. The proposed prohibitions would be tailored restrictions on specific, identified areas to prevent *U.S. persons* from investing in the development of technologies and products that pose a particularly acute national security threat. Both the specific *covered activities* as well as the technical descriptions in the proposed rule were crafted with these objectives in mind. A more detailed discussion of specific *covered activities* and proposed technical descriptions is below under the

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sections on *notifiable transaction* and *prohibited transaction*. The Department of the Treasury invites comments on alternative approaches that would meet the stated objectives.

*§ 850.209—Covered foreign person.*

The Outbound Order requires the Department of the Treasury to prohibit or require notification of certain transactions involving a *covered foreign person* and defines the term as “a person of a country of concern who or that is engaged in activities, as identified in the regulations issued under [the Outbound Order], involving one or more covered national security technologies and products.” The definition of *covered foreign person* in the proposed rule describes three sets of circumstances that would cause a person to be a *covered foreign person*.

*§ 850.209(a)(1)*

First, a person would be a *covered foreign person* if it is a *person of a country of concern* that is engaged in a *covered activity*.

*§ 850.209(a)(2)*

Second, a person would be a *covered foreign person* even if it is not itself a *person of a country of concern* or engaged in a *covered activity* but has a particular relationship with a *person of a country of concern* that is engaged in a *covered activity*. The relationship would have to meet two conditions. First, the relevant person would have to hold a specified interest in the *person of a country of concern*. That interest could take the form of a voting interest, board seat (voting or observer), equity interest, or the power to direct or cause the direction of the management or policies of the *person of a country of concern* through contractual arrangement(s) (including, for

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the avoidance of doubt, any contractual arrangement with respect to a variable interest entity). The exact size of this interest—such as the percentage of voting interest or the number of board seats (voting or observer)—is not determinative as long as there is some interest of the nature described. The policy objective is to cover situations where a vested interest between the two persons exists. Second, if there is such an interest, then more than 50 percent of the first person’s revenue, net income, capital expenditure, or operating expenses would need to be attributable to the *person of a country of concern* and that person must be engaged in a *covered activity*. The first person also would meet this condition if that person holds an interest in more than one *person of a country of concern* engaged in a *covered activity*, and more than 50 percent of the first person’s revenue, net income, capital expenditure, or operating expenses is attributable to such *persons of a country of concern*, in aggregate. The Department of the Treasury intends the threshold of more than 50 percent of any of the financial metrics to be evaluated independently, not in combination. For example, assuming no other relevant circumstances, if a person’s interest in a *person of a country of concern* represents 20 percent of the first person’s revenue and 31 percent of its capital expenditures, these metrics would be evaluated independently and not combined to equal 51 percent.

Under this second set of circumstances, the Department of the Treasury intends to capture those entities that, while not directly engaged in a *covered activity* themselves, are significantly financially connected to entities that are engaged in a *covered activity*. The Department of the Treasury considers that if more than 50 percent of an investment target’s revenue, net income,



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capital expenditure, or operating expense is attributable to one or more *persons of a country of concern* that are engaged in a *covered activity*, the intangible benefits associated with a *U.S. person's* investment in the target are likely to be conveyed to such *persons of a country of concern*. Accordingly, the Department of the Treasury considers that the investment target itself should be treated as a *covered foreign person*. Consistent with the policy objectives of the Outbound Order, this approach seeks to focus on transactions where there is a likelihood of the transfer of intangible benefits to a *person of a country of concern* engaged in a *covered activity*. Moreover, in setting the relevant threshold for financial metrics between the investment target and *persons of a country of concern* engaged in a *covered activity* at more than 50 percent, the Department of the Treasury expects that through reasonable and diligent inquiry a *U.S. person* would be able to determine whether a potential investment target meets the applicable conditions. In capturing certain *U.S. person* transactions with entities that have a vested interest in, as well as a significant financial relationship with, a *covered foreign person*, this approach is intended to, among other things, address a common transaction structure whereby investments are made into parent companies or holding companies. Under these circumstances, a *U.S. entity* or an entity in a third country could be considered a *covered foreign person*.

§ 850.209(a)(3)

Lastly, a *person of a country of concern* would be a *covered foreign person* by virtue of its participation in a joint venture with a *U.S. person* if such joint venture is engaged in a *covered activity*. That is, even though the *person of a country of concern* may not be engaged in a *covered*



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activity itself, the fact of its participation in a joint venture that is engaged in a *covered activity* would cause the person to be a *covered foreign person*. Consistent with the policy objectives of the Outbound Order, this approach seeks to focus on transactions where there is a likelihood of the transfer of intangible benefits from a *U.S. person* to a *person of a country of concern* in connection with a *covered activity*.

The following examples illustrate the application of the proposed definition of *covered foreign person*:

- (5) *Example 5.* Company J holds a 10 percent equity interest in Company K, which is a *person of a country of concern* engaged in a *covered activity*, and income from Company K comprises 30 percent of Company J's net income for the most recent year for which audited financial statements are available. In addition, Company J holds a 10 percent equity interest in Company L, which is a *person of a country of concern* engaged in a *covered activity*, and income from Company L comprises 21 percent of Company J's net income for the most recent year for which audited financial statements are available. Therefore, Company J would be a *covered foreign person* under § 850.209(a)(2), because income from Company K and income from Company L, which are both *persons of a country of concern* that are engaged in *covered activities* in which Company J holds an equity interest, together comprise 51 percent of the net income of Company J for the most recent year for which audited financial statements are available.

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- (6) *Example 6.* Assume the same facts as Example 5, except that none of Company J's net income is attributable to Company K, and instead, 30 percent of Company J's capital expenditures for the most recent year for which audited financial statements are available at the time of a given transaction is attributable to Company K. Company J would not be a *covered foreign person* under § 850.209(a)(2), because the percentage of capital expenditures attributable to Company K and the percentage of net income attributable to Company L would not be aggregated, and neither the percentage of capital expenditures attributable to Company K nor the percentage of net income attributable to Company L is more than 50 percent for Company J.

The Department of the Treasury invites comments regarding this definition, including its application to a U.S. entity or a third-country entity.

In response to the ANPRM, some commenters requested that the definition of *covered foreign person* include a de minimis threshold below which a *person of a country of concern's* activity involving a covered technology or product would not trigger the definition of *covered activity*, meaning the person would not be a *covered foreign person*. The Department of the Treasury declines to propose a de minimis threshold for this definition. A de minimis threshold based on the financial significance of a covered activity in relation to any particular entity does not necessarily correspond to the national security significance of such activity. Setting a de minimis threshold based on the level of activity involving a covered technology or product would

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be challenging and would not effectively respond to the national security objectives of the Outbound Order.

In response to the ANPRM, some commenters requested that the Department of the Treasury maintain a publicly available list of *covered foreign persons*. The Department of the Treasury declines to adopt that suggestion in the proposed rule. Compiling a list of *covered foreign persons* would be challenging given that any such list would likely be subject to frequent change and likely underinclusive, which would undermine the national security goals of the Outbound Order. Limiting the definition of *covered foreign person* to persons included on such a list would risk excluding certain persons that should be covered in order to accomplish the objectives of the Outbound Order, including early-stage companies that may not have come to the attention of the Department of the Treasury. Providing a list of *covered foreign persons* could also result in attempts to evade the rule through corporate restructuring and would be overly burdensome to maintain for the reasons listed above. Rather, under the proposed rule, the Department of the Treasury would expect a *U.S. person* to conduct a reasonable and diligent inquiry to determine whether a transaction is covered under the proposed rule, including whether any *covered foreign person* is involved.

§ 850.210—*Covered transaction.*

As discussed in greater detail below, the definition of *covered transaction* would include a *U.S. person's* direct or indirect:

- Acquisition of an equity interest or contingent equity interest in a *covered foreign person*;

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- Provision of debt financing convertible to an equity interest in a *covered foreign person* or provision of debt financing that affords the lender certain management or governance rights in a *covered foreign person*;
- Conversion of a contingent equity interest or convertible debt in a *covered foreign person*;
- Greenfield investment or certain other corporate expansions that either will establish a *covered foreign person*, or will cause an existing *person of a country of concern* to pivot into a new *covered activity*;
- Entrance into a joint venture, wherever located, with a *person of a country of concern* where the joint venture will undertake a *covered activity*; and
- Investment as a limited partner or equivalent (LP) into a non-U.S. *person* pooled investment fund that invests in a *covered foreign person*.

Each of the above transaction types includes a specific requirement for what a *U.S. person* would need to *know* or intend for a transaction to be a *covered transaction*. Further detail on each of these transaction types is provided below.

The definition of *covered transaction* notes that it does not include an *excepted transaction* or, consistent with the Outbound Order, a transaction for the conduct of the official business of the United States Government by employees, grantees, or contractors thereof.

#### *Acquisition of equity interest or contingent equity interest*

The definition of *covered transaction* would include the acquisition of an equity interest (or equivalent) in a *covered foreign person* and the acquisition of a financial instrument that does

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not constitute an equity interest at the time of the covered transaction but is convertible into, or provides the right to acquire, an equity interest in a *covered foreign person* upon the occurrence of a contingency or defined event. While the issuance of debt secured by equity in a *covered foreign person* would not, absent other circumstances, be a *covered transaction*, foreclosure on collateral that constitutes an equity interest in a *covered foreign person* would constitute the acquisition of an equity interest under the proposed rule and would be a *covered transaction*.

#### *Convertible debt; debt with special rights*

The definition of *covered transaction* would include the provision of debt financing that is convertible by the *U.S. person* into equity of a *covered foreign person*. Additionally, the provision of debt financing that affords or will afford the *U.S. person* the right to make management decisions on behalf of a *covered foreign person* or to appoint members of the board of a *covered foreign person* would also be a *covered transaction*. The intent is to capture lending by a *U.S. person* lender only where such lending involves the acquisition of equity or equity-like rights by the *U.S. person* lender with respect to a *covered foreign person*.

#### *Conversion of contingent interest or convertible debt*

The definition of *covered transaction* includes as a separate basis of coverage the conversion of a contingent equity interest or convertible debt in a *covered foreign person*. As stated above, in addition to the conversion, the original acquisition of either such interest is a *covered transaction*. With respect to a *notifiable transaction*, the policy objective of including the conversion of a contingent equity or convertible debt in the definition of *covered transaction* is to

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gain visibility into the circumstances in which contingent interests in a *covered foreign person* convert. Including the conversion of a contingent equity interest or convertible debt in the scope of *covered transaction* would also address circumstances where the investment target or borrower is not a *covered foreign person* at the time of acquisition of the relevant interest but is a *covered foreign person* at the time of conversion of such interest (e.g., as a result of newly engaging in a *covered activity* or the target's relationship with a *person of a country of concern* engaged in a *covered activity*). The Department of the Treasury anticipates that if the original acquisition was a *notifiable transaction* and was timely notified, the second notification submitted with respect to the conversion would likely be similar to the first notification and thus less time-consuming to prepare. The Department of the Treasury considered alternative approaches such as covering only the acquisition and not the conversion of contingent interests or covering only the conversion. However, each alternative could be either over- or under-inclusive in situations where an investment target has pivoted away from, or into, a *covered activity* in the interim between acquisition and conversion.

#### *Greenfield or brownfield investment*

The definition of *covered transaction* would include a *U.S. person's* acquisition, leasing, or development of operations, land, property, or other assets in a *country of concern* when the *U.S. person knows* that such acquisition, leasing, or development will, or the *U.S. person* intends it to, either (1) establish a *covered foreign person*, such as the acquisition of land in a *country of concern* with the intent to convert it into a facility that designs an integrated circuit or (2) pivot an existing

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entity's operations into a new *covered activity*, such as the acquisition of a factory with the intent to retrofit it to produce equipment for performing volume advanced packaging. A *U.S. person's* intent (as distinct from *knowledge*) would be sufficient in these cases for the transaction to be a *covered transaction*. This is because in the greenfield and brownfield context, a *U.S. person* may not *know* at the time of the transaction that the investment will result in a *covered activity*, yet the Department of the Treasury nevertheless seeks to cover activities intended to bring about the establishment of a *covered foreign person* or a *person of a country of concern's* engagement in a new covered activity, since such a situation is likely to convey intangible benefits from the *U.S. person* to a *covered foreign person*. That a *covered foreign person* ultimately results from a greenfield or brownfield investment would not be necessary for coverage under the proposed rule, as long as the intent to establish a *covered foreign person* is present at the time of the transaction. The Department of the Treasury has assessed that requiring a greenfield or brownfield investment to result in the establishment of a *covered foreign person* or a *person of a country of concern's* engagement in a new covered activity before triggering obligations associated with *covered transaction* status risks undermining the national security goals of the program. For the avoidance of doubt, the Department of the Treasury does not intend to scope in a real estate transaction where the *U.S. person* does not have the requisite *knowledge* or intent.

#### *Joint venture investment*

The definition of *covered transaction* would include a *U.S. person's* entrance into a joint venture, wherever located, with a *person of a country of concern* where the *U.S. person* either



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*knows* or intends that the joint venture will engage in a *covered activity*. Like the greenfield or brownfield investment prong above, this is intended to cover situations in which a *covered foreign person* does not exist at the time of a transaction, but the transaction structure presents the opportunity and incentive for the transfer of intangible benefits from a *U.S. person* to a *person of a country of concern* through the joint venture. Similar to a greenfield or brownfield transaction, a *U.S. person's* intent (as distinct from *knowledge*) would be sufficient for coverage in the joint venture context because a *U.S. person* may not *know* at the time of the transaction that the joint venture will engage in a *covered activity*, yet the Department of the Treasury seeks to capture transactions likely to convey intangible benefits to a *covered foreign person*. Also similar to a greenfield or brownfield transaction, the joint venture would need not engage in a *covered activity* for the establishment of the joint venture to be a *covered transaction* under the proposed rule, as long as the *U.S. person* intends for it to do so.

#### *Investment made as an LP*

The definition of *covered transaction* would include *U.S. person* investments made as an LP into certain pooled funds. This approach would differ from other prongs of the definition of *covered transaction* in the ways described below.

First, it would cover only an investment into a non-*U.S. person* pooled investment fund because the activities of such a fund that is a *U.S. person* would be directly addressed by other prongs of this definition.

Second, it would cover an investment only when the *U.S. person knows* at the time of the



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investment that the pooled fund likely will invest in a *person of a country of concern* engaged in one or more of the three sectors of covered national security technologies and products identified in the Outbound Order. The Department of the Treasury has assessed that when a pooled fund is soliciting investments, it may not yet have identified specific targets in which it seeks to make investments. Therefore, it may not be practicable for an LP to *know* where its investment is going, via the pooled fund, in terms of a specific target entity even following a reasonable and diligent inquiry at the time of its LP investment. However, it is possible for an LP to *know*, through a reasonable and diligent inquiry, where a pooled fund is likely to invest at a higher level in terms of geography and sector. For example, a *U.S. person* could *know* that a pooled fund is likely to invest in PRC AI companies based on researching past investments made by a pooled fund's manager, engaging with the pooled investment fund's general partner, or reviewing such fund's prospectus or other documentation.

Third, this approach would cover an LP investment only when the pooled investment fund undertakes an investment that would be a *covered transaction* if made by the *U.S. person* directly, to avoid regulating transactions by *U.S. person* LPs that do not ultimately result in investments into a *covered foreign person*. In other words, in order to meet the criteria of a *covered transaction*, (1) the *U.S. person* LP would need to invest in a pooled fund that the *U.S. person* knows is likely to invest in a *person of a country of concern* that is in any of the three specified sectors in the Outbound Order; and (2) such pooled fund would need to actually undertake a transaction that would be a *covered transaction* if undertaken by a *U.S. person*. If the transaction is a *notifiable*

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*transaction, this would mean that the U.S. person would be required to file the relevant notification no later than 30 calendar days following the earliest date of the pooled fund's investment in a covered foreign person. If the investment ultimately made by the pooled fund would have been a prohibited transaction if made by a U.S. person and the U.S. person knew at the time of its LP investment in the pooled fund that the pooled fund likely would invest in a person of a country of concern engaged in any of the three specified sectors in the Outbound Order, then such investment made by the pooled fund in a covered foreign person would result in the U.S. person having made a prohibited transaction, which would be a violation of the proposed rule. On the other hand, a U.S. person's investment as an LP into a pooled fund would not be a covered transaction if the U.S. person does not know at the time of its investment that the pooled investment fund likely will invest in a person of a country of concern that is in any of the three relevant sectors, even when such fund subsequently undertakes an investment that would be a covered transaction if made by a U.S. person.*

#### *Indirect covered transaction*

To address a potential loophole, a U.S. person's transaction that is indirect, as well as direct, would be a covered transaction regardless of the number of intermediary entities involved in such transaction if it meets the elements of the definition. For example, if a U.S. person purchased shares in a special purpose vehicle, wherever located, that in turn acquired an equity interest in a covered foreign person, and the U.S. person knew at the time of its transaction that the special purpose vehicle would be acquiring an equity interest in a covered foreign person, that transaction would

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be a *covered transaction*.

#### *Knowledge requirement for a covered transaction*

As set forth in the proposed rule, a transaction that otherwise has the attributes of a *covered transaction* ordinarily would be treated as a *covered transaction* only if the relevant *U.S. person* knows at the time of the transaction that the transaction involves, or will result in the establishment of, a *covered foreign person* (or will result in a *person of a country of concern*'s engagement in a new *covered activity*). As discussed with respect to Subpart A, *knowledge* for this purpose includes both actual knowledge and reason to know of the relevant facts or circumstances—that is, a *U.S. person* that had reason to know of the relevant facts or circumstances would not be excused from obligations or liability associated with entering into a *covered transaction* due to its alleged lack of actual knowledge of those facts or circumstances. Please see the discussion in Subpart A above for further information on how *knowledge*, which includes reason to know, would be assessed.

The following examples illustrate the application of the proposed definition of *covered transaction*:

- (7) *Example 7.* A *U.S. person* acquires an existing manufacturing facility in a *country of concern* that does not, at the time of the acquisition, engage in a *covered activity*. Prior to the transaction, the *U.S. person* extensively researches the feasibility of retrofitting the facility to undertake a *covered activity* and secures financing on the basis of future cash flows from the facility's undertaking of such *covered activity*. The acquisition would therefore be a *covered transaction* under § 850.210(a)(4)(i) because it is the

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acquisition of assets in a *country of concern* that the *U.S. person* intends at the time of the transaction to result in the establishment of a *covered foreign person*.

(8) *Example 8.* A *U.S. person* invests as an LP in Company M, a pooled fund which is not a *U.S. person*. At the time of the *U.S. person's* investment, Company M has not undertaken any investments. However, Company M's manager has an extensive track record of investing predominantly in the artificial intelligence sector in a *country of concern*. Company M's prospectus states that Company M will invest in entities that are leading AI technology advancements including those with a principal place of business in a *country of concern*. One year following the conclusion of fundraising, Company M undertakes a transaction that would be a *covered transaction* if undertaken by a *U.S. person*. The *U.S. person's* investment as an LP would therefore be a *covered transaction* under § 850.210(a)(6), because the *U.S. person* had reason to know (and therefore is deemed to have *known*) that Company M was likely to invest in a *person of a country of concern* engaged in one of the sectors enumerated in § 850.210(a)(6), and Company M subsequently undertook a transaction that would be a *covered transaction* if undertaken by a *U.S. person*. More specifically, if Company M's transaction would be a *prohibited transaction* if undertaken by a *U.S. person*, then the *U.S. person's* investment as an LP into Company M would be a *prohibited transaction*; if Company M's transaction would be a *notifiable transaction* if undertaken by a *U.S. person*, then the *U.S. person's* investment as an LP into Company M would be a

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*notifiable transaction. The completion date of the transaction for the purpose of the deadline for a submission of the required notification would be the earliest date upon which any interest, asset, property, or right in the relevant covered foreign person was conveyed, assigned, delivered, or otherwise transferred to Company M. It would not be the date of the U.S. person's original investment in Company M.*

- (9) *Example 9.* Assume the same facts as Example 8, except that Company M never undertakes a transaction that would be a *covered transaction* if undertaken by a *U.S. person*. As a result, the *U.S. person's* LP investment in Company M would not be a *covered transaction*, as Company M's undertaking of a transaction that would be a *covered transaction* if undertaken by a *U.S. person* is a necessary element of § 850.210(a)(6) of the proposed rule.

Some commenters to the ANPRM requested that certain other activities be either included in the definition of *excepted transaction* or explicitly excluded from the definition of *covered transaction*. These include university-to-university research collaborations; the sale of goods and services; the purchase, sale, and licensing of intellectual property; and a variety of financial and non-financial services ancillary to a transaction such as the processing, clearing, or sending of payments by a bank. The proposed definition of *covered transaction* has been crafted to refer to a narrow set of specific transaction types, and the proposed rule does not explicitly exclude a list of other activities from this definition as it is not necessary (for any transaction to be covered, the elements in the definition of *covered transaction* need to be met).

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Under § 850.210(b)(ii), consistent with the Outbound Order, a transaction undertaken for the conduct of the official business of the United States Government by employees, grantees, or contractors thereof would not be a *covered transaction*.

*§ 850.214—Excepted transaction.*

The proposed rule includes a definition of *excepted transaction* that refers to a transaction that is not a *covered transaction* because it meets specified conditions. See the discussion of Subpart E below for more information.

*§ 850.216—Knowledge.*

The proposed rule defines *knowledge* (which includes variants such as “know”) as actual knowledge that a fact or circumstance exists or is substantially certain to occur, an awareness at the time of a transaction of a high probability of a fact or circumstance’s future occurrence, or reason to know of a fact or circumstance’s existence. Consistent with commenter requests in response to the ANPRM that the terms align with other U.S. Government programs where possible, this language is similar to the definition of knowledge found in the Export Administration Regulations at 15 CFR 772.1. See the above discussion of Subpart A for more information on how this term would be applied in the proposed rule.

*§ 850.217—Notifiable transaction.*

A *notifiable transaction* would be a *covered transaction* in which the relevant *covered foreign person* undertakes (or in the case of certain greenfield, brownfield, or joint venture investments, the *U.S. person knows* will or intends to undertake) any of several specified *covered*

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*activities* listed in the proposed definition of *notifiable transaction*. At this time, the Department of the Treasury has determined that the listed activities may contribute to the threat to the national security of the United States identified in the Outbound Order. Each of the technical descriptions and, where applicable, references to end uses in the proposed definition, is designed to achieve the national security policy objectives of the Outbound Order, and the Department of the Treasury may consider further technical refinements consistent with these objectives. Each *covered activity* for purposes of a *notifiable transaction* is discussed below.

The submission of information to the Department of the Treasury regarding a *notifiable transaction* would increase the U.S. Government's visibility into a transaction involving technologies and products relevant to the threat to the national security of the United States identified in the Outbound Order. This information would be instructive in identifying sectoral trends and related capital flows in the covered activities. Additionally, it would inform future policy development with respect to both implementation of the Outbound Order, as well as the establishment or expansion of other U.S. Government programs relevant to the covered national security technologies and products. It is expected that this information would help policymakers determine whether any existing legal authorities should be used, or new action should be taken to address the threat to the national security of the United States identified in the Outbound Order. The Department of the Treasury invites comments on whether the proposed definition of *notifiable transaction* meets these goals.

*Integrated circuit design and production*



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The *covered activities* set forth in the definition of *notifiable transaction* would include the design, fabrication, or packaging of any integrated circuit that is not covered by the *prohibited transaction* definition (i.e., that does not meet the performance parameters and criteria identified in § 850.224(c), (d) and (e), as applicable). The proposed rule separately defines the terms *fabricate* and *package*, adding further technical detail as to both the notification and prohibition provisions. The Department of the Treasury assesses that the scope of this notification requirement would increase the U.S. Government's visibility into the volume and nature of investments of *U.S. person* transactions involving the defined technologies and products that may contribute to the threat to the national security of the United States.

#### *AI systems*

The *covered activities* set forth in the definition of *notifiable transaction* would include the development of an *AI system* that is not covered by the *prohibited transaction* definition (i.e., that does not meet the criteria identified in § 850.224(j) or (k)) and that is:

- (1) Designed to be used for any government intelligence or mass-surveillance end use (e.g., through mining text, audio, or video; image recognition; location tracking; or surreptitious listening devices) or military end use (e.g., for weapons targeting, target identification, combat simulation, military vehicle or weapons control, military decision-making, weapons design, or combat system logistics and maintenance);
- (2) Intended by the relevant *covered foreign person* to be used for cybersecurity



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applications, digital forensics tools, and penetration testing tools, or the control of robotic systems; or

- (3) Trained using a quantity of computing power greater than a certain level of computational operations (e.g., integer or floating-point operations). The Department of the Treasury is considering three potential alternatives for the level of computational operations:  $10^{23}$ ,  $10^{24}$ , or  $10^{25}$ .

This approach to covering the development of an *AI system* for purposes of a *notifiable transaction* reflects further consideration since the end-use qualification discussed in the ANPRM and focuses on the *AI system*'s design in some cases and its intended use by the relevant *covered foreign person* in other cases. Additionally, the proposed rule would include a technical parameter based on the amount of compute used to train an *AI system*. Commenters to the ANPRM recommended, in the context of *prohibited transactions*, adding coverage of transactions involving frontier AI models, defined based on a set of technical parameters. Given the approach related to the development of an *AI system* for purposes of a *prohibited transaction* (discussed below), the proposed rule offers for comment specific technical parameters in the definition of *notifiable transaction* as well. The Department of the Treasury intends to select one of the compute power alternatives for purposes of the *prohibited transaction* definition and would potentially set the relevant amount of compute power for the corresponding provision in the definition of *notifiable transaction* below the amount of compute power in the definition of *prohibited transaction* (at § 850.224(k)(1)). For the definition of *notifiable transaction* as well as the definition of *prohibited*

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*transaction*, the Department of the Treasury is interested in considering alternatives, including whether the definition should account for (1) specialized AI models trained on high-quality data that could require a lower amount of compute power; (2) AI models that can be fine-tuned or retrained to remove safety features; (3) other techniques (such as model scaling, Monte Carlo Tree Search, pruning, chain of thought, that could be used to increase performance); or (4) other relevant considerations, including alternative language with respect to the definition of *covered activities* relating to *AI systems* for purposes of *notifiable transactions* to add clarity or more precisely capture activities giving rise to the national security concerns related to the development of *AI systems*.

*§ 850.221—Person of a country of concern.*

This defined term is a component of the definitions of *covered foreign person* and *covered transaction*. It would include an individual who is a citizen or permanent resident of a *country of concern* and exclude U.S. citizens and U.S. permanent residents. It would also include an entity with a principal place of business in, headquartered in, incorporated in, or organized under the laws of a *country of concern*. The Department of the Treasury invites comments on the impact of this definition as proposed, particularly whether other categories of persons in addition to U.S. citizens and permanent residents should be excluded from the definition of *person of a country of concern*.

The definition would also include the government of a *country of concern*, persons acting on behalf of such a government, and persons controlled by or directed by such a government. The

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Department of the Treasury expects that, through a reasonable and diligent inquiry, a *U.S. person* should be able to determine whether a potential investment target involves a *person of a country of concern* as defined in the proposed rule.

Finally, the definition would include any entity, wherever located, in which one or more *persons of a country of concern*, individually or in the aggregate, hold at least 50 percent of any outstanding voting interest, voting power of the board, or equity interest, regardless of whether the interest is held directly or indirectly. This is intended to capture entities located outside of a *country of concern* that are majority-owned by *persons of a country of concern*, because a *U.S. person* investment into such an entity could result in the transfer of intangible benefits to or for the benefit of one or more *persons of a country of concern*. When evaluating a tiered ownership structure for any given entity, a *U.S. person* would need to determine whether *persons of a country of concern*, individually or in the aggregate, hold at least 50 percent of the entity's voting interest, voting power of the board, or equity interest, in which case, the entity would be considered a *person of a country of concern*. If the entity meets this criteria, another entity in which it holds at least 50 percent of the entity's voting interest, voting power of the board, or equity interest would also be a *person of a country of concern*, and so on. The definition is intended to draw a bright line so that it is straightforward for a *U.S. person* to ascertain whether an entity is a *person of a country of concern*.

The following examples illustrate the application of the proposed definition of *person of a country of concern*:

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(10) *Example 10.* Company N has its principal place of business in a country outside of a *country of concern* and is headquartered and incorporated outside of a *country of concern*. Six citizens of a *country of concern*, each of whom is not a U.S. citizen or U.S. permanent resident, each hold 10 percent of Company N's equity interest. Company N would therefore be a *person of a country of concern* under § 850.221(d), because an aggregate of 60 percent of the entity's equity interest is held by *persons of a country of concern*.

(11) *Example 11.* Assume the same facts as Example 10. In addition, Company N holds 60 percent of the voting power of the board of Company O, which also has its principal place of business in a country outside of a *country of concern* and is headquartered and incorporated outside of a *country of concern*. Company O would therefore be a *person of a country of concern* under § 850.221(e), because 60 percent of Company O's board voting power is held by Company N, which is a *person of a country of concern* under § 850.221(d).

§ 850.224—*Prohibited transaction.*

A *prohibited transaction* would be a *covered transaction* in which the relevant *covered foreign person* undertakes (or in the case of certain greenfield, brownfield, or joint venture investments, the *U.S. person* knows will or intends to undertake) any of several specified *covered activities* listed in the proposed definition of *prohibited transaction*. At this time, the Department of the Treasury has determined that the listed activities pose a particularly acute national security

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threat to the United States identified in the Outbound Order. Each of the technical descriptions and, where applicable, references to end uses in the proposed definition, is designed to achieve the focused national security policy objectives of the Outbound Order, and the Department of the Treasury may consider further technical refinements consistent with these objectives. Each *covered activity* for purposes of a *prohibited transaction* is discussed below.

#### *Advanced integrated circuit design and equipment*

The *covered activities* set forth in the definition of *prohibited transaction* would include developing or producing any electronic design automation software for the design of integrated circuits or *advanced packaging*. The proposed rule separately defines the terms *advanced packaging*, *develop*, and *produce*, adding further technical detail to the prohibition provision. Additional *covered activities* included in the definition of *prohibited transaction* would include developing or producing any of the following: certain front-end semiconductor fabrication equipment designed for performing the volume fabrication of integrated circuits, equipment for performing volume advanced packaging, or other items designed exclusively for use in or with extreme ultraviolet lithography fabrication equipment.

#### *Advanced integrated circuit design and production*

The *covered activities* set forth in the definition of *prohibited transaction* would include designing any integrated circuit that meets or exceeds certain advanced technical thresholds identified by the Bureau of Industry and Security of the Department of Commerce, or integrated circuits designed for operation at or below 4.5 Kelvin. The term would also include the fabrication

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of advanced integrated circuits that meet the technical criteria specified in the proposed rule. Additionally, the term would include the packaging of any integrated circuit using *advanced packaging* techniques.

#### *Supercomputers*

The *covered activities* set forth in the definition of *prohibited transaction* would include developing, installing, selling, or producing any supercomputer 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. The Department of the Treasury invites comments on the scope of *covered activities* involving supercomputers in the definition of *prohibited transaction* including whether any adjustments or clarification should be made.

#### *Quantum computers and components*

The *covered activities* set forth in the definition of *prohibited transaction* would include developing a *quantum computer* or producing any of the critical components required to produce a *quantum computer* such as a dilution refrigerator or two-stage pulse tube cryocooler. The proposed rule separately defines the term *quantum computer*, adding further technical detail to the prohibition provision. The Department of the Treasury invites comments regarding this prong of the definition including input on how further clarity might be provided with respect to what is meant by critical components, and the extent to which dilution refrigerator or two-stage pulse tube cryocooler can be further defined in terms of critical performance or otherwise.

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### *Quantum sensors*

The *covered activities* set forth in the definition of *prohibited transaction* would include developing or producing any quantum sensing platform designed for, or which the relevant *covered foreign person* intends to be used for, military, government intelligence, or mass-surveillance end uses. The proposed rule includes an end-use limitation to appropriately scope this activity to circumstances that could give rise to a particularly acute national security threat, recognizing that similar technologies could have important civilian purposes.

### *Quantum networking and quantum communication systems*

The *covered activities* set forth in the definition of *prohibited transaction* would include developing or producing any quantum network or quantum communication system designed for, or which the relevant *covered foreign person* intends to be used for: (1) networking to scale up the capabilities of *quantum computers*; (2) secure communications, such as quantum key distribution; or (3) any other application that has military, government intelligence, or mass-surveillance end use. The proposed rule includes an end-use limitation to appropriately scope this activity to circumstances that could give rise to a particularly acute national security threat, recognizing that similar technologies could have civilian purposes.

### *AI systems*

Some commenters to the ANPRM noted that the AI definitions under consideration in connection with a *prohibited transaction* could apply broadly and potentially sweep in civilian uses of an *AI system* unnecessarily. As noted above, the policy objective is to cover U.S. investment



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into entities that develop *AI systems* that have applications that pose a particularly acute national security threat without broadly capturing investments into entities that develop *AI systems* intended only for consumer applications or other civilian end uses that do not have potential national security consequences. To make sure the scope of *prohibited transactions* related to the development of any *AI system* appropriately addresses the national security threat identified in the Outbound Order, the *covered activities* would include any *AI system* that is designed to be exclusively used for, or which the relevant covered foreign person intends to be used for, any military end use (e.g., for weapons targeting, target identification, combat simulation, military vehicle or weapon control, military decision-making, weapons design, or combat system logistics and maintenance); or government intelligence or mass surveillance end use (e.g., through mining text, audio, or video; image recognition; location tracking; or surreptitious listening devices). Additionally, as discussed above in connection with *notifiable transactions* involving the development of *AI systems*, commenters to the ANPRM recommended, among other things, adding coverage of transactions involving frontier AI models and defined based on a set of technical parameters. The proposed rule offers for comment specific technical parameters in describing any *AI system* that is trained using a certain quantity of computing power generally and separately, any *AI system* that is trained using a certain quantity of computing power using primarily biological sequence data. The Department of the Treasury is considering setting the general computing power threshold for a *prohibited transaction* at one of three levels:  $10^{24}$ ,  $10^{25}$ , or  $10^{26}$  computational operations (e.g., integer or floating-point operations). As discussed



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above in connection with *notifiable transactions* involving the development of *AI systems*, the Department of the Treasury intends to select one of the general compute power alternatives for purposes of the *prohibited transaction* definition and would potentially set the relevant amount of compute power for the corresponding provision in the definition of *notifiable transaction* (at § 850.217(d)(3)) below the amount of compute power in the definition of *prohibited transaction*. With respect to *AI systems* trained primarily using biological sequence data, the Department of the Treasury is considering setting the computing power threshold at one of two levels:  $10^{23}$  or  $10^{24}$  computational operations. As noted below, the Department of the Treasury is considering whether this approach with respect to biological sequence data should be utilized for the definition of a *notifiable transaction* rather than the definition of a *prohibited transaction*. Regardless, the Department of the Treasury invites comments on the impacts of setting the computing power threshold at the various levels proposed as alternatives.

The Department of the Treasury, in consultation with other departments and agencies, has determined that the *covered activities* described in connection with *AI systems* pose a particularly acute threat to the national security of the United States and thus are appropriate for the definition of *prohibited transaction*. The specified end uses relate directly to the national security threats identified in the Outbound Order, and the Department of the Treasury, in consultation with other departments and agencies, has determined that transactions involving either an *AI system* exclusively designed to be deployed for such an end use or the relevant *covered foreign person's* intent to use an *AI system* for such an end use present a particularly acute threat to U.S. national

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security. Meanwhile, the general computing power thresholds set forth for consideration would cover powerful AI models, which could enable potential applications of concern, such as the design, synthesis, acquisition, or use of chemical, biological, radiological, or nuclear weapons; powerful offensive cyber operations; or the evasion of human control or oversight through deception or obfuscation. Such models can also enable next-generation military capabilities through improving the speed and accuracy of military decision-making and intelligence capabilities. Models trained using a quantity of computing power greater than  $10^{23}$  or  $10^{24}$  computational operations using primarily biological sequence data could enable potential biotechnology applications of concern, including for the design of biological weapons. The Department of Treasury welcomes comments on whether any transactions involving *AI systems* that could pose a threat to U.S. national security as identified in the Outbound Order would not be covered by the definitions of a *notifiable transaction* or a *prohibited transaction*. The Department of the Treasury invites comments on the impacts of each of these computing power threshold alternatives. The Department of the Treasury is also interested in comments on whether and why this approach to biological sequence data should instead be considered for the notification requirement rather than the prohibition.

#### *Cross-reference to U.S. Government lists*

The definition of *prohibited transaction* would also provide that any *covered transaction* is prohibited when it is with or involves a *covered foreign person* undertaking any *covered activity*—whether referred to in the definition of *prohibited transaction* or in the definition of

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*notifiable transaction*—if the *covered foreign person* is included on one of several U.S. Government lists, such as the Entity List maintained by the Bureau of Industry and Security within the Department of Commerce. Because the United States has already determined that the inclusion of a person on such a list evidences a threat to the interests of the United States, such as the foreign policy or national security of the United States, if a listed person is a *covered foreign person* engaged in any *covered activity*, then a *U.S. person's covered transaction* with such *covered foreign person* and the transfer of capital and *U.S. person* intangible benefits to them would pose a particularly acute risk to U.S. national security even when such listed person is engaged in what would otherwise qualify as only a *covered activity* under the *notifiable transaction* definition.

*§ 850.229—U.S. person.*

The proposed rule would apply to the conduct of a *U.S. person* only. In the proposed rule, a *U.S. person* would include any United States citizen or lawful permanent resident, as well as any entity organized under the laws of the United States or any jurisdiction within the United States, including any foreign branch of any such entity, or any person in the United States. This would mean that an entity organized in the United States would be considered a *U.S. person* for purposes of the proposed rule even if its *parent* is a non-*U.S. person*.

Some commenters to the ANPRM raised questions about the potential extraterritorial reach of the proposed rule as it relates to this term. Depending on how *U.S. person* is defined, these commenters noted that the proposed rule could purport to restrict activity taking place outside of the United States. In response to these comments, the Department of the Treasury clarifies two

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points. First, a non-*U.S. person* that happens to be a *parent* of a *U.S. person* would not be treated as a *U.S. person* for the purposes of this proposed rule solely because of its relationship to the *U.S. person*. Second, while any person in the United States, including personnel of a non-*U.S. person* entity working in a branch office of that entity or otherwise, would be considered a *U.S. person* under the proposed rule based on their presence in the United States, such person's non-*U.S. person* employer would not be considered a *U.S. person* solely because of an employee's presence in the United States. The Department of the Treasury invites comments regarding this proposed approach.

Some commenters to the ANPRM noted that the potential inclusion of “any person in the United States” in this definition could scope in a non-*U.S. person* in transit through the United States that takes an action during this transit that could constitute a *covered transaction*, such as signing investment paperwork, and therefore this portion of the definition should be scaled back or removed. However, the inclusion of “any person in the United States” mirrors the language used in the definition of “United States person” in the Outbound Order. The Department of the Treasury is concerned with persons who are neither citizens nor permanent residents and who are nevertheless able to accrue knowledge, experience, networks, and other intangible assets while they are in the United States that could convey valuable benefits to a *covered foreign person*. The circumstance of a non-*U.S.* citizen or permanent resident individual in transit through the United States who wishes to enter into a transaction that could trigger program coverage, while possible, is not likely to be a frequent occurrence and can be reasonably managed with advance planning.

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### *Subpart C—Prohibited Transactions and Other Prohibited Activities*

This subpart of the proposed rule describes activities that would be prohibited. Such activities would include a *U.S. person* engaging in a *prohibited transaction* unless an exemption has been granted and would include a *U.S. person knowingly directing* an otherwise *prohibited transaction*, as described below. A *U.S. person* would also be required to take all reasonable steps to prohibit and prevent any transaction by its *controlled foreign entity* that would be a *prohibited transaction* if engaged in by a *U.S. person*.

#### *§ 850.303—Knowingly directing an otherwise prohibited transaction.*

Subpart C includes a prohibition on a *U.S. person* that possesses authority at a non-*U.S. person* entity from *knowingly directing* a transaction by that non-*U.S. person* entity that would be a *prohibited transaction* if undertaken by a *U.S. person*. This provision is intended to address a potential loophole, such as a *U.S. person* senior manager at a foreign fund that invests in a *covered foreign person* or otherwise directs a transaction that would be prohibited if engaged in by a *U.S. person*.

In the ANPRM, the Department of the Treasury noted that it was considering applying this provision to situations where a *U.S. person*, with knowledge, “orders, decides, approves, or otherwise causes to be performed a transaction that would be prohibited under these regulations if engaged in by a *U.S. person*.” Commenters to the ANPRM sought clarity on this language, including at what stage of an investment such “directing” would occur, what level of involvement or responsibility would be required to trigger the definition, and through what types of entities

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such “knowingly directing” would need to occur to be covered. Commenters to the ANPRM also asked for clarification that ordinary banking activities would not be scoped into this definition.

The Department of the Treasury’s proposed approach to this provision is guided by several goals: (1) establishing a clear standard so a *U.S. person* (or a non-*U.S. person* employing such *U.S. person*) can determine whether its (or its employee’s) conduct is covered; (2) limiting the reach of the provision to minimize the potential impact on non-senior *U.S. person* employees, including administrative staff and individuals not playing a substantial role in an investment decision; and (3) capturing concerning *U.S. person* activities in a targeted manner.

Under the proposed rule, a *U.S. person* “knowingly directs” a transaction when such *U.S. person* has authority to make or substantially participate in decisions on behalf of a non-*U.S. person* entity and exercises that authority to direct, order, decide upon, or approve a transaction that would be a *prohibited transaction* if engaged in by a *U.S. person*. The proposed provision specifies that a *U.S. person* would have authority if such *U.S. person* is an officer, director, or senior advisor, or otherwise possesses senior-level authority. The Department of the Treasury requests comments on the impacts of the proposed approach as well as any alternatives that commenters consider appropriate.

In response to commenter questions on the ANPRM about whether this provision would apply only to the activity of *U.S. persons* at non-*U.S. person* funds, or to non-financial entities as well, the proposed rule clarifies that this provision would prohibit a *U.S. person* from *knowingly directing* a transaction via any type of non-*U.S. person* entity if the subject transaction would be a

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*prohibited transaction* if undertaken by a *U.S. person*. In response to commenter questions on the ANPRM about whether ordinary banking activities would be included in the definition of *knowingly directing*, the Department of the Treasury's proposed approach to this provision is intended to avoid scoping in the provision of third-party services such as banking services, as well as routine administrative work by a *U.S. person* who lacks substantial involvement in an investment decision. Rather, the Department of the Treasury's objective is to address a potential loophole that could otherwise permit a *U.S. person* to transfer capital and intangible benefits to a *covered foreign person* via a non-*U.S. person* entity.

The following example illustrates the application of the proposed definition of *knowingly directing*:

- (12) *Example 12.* A *U.S. person* is a senior executive at Company P, a non-*U.S. person* operating company. The *U.S. person's* role includes substantial participation in investment decisions related to Company P's strategic acquisitions. The *U.S. person* participates in deliberations among Company P's leadership about whether to undertake a share purchase in Company Q, a privately-held *covered foreign person* that develops a *quantum computer*. Following these deliberations, the *U.S. person* votes in favor of the share purchase and *knows* at the time of the vote that the share purchase would be a *prohibited transaction* if undertaken by a *U.S. person*. Therefore, the *U.S. person* would have *knowingly directed* an otherwise *prohibited transaction* under the proposed rule.



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Wherever possible, consistent with national security objectives, the Department of the Treasury seeks to avoid broad implications on the employment of *U.S. persons*. As a result, the proposed approach would carve out a *U.S. person* who recuses themselves from an investment even if that person has the authority to make or substantially participate in decisions on behalf of a non-*U.S. person* entity. The Department of the Treasury invites comments regarding the proposed approach, particularly to what stage of an investment this recusal carveout should apply (e.g., negotiation of a transaction, the decision to undertake the transaction, and/or overseeing the investment after the *completion date*).

*Subpart D—Notifiable Transactions and other Notifiable Activities*

This subpart of the proposed rule would require a *U.S. person* to notify the Department of the Treasury in any of the following circumstances:

- If it undertakes a *notifiable transaction* (§ 850.401);
- If its *controlled foreign entity* undertakes a transaction that would be notifiable if undertaken by a *U.S. person* (§ 850.402), or;
- If the *U.S. person* acquires actual knowledge following the *completion date* of a transaction that the transaction would have been a *covered transaction* if the *U.S. person* had *known* of relevant facts or circumstances as of the *completion date* (§ 850.403).

In each of the above circumstances, the *U.S. person* would be required to follow specified procedures that include requirements to submit detailed information to the Department of the Treasury according to set timeframes and to certify as to the completeness and accuracy of the



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information submitted, as well as to maintain relevant records. A *U.S. person* would also be required to promptly notify the Department of the Treasury of any material omission or inaccuracy that the *U.S. person* learns about following any information submission.

The requirement to notify the Department of the Treasury in § 850.403 would apply to circumstances in which a *U.S. person* acquires actual knowledge after the window in which a § 850.401 notification could have been timely submitted. Specifically, the § 850.403 notification requirement would apply to situations where a *U.S. person* did not possess *knowledge* at the time of the transaction of a fact that, if *known* at the time of the transaction, would have made the transaction a *covered transaction* (such as, for example, the investment target's engagement in a *covered activity*). The information requirements for a § 850.403 notification include an explanation by the *U.S. person* as to why it did not possess or obtain such *knowledge* at the time of the transaction and to describe any pre-transaction diligence.

Some commenters stated that certain of the information considered in the ANPRM as elements of a complete notification could be difficult to obtain or burdensome to provide and cautioned that certain information requirements could have an unintended chilling effect on transactions in the relevant activities described in the ANPRM. The proposed rule seeks to address the national security threat described in the Outbound Order while minimizing unintended consequences. In light of this, the proposed rule contains information requirements for a *notifiable transaction* that would provide important details regarding a transaction, but are more focused than those listed in the ANPRM. The proposed rule also would require the *U.S. person* to maintain a

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copy of the notification and supporting documentation for ten years (consistent with the 21<sup>st</sup> Century Peace through Strength Act of 2024 (Sec. 3111, Pub. L. 118-50), which amended section 206 of IEEPA and extended the statute of limitations for violations of IEEPA from five years to ten years), during which period the Department of the Treasury could request such documents.

In response to comments to the ANPRM that a requirement to submit a notification before the *completion date* of a transaction could have the effect of delaying the transaction, the proposed rule would allow a notification to be submitted no later than 30 calendar days following the *completion date* of a *notifiable transaction*. In other words, the *U.S. person* could submit the notification at any point prior to the *completion date* of the *notifiable transaction* or within 30 calendar days following the *completion date*.

The following example illustrates the application of the proposed definition of *completion date* and the submission of a notification in the context of an acquisition of a *contingent equity interest*:

(13) *Example 13.* A *U.S. person* acquires a *contingent equity interest* in a *covered foreign person* in a transaction that is a *notifiable transaction*. One year later, the *contingent equity interest* converts into an equity interest. The *U.S. person's* acquisition of a *contingent equity interest* and subsequent conversion into an equity interest each constitute a separate *covered transaction* under § 850.210(a)(1) and § 850.210(a)(3), respectively. Under § 850.204, § 850.401, and § 850.404, the *U.S. person* would be required to file the first notification with the Department of the Treasury no later than

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30 calendar days following the *completion date* of the first *covered transaction*, which would be the earliest date upon which the *contingent equity interest* is conveyed, assigned, delivered, or otherwise transferred to the *U.S. person*. Likewise, the *U.S. person* would be required to file the second notification with the Department of the Treasury no later than 30 calendar days following the *completion date* of the second *covered transaction*, which would be the earliest date upon which the equity interest (resulting from the conversion of the *contingent equity interest*) is conveyed, assigned, delivered, or otherwise transferred to the *U.S. person*.

#### *Subpart E—Exceptions and Exemptions*

This subpart of the proposed rule specifies particular factors that would cause an otherwise *covered transaction* to be treated as an *excepted transaction*. This subpart also specifies provisions that would apply when a transaction is a *covered transaction* but a party to that transaction seeks an exemption from certain applicable rules on national interest grounds (which, if granted, would cause the transaction to be an exempted transaction).

#### *§ 850.501—Excepted transaction.*

In keeping with the goal of tailoring the proposed rule to address the national security threat described in the Outbound Order while minimizing disruptive effects on *U.S. persons*, the proposed rule would define certain exceptions. A transaction that otherwise would qualify as a *covered transaction* but meets one of the exceptions would be referred to as an *excepted transaction*. The Department of the Treasury considers that a transaction that would qualify as an

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*excepted transaction* presents a lower likelihood of the transfer of intangible benefits to the *covered foreign person* or is otherwise less likely to present national security concern than a *covered transaction*.

As discussed in detail below, an *excepted transaction* would include the following (subject to conditions in some instances, as explained below):

- An investment by a *U.S. person* in a publicly traded security;
- An investment by a *U.S. person* in a security issued by an investment company, such as an index fund, mutual fund, or exchange traded fund;
- An investment of a certain size by a *U.S. person* LP in a pooled investment fund;
- A *U.S. person's* full buyout of all interests of *any person of a country of concern* in an entity, such that the entity would not constitute a *covered foreign person* following the transaction;
- An intracompany transaction between a *U.S. person parent* and its subsidiary to support ongoing operations (or other activities that are not *covered activities* as defined in § 850.208);
- Fulfillment of a *U.S. person's* binding capital commitment entered into prior to the date of the Outbound Order;
- The acquisition of a voting interest in a *covered foreign person* upon default or other condition involving a loan, where the loan was made by a lending syndicate and a *U.S. person* participates passively in the syndicate; and

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- Certain transactions that occur in a country or territory outside the United States that has been designated by the Secretary in accordance with provisions set forth in § 850.501(f) of the proposed rule.

To make sure these exceptions are consistent with the policy objectives, certain of the transactions described above would cease to qualify as an *excepted transaction* if a *U.S. person* were to obtain certain investor rights beyond standard minority shareholder protections (for example, in connection with publicly traded securities or an LP investment).

The ANPRM proposed an exception for an investment into a publicly traded security, with “security” defined as set forth in section 3(a)(1) of the Securities Exchange Act of 1934. In response to the ANPRM, some commenters requested that the definition of “publicly traded security” be broadened from the definition of “security” used in the discussion of excepted transactions in the ANPRM to align with the definition used by the Department of the Treasury’s Office of Foreign Assets Control in connection with the Non-SDN Chinese Military-Industrial Complex Companies List. The proposed rule would effectively broaden the carveout to include a security traded on a non-U.S. exchange, or a security traded “over-the-counter,” in addition to a security traded on a U.S. exchange. The proposed rule would adopt this suggestion because a *U.S. person*’s purchase of securities traded on a public exchange, whether inside or outside the United States, presents a lower likelihood of transferring intangible benefits to a *covered foreign person*.

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The proposed rule also would provide an exception for investment in securities issued by an investment company, such as an index fund, mutual fund, or exchange traded fund, as well as a business development company under the Investment Company Act of 1940, as amended.

Similarly, a *U.S. person* making an LP investment under a specified threshold into a pooled fund that then invests in a *covered foreign person* would, subject to the specified criteria, constitute an *excepted transaction*. The rationale for this approach is that LP transactions above a certain threshold are more likely to involve the transfer of intangible benefits such as those often associated with larger institutional investors, including standing and prominence, managerial assistance, and enhanced access to additional financing. When a *U.S. person's* committed capital to a pooled investment fund as an LP exceeds a certain threshold, the *U.S. person* may have greater incentive and potentially greater ability to impact the success of a *covered foreign person* in which the pooled fund invests. The proposed rule presents two alternative approaches for defining the threshold beneath which a *U.S. person's* LP investment into a pooled fund that then invests in a *covered foreign person* would constitute an *excepted transaction*.

Under proposed Alternative 1, a *U.S. person's* investment made as an LP in a pooled fund would constitute an *excepted transaction* if (1) the LP's rights are consistent with a passive investment and (2) the LP's committed capital is not more than 50 percent of the total assets under management of the pooled fund. If the *U.S. person* LP's committed capital were to constitute more than 50 percent of the total assets under management of the pooled fund, its investment would qualify as an *excepted transaction* only if the *U.S. person* secured a binding agreement that the

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pooled fund would not use its capital for a *prohibited transaction*. This approach was developed to address the likelihood of intangible benefits being transferred by such an investment if, for example, a *U.S. person's* LP investment is large enough compared to the investable assets of the pooled fund such that the *U.S. person* LP is an anchor investor or otherwise wields substantial influence that would allow it to guide the pooled fund's investment decisions or interact regularly with the pooled fund's investment targets. This approach would also address situations where the *U.S. person's* LP investment falls below the threshold but contains one of several indicia of control or influence over the pooled fund or the ultimate *covered foreign person* investment target by excluding such an investment from the definition of *excepted transaction*.

Under proposed Alternative 2, a *U.S. person's* investment made as an LP in a pooled investment fund would constitute an *excepted transaction* if the LP's committed capital is not more than \$1 million. The rationale for this alternative approach is that if an LP investment is above the \$1 million threshold, a *U.S. person's* LP investment may be large enough that its investment transfers intangible benefits, such as standing and prominence that an underlying *covered foreign person* investment target could exploit for legitimacy or for further fundraising purposes. Although this alternative may scope in a greater number of LP investments as *covered transactions* compared to Alternative 1, this bright-line approach may be easier to comply with while still addressing the risk of intangible benefits being transferred by such an investment.

An *excepted transaction* also would include a *U.S. person's* full buyout of the interests of a *person of a country of concern* in an entity, where the entity would not constitute a *covered*



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*foreign person* following the transaction. As discussed in the ANPRM, the objective of this exception is to carve out from coverage a transaction that eliminates the likelihood that intangible benefits of a *U.S. person* transfer to a *covered foreign person*, because following a full buyout, a *person of a country of concern* will no longer have any interest in the target of the buyout.

An *excepted transaction* would also include certain intracompany transactions—that is, a transaction between a *U.S. person* and its *controlled foreign entity* to support ongoing operations or other activities that are not *covered activities*. The goal of this exception is to avoid unintended interference with the ongoing operations of a *U.S. person's controlled foreign entity* even when that *controlled foreign entity* also meets the definition of *covered foreign person*. The Department of the Treasury expects that the initial acquisition or establishment of the subsidiary would already constitute a *covered transaction*, and where it does not, the potential impacts on the *U.S. person* from covering such intracompany transactions under the proposed rule would likely outweigh the benefit in terms of the objectives of the Outbound Order. Although the definition of *covered transaction* in the proposed rule would not usually apply to most routine intracompany activities such as the sale or purchase of inventory or fixed assets, the provision of paid services, or the licensing of technology, the intracompany transaction exception in the proposed rule nonetheless exempts intracompany transactions that would be *covered transactions* but support activities that are not *covered activities*. To avoid use of the intracompany transaction exception to establish new *covered foreign persons* or to pivot existing subsidiaries into a new *covered activity*, the exception would not apply to greenfield investments, pivots of existing entities' operations into *covered*



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activities, and joint ventures.

Consistent with the ANPRM, the proposed definition of *excepted transaction* would also include any transaction made in fulfillment of a *U.S. person's* binding capital commitment entered into prior to the effective date of the Outbound Order (August 9, 2023). A *U.S. person* would not have been aware of the scope of the Outbound Order and directive for the implementation of the prohibition and notification requirement before the Outbound Order was issued, and this exception is intended to avoid significant disruption to a *U.S. person* who entered into a binding commitment prior to August 9, 2023. The ANPRM, issued on the same day as the Outbound Order, also included discussion of a possible exception for fulfillment of “binding capital commitments ... made prior to the issuance of the [Outbound] Order.” The Department of the Treasury proposes to specify that this proposed exception applies to any transaction made in fulfillment of a binding capital commitment entered into prior to the date of the Outbound Order. The intent is to effectively address the national emergency identified in the Outbound Order and avoid creating incentives for *U.S. persons* to enter into new binding commitments for a *covered transaction* after issuance of the proposed rule. The Department of the Treasury requests comment on the scope of the exception, including how to address the timing of binding capital commitments.

The definition of *excepted transaction* would also include the acquisition of a voting interest in a *covered foreign person* by a *U.S. person* upon default or other condition involving a loan or similar financing arrangement where the *U.S. person* lender was part of a syndicate of banks and cannot initiate action vis-à-vis the debtor on its own and does not have a lead role in the

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syndicate. Consistent with the objectives of the Outbound Order, it would except a narrow set of circumstances in which a *U.S. person* lender has passively received an interest in a *covered foreign person* and, even after receiving such interest, lacks a role in the lending syndicate that could create the opportunity for a *U.S. person* lender's intangible benefits to transfer to the *covered foreign person* debtor.

The Department of the Treasury, together with the Departments of State and Commerce and other agencies, recognize the importance of working with our partners and allies and will continue coordinating closely to address our shared national security concerns posed by outbound investment. In recognition of the shared objectives and in furtherance of the U.S. Government's efforts to encourage partners and allies address risks posed by outbound investment, the proposed rule would also provide for the potential application of the term *excepted transaction* to certain transactions with or involving a person of a country or territory outside of the United States designated by the Secretary in accordance with certain criteria (to be developed) that relate to that country or territory's own measures to address the national security risk related to certain outbound investment. The Department of the Treasury expects that any such country or territory would be designated after accounting for factors such as whether the country or territory is regulating outbound investment transactions involving technologies critical to a country of concern's military, intelligence, surveillance, or cyber-enabled capabilities, which technologies are covered by such regulation, and whether such regulation addresses national security concerns posed by outbound investment similar to those addressed by the U.S. outbound program. The Department

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of the Treasury is considering taking into account other factors for purposes of designating a country or territory, including the extent to which a country or territory cooperates with the United States on issues of national security and whether it has in place and is using related authorities and tools, such as export controls, to protect sensitive technologies and products.

The proposed rule would provide for the application of this exception only to certain types of transactions with or involving a person of a designated country or territory. The proposed rule anticipates that the Secretary would determine the types of transactions for which the related national security concerns are likely to be adequately addressed by measures taken or that may be taken by the government of a country or territory outside the United States. Once developed, the Department of the Treasury intends to make factors for the designation of a country or territory as well as types of transactions and/or activities that would be subject to the exception publicly available on Treasury's Outbound Investment Security Program website. The Department of the Treasury, along with the Departments of State and Commerce, will continue to work with partners and allies as they explore addressing the national security concerns posed by certain outbound investments. The Department of the Treasury invites comments and input on the proposed factors for the Secretary to consider when designating a country or territory in this context as well as comments on the types of transactions or activities that should be excepted once a country or territory has been designated. Additionally, the Department of the Treasury invites comments more generally on efforts to engage internationally on outbound investment security.

*§ 850.502—National interest exemption.*

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

On a case-by-case basis, the Secretary, in consultation with the Secretary of Commerce, the Secretary of State, and the heads of relevant agencies, as appropriate, may determine that a *covered transaction* is in the national interest of the United States and therefore, exempt it from certain provisions of this proposed rule. The Department of the Treasury anticipates that this exemption of a *covered transaction* would be granted by the Secretary in exceptional circumstances.

This section of the proposed rule describes the process and considerations for such a determination. Any determination that a covered transaction is in the national interest of the United States and therefore exempt from certain provisions will be based on a consideration of the totality of the facts and circumstances. The Department of the Treasury anticipates that such determination may be informed by, among other considerations, the transaction’s effect on critical U.S. supply chain needs, domestic production needed for projected national defense requirements, the United States’ technological leadership globally in areas affecting U.S. national security, and the impact on national security from prohibiting a given transaction. The Department of the Treasury is *not* considering granting retroactive waivers or exemptions (i.e., waivers or exemptions after a *prohibited transaction* has been completed).

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In order to request a national interest exemption, a *U.S. person* would need to submit certain information to the Department of the Treasury, including describing the scope of the relevant transaction, the basis for the request, and an analysis of the transaction's potential impact on the national interest of the United States. The Department of the Treasury may request that a *U.S. person* submit information that may include some or all of the information required by § 850.405, as well as additional details based on the facts and circumstances.

Once developed, the Department of the Treasury anticipates detailing the process and required information for any national interest exemption request on the Department of the Treasury's Outbound Investment Program website.

#### *Subpart F—Violations*

This subpart of the proposed rule describes conduct that would be treated as a violation of the proposed rule. Such conduct would include taking any action prohibited by the proposed rule, failing to take any action required by the proposed rule within the timeframe and in the manner specified, and making materially false or misleading representations to the Department of the Treasury when submitting any information required by the proposed rule. The proposed rule would also prohibit any action that evades or avoids or has the purpose of evading or avoiding any of the prohibitions of the proposed rule.

#### *Subpart G—Penalties and Disclosures*

This subpart of the proposed rule describes the penalties that would be applicable to violations of the proposed rule by any person subject to the jurisdiction of the United States, which

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would include civil and criminal penalties up to the maximum amount set forth in section 206 of IEEPA. Under the proposed rule, the Department of the Treasury may impose a civil penalty on any person that violates the rule, and the Secretary may refer potential criminal violations under the proposed rule to the Attorney General. Further, the proposed rule states that the Secretary, in consultation with the heads of relevant agencies, may take action to nullify, void, or otherwise compel divestment of any *prohibited transaction* entered into after the effective date of the rule. This subpart also describes the process for a person that may have violated applicable rules to submit a voluntary self-disclosure. A *U.S. person* could elect to make such a disclosure of actual or possible violations. The Department of the Treasury would take such disclosure into account as a mitigating factor in determining the appropriate response, including the potential imposition of penalties, if the Department of the Treasury determines that there was, in fact, a violation.

#### *Subpart H—Provision and Handling of Information*

This subpart describes the Department of the Treasury's proposal to treat as confidential, subject to limited exceptions, information and documentary materials that are submitted pursuant to the regulations and that are not otherwise publicly available. Except to the extent required by law or in accordance with one of the enumerated exceptions, the Department of the Treasury would not disclose such information publicly.

However, consistent with the exceptions set forth in the proposed rule, the Department of the Treasury would be permitted to disclose information that would otherwise be treated as confidential in certain limited circumstances; for example, the Department of the Treasury could

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disclose information to U.S. partners and allies where the information is important for the national security analysis or actions of the Department of the Treasury or such partners and allies, and subject to appropriate safeguards. Separately, under the proposed rule, the Department of the Treasury could use information submitted to fulfill its obligations under the Outbound Order, which include the requirement to prepare annual reports to the President in coordination with the Secretary of Commerce and in consultation with the heads of other relevant agencies, as appropriate, and could include anonymized data gathered pursuant to this part.

The Department of the Treasury is considering whether there are additional circumstances where disclosure of otherwise confidential information should be permitted. One proposal under consideration would allow the Department of the Treasury to disclose such information to the public as and when the Secretary determines that such disclosure is in the national interest: for example, to promote compliance with the proposed regulations by sharing with the public information about the activities of particular persons of a country of concern. The Department of the Treasury expects that such an exception would be subject to a high bar and limited to circumstances in which the Secretary identifies a pressing national interest that disclosure could help to address. This exception would not supersede any applicable statutory restrictions that may constrain the sharing of certain categories of information, such as information that a party has identified as protected trade secrets information. The Department of the Treasury invites comments on the considerations that it should take into account in identifying the scope of this potential additional exception to confidential treatment, the standard that should apply to the Secretary's

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determination, and what safeguards may be applicable to disclosure when such an exception applies.

#### *Subpart I—Other Provisions*

This subpart of the proposed rule contains provisions related to the delegation of the Secretary's authorities under the Outbound Order, any amendment to or modification of the proposed rule, and a requirement for certain information regarding any transaction to be furnished upon demand. The proposed rule states that, consistent with the statutory authority on which the Outbound Order and the proposed rule are based, the Department of the Treasury has the power to investigate conduct that may constitute a violation, hold hearings, call witnesses, and require in-person testimony or production of documents, among other powers listed in § 850.904.

Subpart I would also establish, in § 850.903, that the provisions of the rule are severable from one another. If any of the provisions of this rule as finalized, or the application thereof to any person or circumstance, were to be held invalid, such invalidity would not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

#### **IV. Request for Comment**

The Department of the Treasury invites comments on any and all aspects of the proposed rule, including and on the specific provisions discussed above in section III and the questions below. The Department of the Treasury invites comments accompanied by empirical data or other specific information wherever possible.



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1. Are there areas where the proposed rule is broader than necessary to address the national security concerns identified in the Outbound Order? Are there areas where it is narrower than necessary or contains loopholes? If so, where and what adjustments should be made?
2. How could the knowledge standard in the proposed rule be clarified? What, if any, alternatives should be considered? What other factors should be considered to assess whether a person conducted a reasonable and diligent inquiry?
3. What considerations should the Department of the Treasury take into account with respect to the ease or difficulty with which a *U.S. person* will be able to comply with the proposed rule, particularly with respect to ascertaining whether an investment target or relevant counterparty is a *person of a country of concern* and engaged in a *covered activity*?
4. Are there adjustments to the scope of *covered activities* identified in the definition of either *notifiable transaction* or *prohibited transaction* in the proposed rule (including addition(s), removal(s), or elaboration(s)) that should be made to help ensure that the definition addresses the national security concerns identified in the Outbound Order and discussed above while minimizing unintended consequences? If so, what are they?
5. Is the line between the *covered activities* identified in the definition of *notifiable transaction* and those in the definition of *prohibited transaction* (with respect to the products and technologies in the semiconductors and microelectronics and the AI sectors) appropriately drawn? What are the potential consequences of the proposed scope of *covered activities* in the definition of *notifiable transaction* and *prohibited transaction* and

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how should the distinction between the two be adjusted, if at all?

6. How do *U.S. persons* anticipate ascertaining the information necessary to comply with paragraph (a)(2) of the definition of *covered foreign person* at § 850.209? How, if at all, should this definition be adjusted for a situation in which no financial statement (audited or otherwise) is available for a covered foreign person?
7. Are there adjustments to the types and scope of *covered transactions* identified in the proposed rule (including addition(s), removal(s), or elaboration(s)) that should be made to help ensure it addresses the national security concerns identified in the Outbound Order and discussed above while minimizing unintended consequences? If so, what are they?
8. How, if at all, should the definition of *covered transaction* be modified with respect to the conversion of a contingent equity interest or convertible debt? What are the considerations as to the balance among minimizing compliance costs, avoiding over- or under-inclusiveness, while maintaining U.S. Government visibility into the instances of conversion?
9. How, if at all, should the definition of *covered transaction* be modified with respect to LP investments? What considerations should the Department of the Treasury take into account with respect to a *U.S. person's* LP investment qualifying as a *covered transaction* when the relevant pooled investment fund actually undertakes a transaction that would be a *covered transaction* if undertaken by a *U.S. person*?
10. Could the proposed approach to defining an indirect *controlled foreign entity* be further

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refined to enhance clarity and facilitate compliance, and if so, how?

11. The definitions of *controlled foreign entity* and *person of a country of concern* discuss application of such terms in the case of a tiered ownership structure. Could either of these definitions be further refined to enhance clarity and facilitate compliance with respect to their application in a tiered ownership structure, and if so, how?
12. The proposed definition of *person of a country of concern* (in § 850.221(d)) and the proposed definition of *covered foreign person* (in § 850.209(a)(2)) could include a *U.S. person* entity. What considerations should the Department of the Treasury take into account with respect to an entity qualifying as a *U.S. person* and also as a *covered foreign person* or *person of a country of concern*? What are the instances in, and what is the frequency with which, this may occur?
13. What are the legal, commercial, practical or other consequences of including in, or conversely excluding from, the definition of *U.S. person* a person who is lawfully present in the United States? What are the consequences of an individual simultaneously being both a *person of a country of concern* and a *U.S. person*? Under what circumstances, and with what frequency, may this occur?
14. What are the considerations for *U.S. person* due diligence related to the specified end uses and computing thresholds in the different alternatives for an *AI system* in the definitions of *notifiable transaction* and *prohibited transaction*? How would a *U.S. person* investor determine the computational threshold levels of any *AI system* of an investment target or

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- relevant counterparty? What are the considerations with respect to making such determinations related to an entity of a *country of concern* specifically?
15. What would be the impact of a prohibition on *U.S. person* transactions involving entities that develop an *AI system* trained using a quantity of computing power greater than  $10^{24}$ ,  $10^{25}$ , or  $10^{26}$  computational operations? What, if any, unintended consequences could result from adoption of the alternative definitions of *AI system*?
  16. What would be the impact of a prohibition on *U.S. person* transactions involving entities that develop an *AI system* trained using a quantity of computing power greater than  $10^{23}$  or  $10^{24}$  computational operations applied to biological sequence data? What are the considerations or factors weighing in favor or against requiring notification rather than a prohibition in this instance?
  17. How should the Department of the Treasury ensure the regulations remain responsive to changes in the sectors identified in the Outbound Order (i.e., the semiconductors and microelectronics, quantum information technologies, and artificial intelligence sectors)?
  18. How, if at all, could the prohibition on *knowingly directing* a transaction be modified to best address national security concerns identified in the Outbound Order and discussed above while maximizing clarity and minimizing adverse impacts on *U.S. persons*, including their employment at foreign companies? What, if any, alternatives should be considered?
  19. What is the practical utility of a recusal carveout from the prohibition on *knowingly*

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*directing* a transaction? What stage(s) of an investment should the recusal carveout from the prohibition on *knowingly directing* apply to (for example, should it apply to negotiating and decision-making related to an investment, management and oversight of the investment after the *completion date*, or something else), and why? In what ways could the recusal carveout's clarity or usefulness be enhanced?

20. What challenges, if any, are anticipated in connection with the information required to be submitted for a *notifiable transaction*? Are they scoped appropriately to obtain information relevant to the national security concerns identified in the Outbound Order and discussed above, including increasing the U.S. Government's visibility into *U.S. person* transactions involving the relevant technologies and products and highlighting trends with respect to related capital flows? If not, how should the information requirements be modified?
21. Are there categories of transactions that should be added to, or removed from, the definition of *excepted transaction* in light of the national security concerns identified in the Outbound Order? If so, what are they and why? What potential consequences should the Department of the Treasury consider in limiting the applicability of the definition of *excepted transaction* to a transaction made pursuant to a binding, uncalled capital commitment entered into before August 9, 2023?
22. Which of the two proposed alternatives for the exception for LP investments in the definition of *excepted transaction* best addresses national security concerns while minimizing disruptive effects? Should either approach and corresponding threshold for the

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exception be adjusted, and if so, why and how? What consequences could result from basing an exception on either of the proposed thresholds? What are the considerations related to compliance by *U.S. persons*? Where available, please support your answer with data about the type, aggregate number, or total dollar equivalent amount of investments that would be excepted under each of the two proposed alternatives.

23. What adjustments, if any, should be made to the proposed rule to clarify the coverage with respect to a greenfield investment, brownfield investment, or joint venture that is a *covered transaction* versus an intracompany transaction to support ongoing operations or other activities in a *country of concern* that is an *excepted transaction*?
24. What is the value to stakeholders of including a national interest exemption for *notifiable transactions*, *prohibited transactions*, or both? Under what circumstance might a *U.S. person* request a national interest exemption in general? Specifically with respect to a *notifiable transaction*, under what circumstance might a *U.S. person* request a national interest exemption from the notification requirement, while still needing to provide information about the proposed transaction in the course of seeking the exemption?
25. What specific information should the Department of the Treasury require from a *U.S. person* seeking a national interest exemption in order to evaluate the transaction's potential impact on the national interest of the United States and to substantiate the basis for requesting an exemption from the prohibition or notification requirement?

## **V. Rulemaking Requirements**

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This rulemaking pertains to a foreign affairs function of the United States and therefore is not subject to the rulemaking requirements of the Administrative Procedure Act (APA) (5 U.S.C. 553), which exempts a rulemaking from notice and comment requirements “to the extent there is involved . . . a military or foreign affairs function of the United States.” 5 U.S.C. 553(a)(1). As required by the Outbound Order, the proposed rule is being issued to assist in addressing the national emergency declared by the President with respect to the national security threat posed by countries of concern developing technologies that are critical to the next generation of military, intelligence, surveillance, or cyber-enabled capabilities. As described in the Outbound Order, this threat to the national security of the United States has its source in whole or substantial part outside the United States. The proposed rule would have a direct impact on foreign affairs concerns, which include the protection of national security against external threats (for example, limiting investment in specific sectors in designated countries of concern). Although the proposed rule is not subject to the notice and comment requirements of the APA, the Department of the Treasury is engaging in notice and comment rulemaking for this proposed rule, consistent with section 1(a) of the Outbound Order. In addition, the proposed rule was designated as significant under Executive Order 12866, as amended, and was reviewed by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). The Department of the Treasury has undertaken an analysis of the anticipated costs and benefits of the proposed rule. Following the issuance of the ANPRM, a number of stakeholders commented about the potential burden associated with this program, which is novel in its approach to addressing the national



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security concern posed by U.S. outbound investments involving a country of concern. The Department of the Treasury, after taking into account these comments and the novelty of the program, conducted an analysis of the relative costs and benefits of the proposed rule. For purposes of this analysis, the Department of the Treasury assessed the costs and benefits of the proposed rule relative to a no-action baseline reflecting *U.S. person* investment behavior in the absence of regulations.

In addition, this section includes the required assessments of the reporting and recordkeeping burdens under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et. seq.*, and the potential impact on small entities pursuant to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et. seq.*, in each case as discussed below.

*A. Executive Orders 12866, 13563, and 14094*

Executive Orders 12866, 13563, and 14094 direct agencies to assess the costs and benefits of available regulatory alternatives for certain types of rulemaking in certain circumstances and, if regulation is necessary, to select regulatory approaches that maximize net benefits. The Department of the Treasury has conducted an assessment of the costs and benefits of the proposed rule, as well as the costs and benefits of available regulatory alternatives.

As noted above in section I, the Outbound Order directs the Secretary to establish a program to prohibit *U.S. persons* from engaging in certain transactions and require *U.S. persons* to submit notifications of certain other transactions. These two primary components of the program established by the Outbound Order would serve distinct but interrelated objectives with respect to

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the relevant technologies and products. The first component would require the Secretary to prohibit certain types of investment by a *U.S. person* in a *covered foreign person* engaged in certain categories of activities related to technologies and products that pose a particularly acute national security threat. The second component would require notification to the Secretary regarding certain types of investments by a *U.S. person* in a *covered foreign person* engaged in other categories of activities related to technologies and products that may contribute to the threat to national security. The focus of both components would be on investments that could enhance a country of concern's military, intelligence, surveillance, or cyber-enabled capabilities through the advancement of technologies and products in particularly sensitive areas. In an Annex to the Outbound Order, the President identified the People's Republic of China, along with the Special Administrative Region of Hong Kong and the Special Administrative Region of Macau, as a *country of concern*.

As described above in section I, this proposed rule is consistent with the President's mandate in the Outbound Order and prescribes procedures and obligations governing the (1) prohibition of certain types of investment by *U.S. persons* into certain entities located in or subject to the jurisdiction of a country of concern, certain other entities owned by *persons of a country of concern*, and certain entities with an interest in and significant financial connection to a *person of a country of concern*, with capabilities or activities related to defined technologies and products; and (2) mandatory notification to the Secretary by *U.S. persons* for certain types of investment into certain entities located in or subject to the jurisdiction of a *country of concern*, certain other entities owned by *persons of a country of concern*, and certain entities with an interest in and significant

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financial connection to a *person of a country of concern*, with capabilities or activities related to defined technologies and products. The implementation of the Outbound Order through this proposed rule would advance the President's objective of regulating certain investments from the United States into a country of concern.

The proposed rule would cover a defined set of transactions such as certain acquisitions of equity interests (e.g., mergers and acquisitions, private equity, and venture capital) and contingent equity interests, certain debt financing transactions, greenfield and brownfield investments, joint ventures, and certain LP investments by *U.S. persons*. Given the focus on transactions that could aid in the development of technological advances that pose a risk to U.S. national security, the Department of the Treasury proposes to except from the program certain transactions with a lower likelihood of having that effect. The proposed exceptions extend to certain investments into publicly traded securities or into securities issued by an investment company, such as an index fund, mutual fund, or exchange traded fund.

#### *B. Costs*

The primary direct costs to the public associated with the proposed rule would relate to (1) understanding the proposed rule; (2) conducting the transaction-specific diligence that would be needed for a *U.S. person* to determine whether a particular transaction would be either a *notifiable transaction* or a *prohibited transaction* under the proposed rule; and (3) if applicable, preparing and submitting a mandatory notification of certain transactions or other information to the

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Department of the Treasury pursuant to the proposed rule. The Department of the Treasury invites comment on any of the assumptions and estimates in this analysis.

The proposed rule would apply to all *U.S. persons* who undertake, directly or indirectly, a *covered transaction*. Because of the tailored scoping of the proposed rule, the Department of the Treasury estimates that it would apply to a relatively modest volume of potential *covered transactions*. While precise data that matches the scope of *covered transactions* including the relevant technology and products in the proposed rule is not available – and is one of the reasons for the notification requirement which would increase the U.S. Government’s visibility into the relevant transactions – a review of available data appears to support this estimate of a modest volume. For example, to estimate the number of entities that would be potentially affected by the proposed rule and would incur associated direct compliance costs, the Department of the Treasury considered data available through PitchBook from approximately 2021 to 2023.<sup>1</sup> This data indicates that over this three-year period, 180 unique U.S.-based investors made around 318 equity and add-on investment transactions in the semiconductor, AI, and quantum science sectors of the PRC (as defined by PitchBook). This data suggests an annual average of 60 different investors engaging in an annual average of 106 potentially *covered transactions*. Since details of U.S. private investment overseas cannot be determined with precision through the available data, and there are limitations in any dataset based on the parameters set by the provider, the Department of the

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<sup>1</sup> PITCHBOOK, <https://pitchbook.com> (last visited May 24, 2024).

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Treasury has determined this figure to be a lower bound. The Department of the Treasury also acknowledges that some *U.S. person* investors may incur costs even where the rule does not appear to apply directly to their transaction. To clarify, the figure used to estimate the volume of potentially *covered transactions* may not capture all instances of parties who may incur costs as a result of the proposed rule. For example, a *U.S. person* may not always know in advance of the due diligence process whether the *U.S. person* will want or need to collect information related to the proposed rule and then proceed to spend resources on diligence, only to confirm that the relevant transaction is not a *covered transaction*.

For purposes of this analysis, the Department of the Treasury doubled the averages from the available data to account for the likely underrepresentation of potentially relevant transactions. Thus, the Department of the Treasury's analysis is based on the estimate of approximately 120 entities and 212 transactions annually (based on an assumption of an annual average of 1.77 transactions per entity) that may be affected by the proposed rule. The Department of the Treasury is soliciting comments on the reasonableness of this estimate (in terms of the data source and analysis), and whether there are other sources of data that the Department of the Treasury should consider for its cost analysis. The Department of the Treasury also invites comments on whether doubling the averages from publicly available data is a reasonable way to account for any underrepresentation of potentially relevant transactions, or whether a different methodology should be used. For the remainder of this analysis, however, the Department of the Treasury relied on the estimates as described above.

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To derive an estimate for the costs related to the proposed rule, the Department of the Treasury first estimated the associated labor costs related to interpreting and applying the proposed rule. The Department of the Treasury expects that individuals and entities reviewing the proposed rule and engaging in potentially relevant transactions would engage on their own and through their own employees as well as hire lawyers or advisors from outside firms.

For a low-end estimate, the Department of the Treasury relied on a figure from the Bureau of Labor Statistics (BLS), which reports the mean hourly wage for Standard Occupational Classification System Code (SOC Code) 231011—Lawyers to be \$84.84 per hour and SOC Code 111021—General and Operations Managers to be \$62.18 per hour.<sup>2</sup> In each instance the Department of the Treasury tripled the BLS mean hourly wage figure. This adjustment is intended to not only account for employee benefits and overhead, but also to reflect the presumption that hourly labor costs of the investors and their advisors likely to be affected by the proposed rule will often be higher than the hourly mean wage in these occupation categories across the United States. Accordingly, the Department of the Treasury estimates that the impacted entities will each incur costs of \$187 per hour for managers and \$255 for lawyers. The average of these figures is \$221 per hour and, again, this is a low-end estimate.

For a high-end estimate, the Department of the Treasury acknowledges that the hourly rate billed for a lawyer performing the relevant type of work at a private firm may be significantly higher than the average hourly wage of a lawyer from the BLS figure. The global data and business

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<sup>2</sup> Figures based on May 2023 data.

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intelligence platform Statista reports that the average hourly attorney billing rate in Washington, D.C. in 2023 was \$392.<sup>3</sup> The average of the hourly cost of a manager at \$187 per hour and the Statista figure of the hourly rate of a lawyer at \$392 per hour is \$290. The Department of the Treasury invites comments on whether either of these figures (i.e., the low-end or the high-end estimate) are reasonable benchmarks and estimates for this analysis or whether there are other sources of data or estimates that should be considered.

*Costs associated with understanding the proposed rule*

Based on the above assumptions and estimates of affected entities, number of transactions and labor costs, the Department of the Treasury has estimated the annual time and cost that would be spent by affected entities in understanding the proposed rule. While recognizing that the extent of this diligence will necessarily vary from transaction to transaction, the Department of the Treasury arrived at the below estimates for purposes of this regulatory analysis.

The range of estimated aggregate annual costs for understanding the proposed rule begins at \$468,520 on the low end and goes up to \$614,800 on the high end. This is based on the estimate of an average time burden to be ten total person hours per transaction for understanding the proposed rule. As such, ten total person hours per transaction multiplied by 212 annual transactions and the low-end hourly labor cost range and high-end hourly labor cost range described above, respectively, result in the total cost range for understanding the proposed rule.

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<sup>3</sup> STATISTA (Feb. 26, 2024), <https://www.statista.com/statistics/941146/legal-services-hourly-rates-metropolitan-region-united-states/>.

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*Costs associated with diligence and maintaining records*

Based on the above assumptions and estimates of affected entities, number of transactions and labor costs, the Department of the Treasury has estimated the annual time and cost that would be spent by affected entities on conducting additional transactional diligence with respect to this proposed rule. These economic estimates should in no way be construed as relevant to the reasonableness of the inquiry a party would pursue in light of the particular facts and circumstances of a transaction and the requirements of the proposed rule. While recognizing that the extent of this diligence will necessarily vary from transaction to transaction, the Department of the Treasury arrived at the below estimates for purposes of this regulatory analysis.

The Department of the Treasury recognizes that most investment transactions, regardless of whether the investment is potentially subject to this proposed rule, involve some level of review, diligence, assessment, and recordkeeping by the investor. And, for some transactions and investors, the level of information collection, retention, and diligence necessary to comply with the proposed rule may not give rise to any costs beyond what would be incurred in the absence of the proposed rule. This conclusion is reached by focusing on the nature of the information required for a notification, which consists of data typically gathered or available in the process of making an investment. This includes, for example, the proposed information requirements regarding transaction party identifying information as well as the commercial rationale, transaction structure, financial details, and *completion date* of the transaction itself.



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The Department of the Treasury assesses that it is reasonable in some cases to assume that customary transactional due diligence would involve the collection and review of this required information, meaning that the only incremental costs would be incurred for the review of the information from the perspective of ensuring compliance with the proposed rule. While the notification requirement would also include (1) information regarding *covered activities* undertaken by the *covered foreign person* that makes the transaction a *notifiable transaction*, as well as a brief description of the known end uses and end users of the covered foreign person's technology, products, or services; (2) a statement of the attributes that cause the entity to be a covered foreign person; and (3) in certain cases, the identification of the technology node(s) at which any applicable product is produced, the due diligence underlying many *covered transactions* would include gathering and reviewing this information even if not specifically to comply with the proposed rule. The proposed rule further states that a *U.S. person* that has failed to conduct a reasonable and diligent inquiry by the time of a given transaction may be assessed to have had awareness or reason to know of a given fact or circumstance, including facts or circumstances that would cause the transaction to be a *covered transaction*. Compliance with this provision and the requirements of the proposed rule may in some cases require enhanced diligence. Recognizing that in some instances, compliance with the proposed rule may not require the collection and retention of additional transaction-related information, this analysis considers reasonable estimates of the additional due diligence and recordkeeping costs that could be associated with the proposed rule as described below.

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The range of estimated annual incremental cost for conducting due diligence and recordkeeping associated with the proposed rule runs from \$0 on the low end to \$2,459,200 on the high end. These are two ends of the range, and it is anticipated that the costs for most transactions would fall between these figures. The Department of the Treasury estimates that the average time burden would likely not exceed 40 total person hours per transaction for conducting additional due diligence and recordkeeping with respect to the proposed rule.

For the low end of this range, it is reasonable to anticipate that some investors, having spent resources learning about the proposed rule, as discussed above, will be able to quickly collect and assess the information needed to determine whether a potential transaction would be a *prohibited transaction*. As such, the low-end estimate is a zero-dollar incremental cost for additional due diligence and recordkeeping. Not all transactions will be this simple, and it is reasonable to anticipate more costs at the higher end of the range. As such, 40 total person hours per transaction multiplied by 212 annual transactions and the high-end hourly labor cost estimate described above results in the high-end estimate for additional due diligence and recordkeeping related to the proposed rule. The Department of the Treasury estimates 40 person hours per transaction, based on approximately a total of eight person hours across all involved general and operations managers and lawyers per business day for one week. However, the cost of a *U.S. person* conducting diligence and the difficulty of that exercise will vary depending on a transaction's complexity, the availability of relevant information, and the incremental person hours may be higher for certain transactions, for example those that involve indirect transactions.

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The Department of the Treasury invites comments on whether these figures are reasonable benchmarks and estimates for this analysis or whether there are other sources of data or estimates it should consider.

#### *Costs associated with providing information*

The proposed rule would require the submission of information to the Department of the Treasury for notifiable transactions and provides for certain other circumstances that require information submission. The Department of the Treasury intends to require *U.S. persons* to provide notification of certain transactions under the proposed rule. The proposed rule also contemplates that a person seeking a national interest exemption from the proposed rule's notification requirement or prohibition would submit certain information to the Department of the Treasury. The proposed rule would also require a *U.S. person* to make a post-closing submission regarding a transaction that it believed at closing was not a *covered transaction* when the *U.S. person* later discovers information which, had it been known at closing, would have caused the transaction to be a *covered transaction*. Also, the proposed rule would require a *U.S. person* to inform the Department of the Treasury of any material omission or inaccuracy in any previous representation, statement, or certification. Lastly, the Department of the Treasury anticipates time and cost associated with responding to inquiries by the Department of the Treasury.

The Department of the Treasury expects that of the universe of potentially *covered transactions* for which *U.S. persons* perform due diligence each year, certain transactions will turn out not to be covered, others will turn out to be notifiable, and still others will turn out to be

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prohibited. For purposes of this analysis, however, the Department of the Treasury has assumed that *U.S. persons* will perform due diligence with respect to the estimated 212 potentially *covered transactions* each year, and that all 212 will turn out to be *notifiable transactions*. The Department of the Treasury took this approach in the interest of estimating a theoretical maximum upper bound, recognizing that the number of actual *notifiable transactions* is likely to be less than 100 percent of potentially *covered transactions*. A *notifiable transaction* would likely cost more in terms of time and resources than a *prohibited transaction*, because, in addition to the due diligence cost, a *notifiable transaction* would entail resources to prepare and submit a notification.

The estimated annual cost range for time spent submitting information would be \$2,342,600 to \$3,074,000. This estimate assumes 50 person hours per transaction for preparing and submitting a notification through an online portal, combined with the number of transactions per year (212) and the hourly labor cost range described above—\$221 to \$290. As discussed above, this number reflects the high-end estimate, since this analysis assumes that every potentially relevant transaction would result in a notification.

For purposes of this analysis, the Department of the Treasury estimated only the total annual costs of preparing and submitting a notification under § 850.404 of the proposed rule. The Department of the Treasury anticipates that the time and cost behind preparing and submitting a post-transaction notice, notice of any material omission or inaccuracy in any previous representation, statement, or certification, or responding to agency inquiries may be comparable to the costs of preparing and submitting a notification. Likewise, where a *U.S. person* elects to

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provide information in seeking a national interest exemption, the Department of the Treasury anticipates that the associated costs would be comparable to or could slightly exceed the costs of preparing and submitting a notification.

*Estimated total direct costs*

Based on the direct cost estimates above, the total annual direct costs associated with complying with the proposed rule can be expected to have a range of between \$2,811,120 and \$6,148,000 and the total annual time burden would be approximately 21,200 person hours.

*Additional indirect costs associated with prohibited transactions and non-covered transactions*

With respect to *prohibited transactions*, the Department of the Treasury has no basis to conclude that the proposed rule will have additional direct economic costs to U.S. investors beyond those described above. There may, however, be additional indirect costs associated with *prohibited transactions*. Investors who would have otherwise engaged in a *prohibited transaction* absent the proposed rule may pursue alternative investment opportunities since they would be precluded from undertaking a *prohibited transaction*. These indirect costs amount to the difference, if any, between the return on investment that would have been generated by a *prohibited transaction* and the return on investment that would result from an alternative transaction. Any attempt to quantify this cost would be speculative and difficult to assess in any specificity due to individual decision-making, opportunities available, and market conditions. In addition, while the proposed rule may have an economic impact on investment targets that are *covered foreign persons* because certain

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transactions would be prohibited, the proposed rule is not designed to nor does it prohibit all *U.S. person* investments into such persons, due to the scope of transactions covered as well as the exceptions provided for in the proposed rule.

#### *Costs to the U.S. Government*

Administering the regulation would also entail costs to the U.S. Government. Such costs would include information technology (IT) development and ongoing annual maintenance, as well as processing electronic notifications. The Department of the Treasury estimates that initial IT development costs would be between \$4 million and \$8 million with an additional \$2 million to \$3 million required to maintain the systems and the underlying technology being leveraged to support the capabilities. The Department of the Treasury and other relevant agencies, including the Department of Commerce, may incur additional costs, besides those estimated above. This includes other responsibilities related to the implementation of the proposed rule such as analyzing notifications submitted as well as complying with the reporting requirements under the Outbound Order. Furthermore, costs may be associated with efforts to promote compliance with the notification requirement and prohibition requirements, potentially including education on the requirements, development of guidance and frequently asked questions, and conducting stakeholder outreach. The Department of the Treasury does not currently have specific estimates for these costs but estimates that there would be personnel costs of less than \$2 million associated with the proposed regulation in Fiscal Year 2024 with additional costs for ongoing outreach and enforcement thereafter.

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The Department of the Treasury and other government agencies may also incur costs in enforcing compliance with the regulation. The Department of the Treasury does not currently have estimates for these costs, and they are not included in the estimates above.

The Department of the Treasury plans to monitor compliance with the final regulation by leveraging a variety of data sources, both internal and external. Because the external data sources may include third parties, the Department of the Treasury requests comment on what external data sources would be appropriate to leverage in identifying non-compliance with respect to the regulations and what potential costs may be incurred by such third parties. If the external data sources include third party commercial data, the Department of the Treasury assesses that the cost associated with accessing these databases would be modest and incremental, given that the Department of the Treasury regularly maintains access to such databases in the course of other work but may need to request additional licenses for employees. After identifying an instance of apparent non-compliance, the Department of the Treasury may initiate outreach to the involved entity, work with law enforcement to investigate the apparent non-compliance, or initiate an enforcement action. The Department of the Treasury's enforcement of the proposed regulation would also involve coordination with law enforcement agencies. These law enforcement agencies may also incur costs (time and resources) while conducting investigations into potential non-compliance.

### *C. Benefits*

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The President found in the Outbound Order that the advancement by *countries of concern* in sensitive technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities of such countries constitutes an unusual and extraordinary threat to the national security of the United States, which has its source in whole or substantial part outside the United States, and that certain United States investments risk exacerbating this threat. The potential military, intelligence, surveillance, or cyber-enabled applications of these technologies and products pose risks to U.S. national security particularly when developed by a *country of concern* in which the government seeks to (1) direct entities to obtain technologies to achieve national security objectives; and (2) compel entities to share with or transfer these technologies to the government's military, intelligence, surveillance, or security apparatuses. As part of their strategy of advancing the development of these sensitive technologies and products, *countries of concern* are exploiting or could exploit certain United States outbound investments, including certain intangible benefits that often accompany United States investments and that help companies succeed, such as enhanced standing and prominence, managerial assistance, investment and talent networks, market access, and enhanced access to additional financing. Such investments, therefore, risk exacerbating this threat to U.S. national security. Although the United States has undertaken efforts to enhance existing policy tools and develop new policy initiatives aimed at maintaining U.S. leadership in technologies critical to national security, there remain instances where the risks presented by U.S. investments enabling *countries of concern* to develop critical



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military, intelligence, surveillance, or cyber-enabled capabilities are not sufficiently addressed by existing tools.

The proposed rule is designed to complement our existing tools and effectively address the threat to the national security of the United States described in the Outbound Order. The benefit of protecting national security is difficult to quantify. Furthermore, the notification component of the proposed rule is intended to provide key information that the Department of the Treasury could use to better inform the development and implementation of the program. These notifications would increase the U.S. Government's visibility into transactions by *U.S. persons* or their *controlled foreign entities* and involving technologies and products relevant to the threat to the national security of the United States due to the policies and actions of *countries of concern*. These notifications would be helpful in highlighting trends with respect to related capital flows and would inform future policy development. The Department of the Treasury expects that the national security benefits, while qualitative, will outweigh the compliance costs of the proposed rule. The Department of the Treasury requests comment on data or methods that may inform estimates of potential costs of the proposed rule.

#### *D. Alternatives*

The Outbound Order requires the Secretary of the Treasury to issue implementing regulations subject to public notice and comment. As a result, the Department of the Treasury did not have the discretion to refrain from promulgating the proposed rule or to promulgate it without notice and comment. However, the Department of the Treasury considered different approaches

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to the proposed rule that would be available under the Outbound Order. Specifically, the Department of the Treasury considered the following potential alternatives to the proposed rule:

- *Scope of covered transaction and excepted transaction.* The Department of the Treasury could have proposed a broader definition of *covered transaction* and/or fewer exceptions and considered certain alternatives to the scope of *covered transaction* and *excepted transaction* in developing the proposed rule. This discussion does not cover each alternative considered for the scope of *covered transaction* but provides a summary of a few alternatives the Department of the Treasury considered. The Department of the Treasury considered and selected regulatory approaches that maximize net benefits (including effectively addressing the national security threat identified in the Outbound Order) while balancing potential compliance and implementation costs. For example, an alternative that the Department of the Treasury considered in relation to contingent equity interests in particular was to limit the scope of *covered transaction* to just the acquisition of a contingent equity interest and not separately cover the conversion of the contingent equity interest. This would have reduced some of the compliance and resource burden on a *U.S. person*, who would have, in the context of a *notifiable transaction*, been required to submit a notification only at the time of acquisition rather than a notification at the time of acquisition and another notification at the time of conversion of contingent equity. However, this alternative would have reduced the ability of the U.S. Government to observe the frequency and instances in which the relevant

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contingent interests convert. Additionally, it would not have scoped in circumstances where the acquisition of a contingent equity interest did not involve a *covered foreign person* but then a *covered foreign person* was involved at the time of the conversion of a contingent equity interest, which would have limited the proposed rule's reach and ability to address the national security threat identified in the Outbound Order. Another example is with respect to the exception for LP investments where the proposed rule puts forth two proposed alternatives. As discussed above in the section-by-section analysis with respect to § 850.501 of the proposed rule, the Department of the Treasury, after consulting with the heads of other agencies, is offering and seeking comment on two alternatives for this exception. Under proposed Alternative 1, a *U.S. person's* investment made as an LP in a pooled investment fund would constitute an *excepted transaction* if (1) the LP's rights are consistent with a passive investment and (2) the LP's committed capital is not more than 50 percent of the total assets under management of the pooled fund. If the *U.S. person* LP's committed capital were to constitute more than 50 percent of the total assets under management of the pooled fund, its investment would qualify as an *excepted transaction* only if the *U.S. person* secured a binding agreement that the pooled fund would not use its capital for a *prohibited transaction*. This approach would address situations where the *U.S. person's* LP investment falls below the threshold but contains one of several indicia of control or influence over the pooled fund or the ultimate *covered foreign person* investment target. Compared to Alternative 2, Alternative 1 would scope in fewer LP investments as

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*covered transactions* but could potentially be more challenging for a *U.S. person* to comply with, as it requires a multi-factor analysis for assessing whether a *U.S. person's* LP investment is an *excepted transaction*. Under Alternative 2, a *U.S. person* LP's committed capital in a pooled fund that then invests in a *covered foreign person* would be an *excepted transaction* only if the committed capital was not more than \$1,000,000. Although this alternative would likely scope in a greater number of LP investments as *covered transactions* compared to Alternative 1 (and potentially increase the compliance costs of this program), the bright-line approach may be easier for *U.S. persons* to comply with than Alternative 1.

- *Covered national security technologies using broad definition of sectors rather than specific activities and technologies.* In the proposed rule, the Department of the Treasury proposed to define *notifiable transaction* and *prohibited transaction* in § 850.217 and § 850.224, respectively, by reference to certain technologies and activities, and in some instances, end uses. Alternatively, the Department of the Treasury could have opted for a broad sectoral categorization, such as, for example, all technologies and products in the artificial intelligence sector, regardless of the end use of such artificial intelligence related technologies or products. If the Department of the Treasury had proposed that approach, the Department of the Treasury estimates that the economic impact for *U.S. persons* subject to the rule, and for the overall U.S. economy, would be significantly greater than under the proposed rule. Instead, the Department of the Treasury, along with other relevant agencies,

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carefully tailored the *covered activities* and technical descriptions under the definitions of *notifiable transaction* and *prohibited transaction*. In the case of *AI systems*, the proposed rule addresses *covered activities* related to certain *AI systems* that would have applications that pose or have the potential to pose national security risks without broadly capturing AI systems intended only for commercial applications or other civilian end uses that do not have potential national security consequences, thereby limiting the additional compliance and implementation burden on *U.S. persons*.

The Department of the Treasury intends that the proposed rule would provide a *U.S. person* with clarity and guidance regarding its obligations with respect to a *covered transaction*, while effectively addressing the national emergency identified in the Outbound Order in a targeted manner. The Department of the Treasury expects that the national security benefits, while qualitative, will outweigh the compliance costs of the proposed rule.

### **Paperwork Reduction Act**

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) (PRA).

The proposed rule would require a *U.S. person* to submit a notification with respect to (1) any *notifiable transaction*; (2) any transaction by a *controlled foreign entity* that would be a *notifiable transaction* if engaged in by a *U.S. person*; and (3) any transaction for which a *U.S.*

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*person acquires actual knowledge after the completion date of the transaction that the transaction would have been a prohibited transaction or a notifiable transaction if knowledge had been possessed by the relevant U.S. person at the time of the transaction. Such notification would include relevant details on the U.S. person involved in the transaction as well as information on the transaction and the covered foreign person involved. The proposed rule would require any U.S. person that has filed a notification to respond to any questions or document requests from the Department of the Treasury related to the transaction or compliance with the proposed rule; any information or documents provided to the Department of the Treasury in response to such request would be deemed part of the notification under the proposed rule.*

The proposed rule would also require any U.S. person that files a notification to maintain a copy of the notification filed and supporting documentation for a period of ten years from the date of the filing. Further, the proposed rule would require any person who has made any representation, statement, or certification subject to the proposed rule to notify the Department of the Treasury in writing of any material omission or inaccuracy in such representation, statement, or certification. Finally, the proposed rule would also require any U.S. person seeking a national interest exemption to submit information to the Department of the Treasury regarding the scope of the transaction including, as applicable, the information that would be required for a notification of a notifiable transaction.

The collections of information described would be used by the Department of the Treasury and the Department of Commerce, and, as appropriate, other relevant agencies, in connection with

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the analysis of notifiable transactions pursuant to the Outbound Order. The information provided in the notifications would increase the U.S. Government's visibility into the volume and nature of *U.S. person* transactions involving the defined technologies and products that may contribute to the threat to the national security of the United States. The information in the notifications will be helpful in highlighting trends with respect to related capital flows. It would also inform future policy development and decisions, including any modifications to the scope of *notifiable transactions* and *prohibited transactions*. Additionally, the information would assist the Secretary in complying with the report requirements in section 4 of the Outbound Order and in determining whether to grant a national interest exemption to a particular *covered transaction*. The proposed rule would prohibit the Department of the Treasury from making public any information or documentary materials submitted to or filed with the Department of the Treasury under the proposed rule unless required by law or otherwise provided in the proposed rule.

Written comments and recommendations for the proposed information collections can be submitted by visiting <https://www.reginfo.gov/public/do/PRAMain>. Information collection requests may be found by selecting "Currently Under Review—Open for Public Comments" or by using the search function. Comments on the collections of information should be received by August 4, 2024.

The Department of the Treasury used the methodology described in the previous section to estimate the total annual reporting and recordkeeping burden of the information collections in this proposed rule. The Department of the Treasury estimates that the annual hourly burden would be

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up to 19,080 hours. This annual total is based on the Department of the Treasury's assumption that: (1) 120 entities per year would respond to the information collections in this proposed rule and each entity would submit an average of 1.77 notifications annually, meaning these respondents would file a total 212 responses to the information collections annually; and (2) each respondent would spend an estimated 50 to 90 person hours per response. The Department of the Treasury estimates that the annual cost burden associated with the information collections and recordkeeping in the proposed rule would range between \$2,342,600 and \$5,533,200.

In accordance with 5 CFR 1320.8(d)(1), the Department of the Treasury is soliciting comments from members of the public concerning these collections of information to:

- (1) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collections of information;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collections of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology.



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Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the OMB.

### **Regulatory Flexibility Act**

It is hereby certified that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

The proposed rule may impact any *U.S. person*, including a small business that engages in a *covered transaction* with a *covered foreign person*. The Department of the Treasury does not anticipate that the proposed rule would affect “small organizations” or “small governmental jurisdiction[s],” as defined in the RFA.

The Department of the Treasury expects the proposed rule to have a negligible baseline impact on small businesses because the proposed rule’s obligations on *U.S. persons* target investments generally associated with larger institutions that more often are involved in cross-border investments related to the sectors under the proposed rule. These larger institutions are more likely to enter into transactions that will trigger the definition of covered transaction. The proposed rule would except specific types of transactions that may be more attractive or accessible to small business investors. And, as discussed below, the Department of the Treasury has assessed that small businesses would be likely to enter into transactions that constitute *excepted transactions*. As an example, the Small Business Administration’s (SBA’s) Table of Size Standards with respect

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to NAICS U.S. Industry Sector 52 “Finance and Insurance” defines a small business in this sector by dollar value of assets or revenue rather than by number of employees. As discussed below, the Department of the Treasury believes that the relevant SBA thresholds are too low to capture the type of U.S. investor likely to actively invest in an entity that engages in the identified activities related to 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. For example, SBA categories such as “open end investment funds,” and “other financial vehicles” are not considered small businesses if their average annual receipts exceed \$40 million. As a reference point, IBISWorld reports that for NAICS Industry Code 52591 “Open-End Investment Funds,” for years 2018 to 2023, there were 825 businesses in this category and a total 2023 revenue across those businesses of \$191.1 billion.<sup>4</sup> Extrapolating from this data, the average 2023 revenue per firm in this category would have been \$231.5 million.

In fact, the total number of potential investors subject to the regulation is likely limited to a small set of relatively large and sophisticated investors. As discussed above, the Department of the Treasury considered PitchBook Data from approximately 2021 through 2023. Notably, the most common type of U.S. based investors in this survey were identified by PitchBook Data as a venture capital business, corporation, private equity or buyout firm, or comparable investor types.

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<sup>4</sup> IBIS WORLD, <https://www.ibisworld.com/united-states/market-research-reports/open-end-investment-funds-industry/#IndustryStatisticsAndTrends> (last visited Mar. 15, 2024).

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Given the applications of technologies and products in these sectors, the Department of the Treasury believes investments into these sectors involving a *person of a country of concern* is not typical for a small business, as these investor types are treated in the SBA's Table of Size Standards. Importantly, the proposed rule would also except certain types of transactions, including certain investments into publicly traded securities or into securities issued by an investment company, such as an index fund, mutual fund, or exchange traded fund, where a small business is more likely to consider investing. Given the narrow scoping of what constitutes a *covered transaction* under the proposed rule, the Department of the Treasury expects that few small businesses, as that term is defined by SBA, will be impacted by the proposed rule.

In the unlikely event that a small entity is subject to the requirements of the program, such entity would be expected to incur the costs described in the separate cost benefit analysis above. For submission of notifications, the Department of the Treasury has endeavored to develop information gathering procedures that minimize the burden on *U.S. persons*, both large and small. *U.S. persons* who file a notification will use a fillable form that will be available online and is intended to facilitate submission through an electronic format. This fillable form will benefit anyone who submits a notification, regardless of their size, but may be especially helpful for small businesses who will be able to submit directly to the Department of the Treasury through an online portal.

Notwithstanding this certification, the Department of the Treasury invites comments from the public about the impact the proposed rule on small entities. The proposed rule will be submitted

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to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on its impact on small business.

### **List of Subjects in 31 CFR Part 850**

- Administrative practice and procedure
- Artificial intelligence
- Business and industry
- Confidential business information
- Electronic filing
- Executive orders
- Foreign persons
- Hong Kong
- Holding companies
- Investigations
- Investments
- Investment companies
- Microelectronics
- National defense
- National security
- Macau
- Penalties

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- People’s Republic of China
- Quantum information technologies
- Reporting and recordkeeping requirements
- Science and technology
- Securities
- Semiconductors
- U.S. investments abroad.

For the reasons set forth in the preamble, the Department of the Treasury proposes to amend title 31 of the Code of Federal Regulations as follows:

**PART 850—PROVISIONS PERTAINING TO U.S. INVESTMENTS IN CERTAIN NATIONAL SECURITY TECHNOLOGIES AND PRODUCTS IN COUNTRIES OF CONCERN**

**Subpart A—General**

Sec.

850.101 Scope.

850.102 Relation of this part to other laws and regulations.

850.103 Rules of construction and interpretation.

850.104 Knowledge standard.

**Subpart B—Definitions**

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850.201 Advanced packaging.

850.202 AI system.

850.203 Certification.

850.204 Completion date.

850.205 Contingent equity interest.

850.206 Controlled foreign entity.

850.207 Country of concern.

850.208 Covered activity.

850.209 Covered foreign person.

850.210 Covered transaction.

850.211 Develop.

850.212 Entity.

850.213 Excepted transaction.

850.214 Fabricate.

850.215 Knowingly directing.

850.216 Knowledge.

850.217 Notifiable transaction.

850.218 Package.

850.219 Parent.

850.220 Person.

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850.221 Person of a country of concern.

850.222 Principal place of business.

850.223 Produce.

850.224 Prohibited transaction.

850.225 Quantum computer.

850.226 Relevant agencies.

850.227 Subsidiary.

850.228 United States.

850.229 U.S. person.

#### **Subpart C—Prohibited Transactions and Other Prohibited Activities**

850.301 Undertaking a prohibited transaction.

850.302 Actions of a controlled foreign entity.

850.303 Knowingly directing an otherwise prohibited transaction.

#### **Subpart D—Notifiable Transactions and Other Notifiable Activities**

850.401 Undertaking a notifiable transaction.

850.402 Notification of actions of a controlled foreign entity.

850.403 Notification of post-transaction knowledge.

850.404 Procedures for notifications.

850.405 Content of notifications.

850.406 Notice of material omission or inaccuracy.

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#### **Subpart E—Exceptions and Exemptions**

850.501 Excepted transaction.

850.502 National interest exemption.

850.503 IEEPA statutory exception.

#### **Subpart F—Violations**

850.601 Taking actions prohibited by this part.

850.602 Failure to fulfill requirements.

850.603 Misrepresentation and concealment of facts.

850.604 Evasions; attempts; causing violations; conspiracies.

#### **Subpart G—Penalties and Disclosures**

850.701 Penalties.

850.702 Administrative collection; referral to United States Department of Justice.

850.703 Divestment.

850.704 Voluntary self-disclosure.

#### **Subpart H—Provision and Handling of Information**

850.801 Confidentiality.

850.802 Language of information.

#### **Subpart I—Other Provisions**

850.901 Delegation of authorities of the Secretary of the Treasury.

850.902 Amendment, modification, or revocation.



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850.903 Severability.

850.904 Reports to be furnished on demand.

**Authority:** 50 U.S.C. 1701 et seq.; E.O. 14105, 88 FR 54867.

## **Subpart A—General**

### **§ 850.101 Scope.**

- (a) This part implements Executive Order 14105 of August 9, 2023, “Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern” (the Order), directing the Secretary of the Treasury (the Secretary), in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant executive departments and agencies, to issue, subject to public notice and comment, regulations that require U.S. persons to provide notification of information relative to certain transactions involving covered foreign persons and that prohibit U.S. persons from engaging in certain other transactions involving covered foreign persons.
- (b) The regulations identify certain types of transactions that are *covered transactions*—that is, transactions that are either notifiable or prohibited. Additionally, the regulations identify other instances where a U.S. person has obligations with respect to certain transactions. The regulations prescribe exceptions to the definition of *covered transaction*. A transaction that meets an

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exception is not a *covered transaction* and is referred to as an *excepted transaction*.

Finally, the regulations prescribe a process for the Secretary to exempt certain *covered transactions* from the rules otherwise prohibiting or requiring notification of *covered transactions* on a case-by-case basis.

- (c) The regulations identify categories of *covered transactions* that are *notifiable transactions*. A *notifiable transaction* is a transaction by a *U.S. person* or its *controlled foreign entity* with or resulting in the establishment of a *covered foreign person* that engages in a *covered activity* or a *person of a country of concern's* engagement in a new *covered activity* that the Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other *relevant agencies*, has determined may contribute to the threat to the national security of the United States identified in the Order. The regulations require a *U.S. person* to notify the Department of the Treasury of each such *notifiable transaction* by such *U.S. person* or its *controlled foreign entity*. The regulations also require a *U.S. person* to provide prompt notice to the Department of the Treasury upon acquiring actual knowledge after the *completion date* of a transaction of facts or circumstances that would have caused the transaction to be a *covered transaction* if the *U.S. person* had had such knowledge on the *completion date*. Additionally, any person who makes a representation, statement, or certification under to this part is required to promptly

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notify the Department of the Treasury upon learning of a material omission or inaccuracy in such representation, statement, or certification.

- (d) The regulations identify categories of *covered transactions* that are *prohibited transactions*. A *prohibited transaction* is a transaction by a *U.S. person* with or resulting in the establishment of a *covered foreign person* that engages in a *covered activity* or a *person of a country of concern's* engagement in a new *covered activity* that the Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other *relevant agencies*, has determined poses a particularly acute national security threat because of its potential to significantly advance the military, intelligence, surveillance, or cyber-enabled capabilities of a country of concern. The regulations prohibit a *U.S. person* from engaging in a *prohibited transaction* and also prohibit a *U.S. person* from *knowingly directing* a transaction that the *U.S. person* knows would be a *prohibited transaction* if engaged in by a *U.S. person*. The regulations also require a *U.S. person* to take all reasonable steps to prohibit and prevent any transaction by its *controlled foreign entity* that would be a *prohibited transaction* if undertaken by a *U.S. person*.
- (e) Pursuant to the Order, the Secretary shall, as appropriate:
- (1) Communicate with the Congress and the public with respect to the implementation of the Order;

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- (2) Consult with the Secretary of Commerce on industry engagement and analysis of notifiable transactions;
- (3) Consult with the Secretary of State, the Secretary of Defense, the Secretary of Commerce, the Secretary of Energy, and the Director of National Intelligence on the implications for military, intelligence, surveillance, or cyber-enabled capabilities of covered national security technologies and products in the Order and potential covered national security technologies and products;
- (4) Engage, together with the Secretary of State and the Secretary of Commerce, with allies and partners regarding the national security risks posed by countries of concern advancing covered national security technologies and products;
- (5) Consult with the Secretary of State on foreign policy considerations related to the implementation of the Order, including but not limited to the issuance and amendment of regulations; and
- (6) Investigate, in consultation with the heads of relevant agencies, as appropriate, violations of the Order or the regulations in this part and pursue available civil penalties for such violations.

**§ 850.102 Relation of this part to other laws and regulations.**

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Nothing in this part shall be construed as altering or affecting any other authority, process, regulation, investigation, enforcement measure, license, authorization, or review provided by or established under any other provision of federal law, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), or any other authority of the President or the Congress under the Constitution of the United States. This part is separate from, and independent of, the other parts of this subtitle. Differing foreign policy and national security circumstances may result in differing interpretations of the same or similar language among the parts of this subtitle. No action taken pursuant to any other provision of law or regulation, including the other parts of this subtitle, authorizes any transaction prohibited by this part or alters any other obligation under this part. No action taken pursuant to this part relieves the involved parties from complying with any other applicable laws or regulations.

**§ 850.103 Rules of construction and interpretation.**

- (a) As used in this part, the term “including” (or variations such as “include”) means “including but not limited to.”
- (b) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate.
- (c) Section headings are included for convenience of reference only and shall not affect the interpretation of this part.

**§ 850.104 Knowledge standard.**

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- (a) Certain provisions of this part apply only if a U.S. person *knows* of a fact or circumstance. The term *knowledge* is defined in § 850.216. In determining whether a U.S. person is complying with this part or has violated any obligation under this part, the Department of the Treasury will assess whether such person has or had knowledge of the relevant facts and circumstances at the specified time.
- (b) Such assessment as to whether, at the time of a given transaction, a U.S. person has or had knowledge of a given fact or circumstance will be made based on information a U.S. person had or could have had through a reasonable and diligent inquiry. A U.S. person that has failed to conduct a reasonable and diligent inquiry by the time of a given transaction may be assessed to have had reason to know of a given fact or circumstance, including facts or circumstances that would cause the transaction to be a covered transaction.
- (c) In assessing whether a U.S. person has undertaken such a reasonable and diligent inquiry, the Department of the Treasury's considerations will include the following, as applicable, among others that the Department of the Treasury deems relevant, with respect to a particular transaction:
  - (1) The inquiry a U.S. person, its legal counsel, or its representatives have made on behalf of the U.S. person regarding an investment target or relevant counterparty, including questions asked of the investment target or relevant counterparty, as of the time of the transaction;

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- (2) The contractual representations or warranties the U.S. person has obtained or attempted to obtain from the investment target or relevant counterparty with respect to the determination of a transaction's status as a covered transaction and an investment target or relevant counterparty's status as a covered foreign person;
- (3) The effort by the U.S. person at the time of the transaction to obtain available non-public information relevant to the determination of a transaction's status as a covered transaction and an investment target or relevant counterparty's status as a covered foreign person, and the efforts undertaken by the U.S. person to obtain and review such information;
- (4) Available public information, the efforts undertaken by the U.S. person to obtain and review such information, and the degree to which other information available to the U.S. person at the time of the transaction is consistent or inconsistent with such publicly available information;
- (5) Whether the U.S. person, its legal counsel, or its representatives have purposefully avoided learning or sharing relevant information;
- (6) The presence or absence of warning signs, which may include evasive responses or non-responses from an investment target or relevant counterparty to questions or a refusal to provide information, contractual representations, or warranties; and

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- (7) The use of public and commercial databases to identify and verify relevant information of an investment target or relevant counterparty.

## **Subpart B—Definitions**

### **§ 850.201 Advanced packaging.**

The term *advanced packaging* means to package integrated circuits in a manner that supports the two-and-one-half-dimensional (2.5D) or three-dimensional (3D) assembly of integrated circuits, such as by directly attaching one or more die or wafer using through-silicon vias, die or wafer bonding, heterogeneous integration, or other advanced methods and materials.

### **§ 850.202 AI system.**

The term *AI system* means:

- (a) A machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments—i.e., a system that uses data inputs to:
  - (1) Perceive real and virtual environments;
  - (2) Abstract such perceptions into models through automated or algorithmic statistical analysis; and
  - (3) Use model inference to make a classification, prediction, recommendation, or decision.
- (b) Any data system, software, hardware, application, tool, or utility that operates in whole or in part using a system described in (a).



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**§ 850.203 Certification.**

- (a) The term *certification* means a written statement signed by the chief executive officer or other duly authorized designee of the person filing a notification or providing other information that certifies under the penalties provided in the False Statements Accountability Act of 1996, as amended (18 U.S.C. 1001) that the notification or other information filed or provided:
  - (1) Fully complies with the regulations in this part; and
  - (2) Is accurate and complete in all material respects to the best knowledge of the person filing a notification or other information.
- (b) For purposes of this section, a duly authorized designee is:
  - (1) In the case of a partnership, any general partner thereof;
  - (2) In the case of a corporation, any officer thereof; and
  - (3) In the case of any entity lacking partners and officers, any individual within the organization exercising executive functions similar to those of a general partner of a partnership or an officer of a corporation or otherwise authorized by the board of directors or equivalent to provide such certification.
- (c) In each case described in paragraphs (b)(1) through (3) of this section, such designee must possess actual authority to make the certification on behalf of the person filing a notification or other information.

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**Note 1 to § 850.203:** A template for certifications may be found at the Outbound Investment Security Program section of the Department of the Treasury website.

**§ 850.204 Completion date.**

The term *completion date* means:

- (a) With respect to a covered transaction other than under § 850.210(a)(6), the earliest date upon which any interest, asset, property, or right is conveyed, assigned, delivered, or otherwise transferred to a U.S. person, or as applicable, its controlled foreign entity; or
- (b) With respect to a covered transaction under § 850.210(a)(6), the earliest date upon which any interest, asset, property, or right in the relevant covered foreign person is conveyed, assigned, delivered, or otherwise transferred to the applicable fund.

**§ 850.205 Contingent equity interest.**

The term *contingent equity interest* means a financial instrument that currently does not constitute an equity interest but is convertible into, or provides the right to acquire, an equity interest upon the occurrence of a contingency or defined event.

**§ 850.206 Controlled foreign entity.**

- (a) The term *controlled foreign entity* means any entity incorporated in, or otherwise organized under the laws of, a country other than the United States of which a U.S. person is a parent.

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- (b) For purposes of this term, the following rules shall apply in determining whether an entity is a parent of another entity in a tiered ownership structure:
- (1) Where the relationship between an entity and another entity is that of parent and subsidiary, the holdings of voting interest or voting power of the board, as applicable, of a subsidiary shall be fully attributed to the parent.
  - (2) Where the relationship between an entity and another entity is not that of parent and subsidiary (i.e., because the holdings of voting interest or voting power of the board, as applicable, of the first entity in the second entity is 50 percent or less), then the indirect downstream holdings of voting interest or voting power of the board, as applicable, attributed to the first entity shall be determined proportionately.
  - (3) Where the circumstances in both (b)(1) and (b)(2) apply (i.e., because a U.S. person holds both direct and indirect downstream holdings in the same entity), any holdings of voting interest shall be aggregated for the purposes of applying this definition, and any holdings of voting power of the board shall be aggregated for the purposes of applying this definition. Voting interest shall not be aggregated with voting power of the board for the purposes of applying this definition.

**§ 850.207 Country of concern.**

The term *country of concern* has the meaning given to it in the Annex to the Order.

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**§ 850.208 Covered activity.**

The term *covered activity* means, in the context of a particular transaction, any of the activities referred to in the definition of notifiable transaction in § 850.217 or prohibited transaction in § 850.224.

**§ 850.209 Covered foreign person.**

(a) The term *covered foreign person* means:

- (1) A person of a country of concern that engages in a covered activity; or
- (2) A person that directly or indirectly holds any voting interest, board seat, or equity interest in any person described in paragraph (a)(1) of this section, or holds any power to direct or cause the direction of the management or policies of any person described in paragraph (a)(1) of this section through one or more contractual arrangements, including, for the avoidance of doubt, variable interest entities; and where the person, based the relevant financial statement described in paragraph (b) of this section:
  - (i) Derives more than 50 percent of its revenue from any person described in paragraph (a)(1) of this section, individually or in the aggregate;
  - (ii) Derives more than 50 percent of its net income from any person described in paragraph (a)(1) of this section, individually or in the aggregate;

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- (iii) Incurs more than 50 percent of its capital expenditure through any person described in paragraph (a)(1) of this section, individually or in the aggregate; or
  - (iv) Incurs more than 50 percent of its operating expenses through any person described in paragraph (a)(1) of this section, individually or in the aggregate.
- (3) With respect to a covered transaction described in § 850.210(a)(5), the person of a country of concern that participates in the joint venture is deemed to be a covered foreign person by virtue of its participation in the joint venture.
- (b) Determination of whether a person is a covered foreign person within the meaning of paragraph (a)(2) of this section shall be made based on an annual financial statement from the most recent year for which an audited financial statement of such person is available at the time of a given transaction. If an audited financial statement is not available, the most recent unaudited financial statement shall be used instead.

**§ 850.210 Covered transaction.**

- (a) The term *covered transaction* means a U.S. person's direct or indirect:

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- (1) Acquisition of an equity interest or a contingent equity interest (or interest equivalent to an equity or contingent equity interest) in a person that the U.S. person knows at the time of the acquisition is a covered foreign person;
- (2) Provision of a loan or a similar debt financing arrangement to a person that the U.S. person knows at the time of the provision is a covered foreign person, where such debt financing:
  - (i) Is convertible to an equity interest; or
  - (ii) Affords or will afford the U.S. person the right to make management decisions with respect to or on behalf of the covered foreign person or the right to appoint members of the board of directors (or equivalent) of the covered foreign person;
- (3) Conversion of a contingent equity interest (or interest equivalent to a contingent equity interest) or conversion of debt to an equity interest in a person that the U.S. person knows at the time of the conversion is a covered foreign person;
- (4) Acquisition, leasing, or other development of operations, land, property, or other assets in a country of concern that the U.S. person knows at the time of such acquisition, leasing, or other development will result in, or that the U.S. person intends to result in:
  - (i) The establishment of a covered foreign person; or

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- (ii) The engagement of a person of a country of concern in a covered activity where it was not previously engaged in such covered activity;
  - (5) Entrance into a joint venture, wherever located, that is formed with a person of a country of concern and that the subject U.S. person knows at the time of entrance into the joint venture will engage in or the U.S. person intends to engage in a covered activity;
  - or
  - (6) Acquisition of a limited partner or equivalent interest in a venture capital fund, private equity fund, fund of funds, or other pooled investment fund (in each case where the fund is not a U.S. person) that a U.S. person knows at the time of the acquisition likely will invest in a person of a country of concern that is in the semiconductors and microelectronics, quantum information technologies, or artificial intelligence sectors, and such fund undertakes a transaction that would be a covered transaction if undertaken by a U.S. person.
- (b) Notwithstanding paragraph (a) of this section, a transaction is not a covered transaction if it is:
- (i) An excepted transaction as set forth in § 850.501; or

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- (ii) For the conduct of the official business of the United States Government by employees, grantees, or contractors thereof.
- (c) The acquisition of a convertible or contingent interest described in paragraph (a)(1) or (a)(2) of this section may constitute a covered transaction, and the subsequent occurrence of a conversion event described in paragraph (a)(3) of this section may constitute a separate covered transaction. A U.S. person should assess each of the acquisition and the conversion to determine the applicability of this part.

**Note 1 to § 850.210:** For the avoidance of doubt, in the context of a debt financing, a lender's foreclosure on collateral that constitutes an equity interest is an acquisition of such equity interest by the lender.

**§ 850.211 Develop.**

The term *develop* means to engage in any stages prior to serial production, such as design or modification, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, and layouts.

**§ 850.212 Entity.**

The term *entity* means any branch, partnership, association, estate, joint venture, trust, corporation or division of a corporation, group, sub-group, or other organization (whether or not organized under the laws of any State or foreign state).

**§ 850.213 Excepted transaction.**



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The term *excepted transaction* means a transaction that meets the criteria in § 850.501.

**§ 850.214 Fabricate.**

The term *fabricate* means to form devices such as transistors, poly capacitors, non-metal resistors, and diodes on a wafer of semiconductor material.

**§ 850.215 Knowingly directing.**

The term *knowingly directing* has the definition set forth in § 850.303.

**§ 850.216 Knowledge.**

Knowledge of a fact or circumstance (the term may be a variant, such as “know”) means:

- (a) Actual knowledge that a fact or circumstance exists or is substantially certain to occur;
- (b) An awareness of a high probability of a fact or circumstance’s existence or future occurrence; or
- (c) Reason to know of a fact or circumstance’s existence.

**Note 1 to § 850.216:** See the discussion of the knowledge standard in § 850.104 for more information about how this term is applied in this part.

**§ 850.217 Notifiable transaction.**

The term *notifiable transaction* means a covered transaction (that is not a prohibited transaction) in which the relevant covered foreign person or, with respect to a covered transaction described in § 850.210(a)(5), the relevant joint venture:

- (a) Designs any integrated circuit that is not described in § 850.224(c);

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- (b) Fabricates any integrated circuit that is not described in § 850.224(d);
- (c) Packages any integrated circuit that is not described in § 850.224(e); or
- (d) Develops any AI system that is not described in § 850.224(j) or (k) and that is:
  - (1) Designed to be used for any government intelligence or mass-surveillance end use (e.g., through mining text, audio, or video; image recognition; location tracking; or surreptitious listening devices) or military end use (e.g., for weapons targeting, target identification, combat simulation, military vehicle or weapons control, military decision-making, weapons design, or combat system logistics and maintenance);
  - (2) Intended by the covered foreign person to be used for cybersecurity applications, digital forensics tools, and penetration testing tools, or the control of robotic systems; or

Alternative 1 for paragraph (d)(3)

- (3) Trained using a quantity of computing power greater than  $10^{23}$  computational operations (e.g., integer or floating-point operations).

Alternative 2 for paragraph (d)(3)

- (3) Trained using a quantity of computing power greater than  $10^{24}$  computational operations (e.g., integer or floating-point operations).

Alternative 3 for paragraph (d)(3)

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- (3) Trained using a quantity of computing power greater than  $10^{25}$  computational operations (e.g., integer or floating-point operations).

**Note 1 to § 850.217:** Consistent with section 3 of the Order, the Secretary, in consultation with the Secretary of Commerce, and, as appropriate, the heads of other relevant agencies, shall periodically assess whether the quantity of computing power described in paragraph (d)(3) remains effective in addressing threats to the national security of the United States described in the Order and make updates, as appropriate, through public notice.

**§ 850.218 Package.**

The term *package* means to assemble various components, such as the integrated circuit die, lead frames, interconnects, and substrate materials to safeguard the semiconductor device and provide electrical connections between different parts of the die.

**§ 850.219 Parent.**

The term *parent* means, with respect to an entity:

- (a) A person who or which directly or indirectly holds more than 50 percent of:
  - (1) The outstanding voting interest in the entity; or
  - (2) The voting power of the board of the entity;
- (b) The general partner, managing member, or equivalent of the entity; or
- (c) The investment adviser to any entity that is a pooled investment fund, with “investment adviser” as defined in the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(11)).

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**§ 850.220 Person.**

The term *person* means any individual or entity.

**§ 850.221 Person of a country of concern.**

The term *person of a country of concern* means:

- (a) Any individual that:
  - (1) Is a citizen or permanent resident of a country of concern;
  - (2) Is not a U.S. citizen; and
  - (3) Is not a permanent resident of the United States.
- (b) An entity with a principal place of business in, headquartered in, or incorporated in or otherwise organized under the laws of, a country of concern;
- (c) The government of a country of concern, including any political subdivision, political party, agency, or instrumentality thereof; any person acting for or on behalf of the government of such country of concern; or any entity with respect to which the government of such country of concern holds individually or in the aggregate, directly or indirectly, 50 percent or more of the entity's outstanding voting interest, voting power of the board, or equity interest, or otherwise possesses the power to direct or cause the direction of the management and policies of such entity (whether through the ownership of voting securities, by contract, or otherwise);
- (d) Any entity in which one or more persons identified in paragraph (a), (b), or (c) of this section, individually or in the aggregate, directly or indirectly, holds at least 50

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percent of any of the following interests of such entity: outstanding voting interest, voting power of the board, or equity interest; or

- (e) Any entity in which one or more persons identified in paragraph (d) of this section, individually or in the aggregate, directly or indirectly, holds at least 50 percent of any of the following interests of such entity: outstanding voting interest, voting power of the board, or equity interest.

**§ 850.222 Principal place of business.**

The term *principal place of business* means the primary location where an entity's management directs, controls, or coordinates the entity's activities, or, in the case of an investment fund, where the fund's activities are primarily directed, controlled, or coordinated by or on behalf of the general partner, managing member, or equivalent.

**§ 850.223 Produce.**

The term *produce* means to engage in any of the post-development stages of realizing the relevant technology or product, such as engineering, manufacture, integration, assembly, inspection, testing, and quality assurance.

**§ 850.224 Prohibited transaction.**

The term *prohibited transaction* means a covered transaction in which the relevant covered foreign person or, with respect to a covered transaction described in § 850.210(a)(5), the relevant joint venture:

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- (a) Develops or produces any electronic design automation software for the design of integrated circuits or advanced packaging;
- (b) Develops or produces any:
  - (1) Front-end semiconductor fabrication equipment designed for performing the volume fabrication of integrated circuits, including equipment used in the production stages from a blank wafer or substrate to a completed wafer or substrate (i.e., the integrated circuits are processed but they are still on the wafer or substrate);
  - (2) Equipment for performing volume advanced packaging; or
  - (3) Commodity, material, software, or technology designed exclusively for use in or with extreme ultraviolet lithography fabrication equipment.
- (c) Designs any integrated circuit that meets or exceeds the performance parameters in Export Control Classification Number 3A090.a in supplement No. 1 to 15 CFR part 774, or integrated circuits designed for operation at or below 4.5 Kelvin;
- (d) Fabricates any integrated circuit that meets any of the following criteria:
  - (1) Logic integrated circuits using a non-planar transistor architecture or with a production technology node of 16/14 nanometers or less, including fully depleted silicon-on-insulator (FDSOI) integrated circuits;
  - (2) NOT-AND (NAND) memory integrated circuits with 128 layers or more;

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- (3) Dynamic random-access memory (DRAM) integrated circuits using a technology node of 18 nanometer half-pitch or less;
- (4) Integrated circuits manufactured from a gallium-based compound semiconductor;
- (5) Integrated circuits using graphene transistors or carbon nanotubes; or
- (6) Integrated circuits designed for operation at or below 4.5 Kelvin;
- (e) Packages any integrated circuit using advanced packaging techniques;
- (f) Develops, installs, sells, or produces any supercomputer 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;
- (g) Develops a quantum computer or produces any of the critical components required to produce a quantum computer such as a dilution refrigerator or two-stage pulse tube cryocooler;
- (h) Develops or produces any quantum sensing platform designed for, or which the relevant covered foreign person intends to be used for, any military, government intelligence, or mass-surveillance end use;
- (i) Develops or produces any quantum network or quantum communication system designed for, or which the relevant covered foreign person intends to be used for:

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- (1) Networking to scale up the capabilities of quantum computers, such as for the purposes of breaking or compromising encryption;
  - (2) Secure communications, such as quantum key distribution; or
  - (3) Any other application that has any military, government intelligence, or mass-surveillance end use;
- (j) Develops any AI system that is designed to be exclusively used for, or which the relevant covered foreign person intends to be used for, any:
- (1) Military end use (e.g., for weapons targeting, target identification, combat simulation, military vehicle or weapon control, military decision-making, weapons design, or combat system logistics and maintenance); or
  - (2) Government intelligence or mass surveillance end use (e.g., through mining text, audio, or video; image recognition; location tracking; or surreptitious listening devices);
- (k) Develops any AI system that is trained using a quantity of computing power greater than:

Alternative 1 for (k)(1)

- (1)  $10^{24}$  computational operations (e.g., integer or floating-point operations);
- or

Alternative 2 for (k)(1)



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- (1)  $10^{25}$  computational operations (e.g., integer or floating-point operations);
- or

Alternative 3 for (k)(1)

- (1)  $10^{26}$  computational operations (e.g., integer or floating-point operations);
- or

Alternative 1 for (k)(2)

- (2)  $10^{23}$  computational operations (e.g., integer or floating-point operations) using primarily biological sequence data;

Alternative 2 for (k)(2)

- (2)  $10^{24}$  computational operations (e.g., integer or floating-point operations) using primarily biological sequence data;
- (l) Meets the conditions set forth in § 850.209(a)(2) because of its relationship to one or more covered foreign persons engaged in any covered activity described in any of paragraphs (a) through (k) of this section; or
  - (m) Engages in a covered activity, whether referenced in this section or § 850.217 and is:
    - (1) Included on the Bureau of Industry and Security's Entity List (15 CFR part 744, supplement no. 4);
    - (2) Included on the Bureau of Industry and Security's Military End User List (15 CFR part 744, supplement no. 7);

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- (3) Meets the definition of “Military Intelligence End-User” by the Bureau of Industry and Security in 15 CFR 744.22(f)(2);
- (4) Included on the Department of the Treasury’s list of Specially Designated Nationals and Blocked Persons (SDN List), or is an entity in which one or more individuals or entities included on the SDN List, individually or in the aggregate, directly or indirectly, own a 50 percent or greater interest;
- (5) Included on the Department of the Treasury’s list of Non-SDN Chinese Military-Industrial Complex Companies (NS–CMIC List); or
- (6) Designated as a foreign terrorist organization by the Secretary of State under 8 U.S.C. 1189.

**Note 1 to § 850.224:** Consistent with section 3 of the Order, the Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies, shall periodically assess whether the quantities of computing power described in paragraph (k) of this section remain effective in addressing threats to the national security of the United States described in the Order and make updates, as appropriate, through public notice.

**§ 850.225     Quantum computer.**

The term *quantum computer* means a computer that performs computations that harness the collective properties of quantum states, such as superposition, interference, or entanglement.

**§ 850.226     Relevant agencies.**

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The term *relevant agencies* means the Departments of State, Defense, Justice, Commerce, Energy, and Homeland Security, the Office of the United States Trade Representative, the Office of Science and Technology Policy, the Office of the Director of National Intelligence, the Office of the National Cyber Director, and any other department, agency, or office the Secretary determines appropriate.

**§ 850.227     Subsidiary.**

The term *subsidiary* means, with respect to a person, an entity of which such person is a parent.

**§ 850.228     United States.**

The term *United States* or *U.S.* means the United States of America, the States of the United States of America, the District of Columbia, and any commonwealth, territory, dependency, or possession of the United States of America, or any subdivision of the foregoing, and includes the territorial sea of the United States of America. For purposes of this part, an entity organized under the laws of the United States of America, one of the States, the District of Columbia, or a commonwealth, territory, dependency, or possession of the United States is an entity organized “in the United States.”

**§ 850.229     U.S. person.**

The term *U.S. person* means 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 branch of any such entity, or any person in the United States.

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## **Subpart C—Prohibited Transactions and Other Prohibited Activities**

### **§ 850.301 Undertaking a prohibited transaction.**

A U.S. person may not engage in a prohibited transaction unless an exemption for that transaction has been granted under § 850.502.

### **§ 850.302 Actions of a controlled foreign entity.**

- (a) A U.S. person shall take all reasonable steps to prohibit and prevent any transaction by its controlled foreign entity that would be a prohibited transaction if engaged in by a U.S. person.
- (b) If a controlled foreign entity engages in a transaction that would be a prohibited transaction if engaged in by a U.S. person, in determining whether the relevant U.S. person took all reasonable steps to prohibit and prevent such transaction, the Department of the Treasury will consider, among other factors, any of the following with respect to a U.S. person and its controlled foreign entity:
  - (1) The execution of agreements with respect to compliance with this part between the subject U.S. person and its controlled foreign entity;
  - (2) The existence and exercise of governance or shareholder rights by the U.S. person with respect to the controlled foreign entity, where applicable;

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- (3) The existence and implementation of periodic training and internal reporting requirements by the U.S. person and its controlled foreign entity with respect to compliance with this part;
- (4) The implementation of appropriate and documented internal controls, including internal policies, procedures, or guidelines that are periodically reviewed internally, by the U.S. person and its controlled foreign entity; and
- (5) Implementation of a documented testing and/or auditing process of internal policies, procedures, or guidelines.

**Note 1 to § 850.302:** Findings of violations of this section and decisions related to enforcement and penalties will be made based on a consideration of the totality of relevant facts and circumstances, including whether the U.S. person has taken the steps described in paragraph (b) of this section and whether such steps were reasonable given the size and sophistication of the U.S. person.

**§ 850.303      Knowingly directing an otherwise prohibited transaction.**

- (a) A U.S. person is prohibited from knowingly directing a transaction by a non-U.S. person that the U.S. person knows at the time of the transaction would be a prohibited transaction if engaged in by a U.S. person. For purposes of this section, a U.S. person “knowingly directs” a transaction when the U.S. person has authority, individually or as part of a group, to make or substantially participate in decisions on behalf of a non-U.S. person, and exercises that authority to direct, order, decide

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upon, or approve a transaction. Such authority exists when a U.S. person is an officer, director, or senior advisor, or otherwise possesses senior-level authority at a non-U.S. person.

- (b) A U.S. person that has the authority described in paragraph (a) of this section and recuses themselves from an investment will not be considered to have exercised their authority to direct, order, decide upon, or approve a transaction.

#### **Subpart D—Notifiable Transactions and Other Notifiable Activities**

##### **§ 850.401 Undertaking a notifiable transaction.**

A U.S. person that undertakes a notifiable transaction shall file a notification of that transaction with the Department of the Treasury pursuant to § 850.404.

##### **§ 850.402 Notification of actions of a controlled foreign entity.**

A U.S. person shall file a notification with the Department of the Treasury pursuant to § 850.404 with respect to any transaction by a controlled foreign entity of that U.S. person that would be a notifiable transaction if engaged in by a U.S. person.

##### **§ 850.403 Notification of post-transaction knowledge.**

A U.S. person that acquires actual knowledge after the completion date of a transaction of a fact or circumstance such that the transaction would have been a covered transaction if such knowledge had been possessed by the relevant U.S. person at the time of the transaction shall promptly, and in no event later than 30 calendar days following the acquisition of such knowledge,

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submit a notification pursuant to § 850.404. This requirement applies regardless of whether the transaction would have been a notifiable transaction or a prohibited transaction.

**Note 1 to § 850.403:** For the avoidance of doubt, a U.S. person's submission of a notification pursuant to this section shall not preclude a finding by the Department of the Treasury that as a factual matter the U.S. person had relevant knowledge of the transaction's status at the time of the transaction.

**§ 850.404 Procedures for notifications.**

- (a) A U.S. person that has an obligation under § 850.401, § 850.402, or § 850.403 shall file an electronic copy of the notification of the transaction with the Department of the Treasury including the information set out in § 850.405 and the certification referred to in § 850.203. The U.S. person shall follow the electronic filing instructions posted on the Department of the Treasury's Outbound Investment Security Program website. No communications or submissions other than those described in this section shall constitute the filing of a notification for purposes of this part.
- (b) The Department of the Treasury may contact a U.S. person that has filed a notification with questions or document requests related to the transaction or compliance with this part. The U.S. person shall respond to any such questions or requests within the time frame and in the manner specified by the Department of the Treasury. Information and other documents provided by the U.S. person to the

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Department of the Treasury after the filing of the notification under this section shall be deemed part of the notification and shall be subject to the certification referred to in § 850.203.

- (c) A U.S. person shall file a notification under § 850.401 or § 850.402 with the Department of the Treasury no later than 30 calendar days following the completion date of a notifiable transaction. A U.S. person shall file a notification required under § 850.403 with the Department of the Treasury no later than 30 calendar days after it acquires the knowledge referred to in § 850.403.
- (d) If a U.S. person files a notification prior to the completion date of the notifiable transaction, the U.S. person shall update such notification no later than 30 calendar days following the completion date of the notifiable transaction if information in the original filing has materially changed.
- (e) A U.S. person shall inform the Department of the Treasury in writing no later than 30 calendar days following the acquisition of previously unavailable information required under § 850.405.

**Note 1 to § 850.404:** While the Department of the Treasury may engage with the U.S. person following notification, it is also possible the U.S. person will receive no communication from the Department of the Treasury other than an electronic acknowledgment of receipt after notification is submitted.

**§ 850.405      Content of notifications.**



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- (a) A U.S. person that has an obligation under this part to file a notification shall provide the information set forth in this section, which must be accurate and complete in all material respects.
- (b) A notification shall provide, as applicable:
  - (1) The contact information of a representative of the U.S. person filing the notification who is available to communicate with the Department of the Treasury about the notification including such representative's name, title, email address, mailing address, phone number, and employer;
  - (2) A description of the U.S. person, including name, and as applicable, principal place of business and place of incorporation or legal organization, company address, website, and, if the U.S. person is an entity, such U.S. person's ultimate owner;
  - (3) A post-transaction organizational chart of the U.S. person that includes its relationship with any controlled foreign entity or entities of the U.S. person and that identifies the covered foreign person and other relevant persons involved in the transaction;
  - (4) A brief description of the commercial rationale for the transaction;
  - (5) A brief description of why the U.S. person has determined the transaction is a covered transaction that includes a discussion of the nature of the transaction, its structure, reference to the paragraph of § 850.210(a) that best

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describes the transaction type, and whether the notification is being submitted pursuant to § 850.401, § 850.402, or § 850.403.

- (6) The status of the transaction, including the actual or expected completion date of the transaction;
- (7) The total transaction value in U.S. dollars or U.S. dollar equivalent, an explanation of how the transaction value was determined, and a description of the consideration for the transaction (including cash, securities, other assets, and debt forgiveness);
- (8) The aggregate equity interest, voting interest, board seats (or equivalent holdings) of the U.S. person and its affiliates in the covered foreign person (or in the joint venture, as applicable) following the completion date of the transaction, including a description of any agreements or commitments for future investment or options to make future investments in the covered foreign person (or joint venture);
- (9) Information about the covered foreign person, including its name, and as applicable, principal place of business and place of incorporation or legal organization, company address, website, and if the covered foreign person is an entity, such covered foreign person's ultimate owner, and the full legal names and titles of each officer, director, and other member of management

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of the covered foreign person, and a post-transaction organizational chart of the covered foreign person;

- (10) Identification and description of each of the covered activity or activities undertaken by the covered foreign person that makes the transaction a covered transaction, as well as a brief description of the known end use(s) and end user(s) of the covered foreign person's technology, products, or services;
- (11) A statement describing the attributes that cause the entity to be a covered foreign person, and any other relevant information regarding the covered foreign person and covered activity or activities;
- (12) If a transaction involves a covered activity identified in § 850.217(a), (b), or (c), identification of the technology node(s) at which any applicable product is produced; and;
- (13) If the notification is required under § 850.403:
  - (i) Identification of the fact or circumstance of which the U.S. person acquired knowledge post-transaction;
  - (ii) The date upon which the U.S. person acquired such knowledge;
  - (iii) A statement explaining why the U.S. person did not possess or obtain such knowledge at the time of the transaction; and
  - (iv) A description of any pre-transaction diligence undertaken by the

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U.S. person, including, as applicable, any steps described in § 850.104(c).

- (c) The U.S. person shall maintain a copy of the notification filed and supporting documentation for a period of ten years from the date of the filing. Such supporting documentation shall include, as applicable, any pitch decks, marketing letters, and offering memorandums; transaction documents including side letters and investment agreements; and due diligence materials related to the transaction. The U.S. person shall make all supporting documentation available upon request by the Department of the Treasury.
- (d) If the U.S. person does not provide responses to the information required in paragraph (b) of this section, the U.S. person shall provide sufficient explanation for why the information is unavailable or otherwise cannot be obtained and explain the U.S. person's efforts to obtain such information. If such information subsequently becomes available, the U.S. person shall provide such information to the Department of the Treasury promptly, and in no event later than 30 calendar days following the availability of such information.

**§ 850.406 Notice of material omission or inaccuracy.**

A person who has made any representation, statement, or certification subject to this part shall inform the Department of the Treasury in writing promptly, and in no event later than 30

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calendar days after learning of a material omission or inaccuracy in such representation, statement, or certification.

## **Subpart E—Exceptions and Exemptions**

### **§ 850.501 Excepted transaction.**

A transaction that would be either a prohibited transaction or a notifiable transaction if engaged in by a U.S. person but for this section is not a prohibited transaction or a notifiable transaction if the conditions set forth in this section are met. In that case, the transaction is an excepted transaction.

The following transactions are excepted transactions:

- (a) (1) An investment by a U.S. person:
  - (i) In any publicly traded security, with “security” as defined in section 3(a)(10) of the Securities Exchange Act of 1934, as amended, at 15 U.S.C. 78c(a)(10), denominated in any currency, and that trades on a securities exchange or through the method of trading that is commonly referred to as “over-the-counter,” in any jurisdiction;
  - (ii) In a security issued by (1) any “investment company” as defined in section 3(a)(1) of the Investment Company Act of 1940, as amended, at 15 U.S.C. 80a-3(a)(1), that is registered with the U.S. Securities and Exchange Commission, such as index funds, mutual funds, or exchange traded funds, or (2) any company that has elected

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to be a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 8a-54); or any derivative thereon; or

Alternative 1 for paragraph (a)(1)(iii)

- (iii) Made as a limited partner or equivalent in a venture capital fund, private equity fund, fund of funds, or other pooled investment fund other than as described in paragraph (a)(1)(ii) of this section where:
  - (A) The limited partner's contribution is solely capital and the limited partner:
    - (1) Is not responsible for any debts or other financial obligations with respect to the fund beyond its investment including any uncalled capital commitments related thereto;
    - (2) Cannot approve, disapprove, or otherwise influence or participate in the investment decisions of the fund;
    - (3) Cannot approve, disapprove, or otherwise influence or participate in the decisions made by the general partner, managing member, or equivalent related to entities in which the fund is invested;
    - (4) Cannot unilaterally dismiss, prevent the dismissal of,

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select, or determine the compensation of the general partner, managing member, or equivalent of the fund; and

- (5) Cannot participate in, and has no right or ability, by virtue of its status as a limited partner or any other contractual relationship, to influence the decision-making or operations of any covered foreign person in which the fund is invested;

and;

- (B)
  - (1) The limited partner's committed capital is not more than 50 percent of the total assets under management of the fund, aggregated across any investment and co-investment vehicles that comprise the fund; or,
  - (2) Where the fund is not a U.S. person or a controlled foreign entity, the limited partner has secured a binding contractual assurance that its capital will not be used to engage in a transaction that would cause the limited partner to have made an indirect prohibited transaction.

Alternative 2 for paragraph (a)(1)(iii)

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- (iii) Made as a limited partner or equivalent in a venture capital fund, private equity fund, fund of funds, or other pooled investment fund other than as described in paragraph (a)(1)(ii) of this section where the limited partner's committed capital is not more than \$1,000,000, aggregated across any investment and co-investment vehicles that comprise the fund.
- (2) Notwithstanding paragraph (a)(1) of this section, an investment is not an excepted transaction if it affords the U.S. person rights beyond standard minority shareholder protections with respect to the covered foreign person. Such protections include:
- (i) The power to prevent the sale or pledge of all or substantially all of the assets of an entity or a voluntary filing for bankruptcy or liquidation;
  - (ii) The power to prevent an entity from entering into contracts with majority investors or their affiliates;
  - (iii) The power to prevent an entity from guaranteeing the obligations of majority investors or their affiliates;
  - (iv) The right to purchase an additional interest in an entity to prevent the dilution of an investor's pro rata interest in that entity in the event



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that the entity issues additional instruments conveying interests in the entity;

(v) The power to prevent the change of existing legal rights or preferences of the particular class of stock held by minority investors, as provided in the relevant corporate documents governing such stock; and

(vi) The power to prevent the amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of an entity with respect to the matters described in paragraphs (a)(2)(i) through (v) of this section;

(b) The acquisition by a U.S. person of equity or other interests in an entity held by one or more persons of a country of concern; *provided that*:

(1) The U.S. person is acquiring all equity or other interests in such entity held by all persons of a country of concern; and

(2) Following such acquisition, the entity does not constitute a covered foreign person.

(c) A transaction that, but for this paragraph, would be a covered transaction between a U.S. person and its controlled foreign entity that supports ongoing operations or other activities that are not covered activities as defined in § 850.208; *provided that*

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this exception shall not apply when the transaction is a covered transaction pursuant to § 850.210(a)(4) or (a)(5);

- (d) A transaction made after the effective date of this part pursuant to a binding, uncalled, capital commitment entered into before August 9, 2023; or
- (e) The acquisition of a voting interest in a covered foreign person by a U.S. person upon default or other condition involving a loan or a similar financing arrangement, where the loan was made by a syndicate of banks in a loan participation where the U.S. person lender(s) in the syndicate:
  - (1) Cannot on its own initiate any action vis-à-vis the debtor; and
  - (2) Does not have a lead role in the syndicate.

or

- (f)
  - (1) A transaction that is:
    - (i) With or involving a person of a country or territory outside of the United States designated by the Secretary, after taking into account whether the country or territory is addressing national security concerns posed by outbound investment; and
    - (ii) Of a type for which the Secretary has determined that the related national security concerns are likely to be adequately addressed by

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measures taken or that may be taken by the government of the relevant country or territory.

- (2) Prior to making a designation or determination under paragraph (f) of this section, the Secretary shall consult with the Secretary of State, the Secretary of Commerce, and, as appropriate, the heads of other relevant agencies.
- (3) The Secretary's designations and determinations under paragraph (f) of this section shall be made available through public notice.

**Note 1 to § 850.501:** A limited partner's participation on an advisory board or a committee of an investment fund shall not constitute having the ability to undertake the actions referred to in Alternative 1 paragraphs (a)(1)(iii)(A)(1) to (5) of this section if the advisory board or committee does not have the ability to approve, disapprove, or otherwise control: (i) investment decisions of the investment fund; or (ii) decisions made by the general partner, managing member, or equivalent related to entities in which the investment fund is invested.

**§ 850.502 National interest exemption.**

- (a) The Secretary, in consultation with the Secretary of Commerce, the Secretary of State, and the heads of relevant agencies, as appropriate, may determine that a covered transaction is in the national interest of the United States and therefore is exempt from applicable provisions in Subparts C and D of this part (excluding §§ 850.406, 850.603 and 850.604). Such a determination may be made following a

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request by a U.S. person on its own behalf or on behalf of its controlled foreign entity.

- (b) Any determination pursuant to paragraph (a) of this section will be based on a consideration of the totality of the relevant facts and circumstances and may be informed by, among other considerations, the transaction's effect on critical U.S. supply chain needs; domestic production needs in the United States for projected national defense requirements; United States' technological leadership globally in areas affecting U.S. national security; and impact on U.S. national security if the U.S. person is prohibited from undertaking the transaction.
- (c) A U.S. person seeking a national interest exemption shall submit relevant information to the Department of the Treasury regarding the transaction and shall articulate the basis for the request, including the U.S. person's analysis of the transaction's potential impact on the national interest of the United States. The Department of the Treasury may request additional information that may include some or all of the information required under § 850.405.
- (d) A determination that a covered transaction is exempt under this section may be subject to binding conditions.
- (e) No determination pursuant to paragraph (a) of this section will be valid unless provided to the subject U.S. person in writing and signed by the Assistant Secretary or Deputy Assistant Secretary of the Treasury for Investment Security.

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**Note 1 to § 850.502:** A process and related information for exemption requests will be made available on the Department of the Treasury's Outbound Investment Security Program website.

**§ 850.503 IEEPA statutory exception.**

Conduct referred to in 50 U.S.C. 1702(b) shall not be regulated or prohibited, directly or indirectly, by this part.

**Subpart F—Violations**

**§ 850.601 Taking actions prohibited by this part.**

The taking of any action prohibited by this part is a violation of this part.

**§ 850.602 Failure to fulfill requirements.**

Failure to take any action required by this part, and within the time frame and in the manner specified by this part, as applicable, is a violation of this part.

**§ 850.603 Misrepresentation and concealment of facts.**

With respect to any information submission to or communication with the Department of the Treasury pursuant to any provision of this part, the making of any materially false or misleading representation, statement, or certification, or falsifying or concealing any material fact is a violation of this part.

**§ 850.604 Evasions; attempts; causing violations; conspiracies.**

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- (a) Any action on or after the effective date of this part that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this part is prohibited.
- (b) Any conspiracy formed to violate the prohibitions set forth in this part is prohibited.

## **Subpart G—Penalties and disclosures**

### **§ 850.701 Penalties.**

- (a) Section 206 of IEEPA applies to any person subject to the jurisdiction of the United States who violates, attempts to violate, conspires to violate, or causes a violation of any order, regulation, or prohibition issued by or pursuant to the direction or authorization of the Secretary pursuant to this part or otherwise under IEEPA.
  - (1) A civil penalty not to exceed the maximum amount set forth in section 206 of IEEPA may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any order, regulation, or prohibition issued under IEEPA, including any provision of this part.
  - (2) A person who willfully commits, willfully attempts to commit, willfully conspires to commit, or aids or abets in the commission of a violation, attempt to violate, conspiracy to violate, or causing of a violation of any order, regulation, or prohibition issued under IEEPA, including any provision of this part, shall, upon conviction, be fined not more than

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\$1,000,000, or if a natural person, be imprisoned for not more than 20 years, or both.

- (b) The Secretary may refer potential criminal violations of the Order, or of this part, to the Attorney General.
- (c) The civil penalties provided for in IEEPA are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (Pub. L. 101–410, 28 U.S.C. 2461 note).
- (d) The criminal penalties provided for in IEEPA are subject to adjustment pursuant to 18 U.S.C. 3571.
- (e) The penalties available under this section are without prejudice to other penalties, civil or criminal, and forfeiture of property, available under other applicable law.
- (f) Pursuant to 18 U.S.C. 1001, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact; makes any materially false, fictitious, or fraudulent statement or representation; or makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry shall be fined under title 18, United States Code, or imprisoned not more than 5 years, or both.

**§ 850.702 Administrative collection; referral to United States Department of Justice.**

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The imposition of a monetary penalty under this part creates a debt due to the U.S. Government. The Department of the Treasury may take action to collect the penalty assessed if not paid. In addition or instead, the matter may be referred to the Department of Justice for appropriate action to recover the penalty.

**§ 850.703 Divestment.**

- (a) The Secretary, in consultation with the heads of relevant agencies, as appropriate, may take any action authorized under IEEPA to nullify, void, or otherwise compel the divestment of any prohibited transaction entered into after the effective date of this part.
- (b) The Secretary may refer any action taken under paragraph (a) of this section to the Attorney General to seek appropriate relief to enforce such action.

**§ 850.704 Voluntary self-disclosure.**

- (a) Any person who has engaged in conduct that may constitute a violation of this part may submit a voluntary self-disclosure of that conduct to the Department of the Treasury.
- (b) In determining the appropriate response to any violation, the Department of the Treasury will consider the submission and the timeliness of any voluntary self-disclosure.
- (c) In assessing the timeliness of a voluntary self-disclosure, the Department of the Treasury will consider whether it has learned of the conduct prior to the voluntary



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self-disclosure. The Department of the Treasury may consider disclosure of a violation to another government agency other than the Department of the Treasury as a voluntary self-disclosure based on a case-by-case assessment.

- (d) Notwithstanding the foregoing, identification to the Department of the Treasury of conduct that may constitute a violation of this part may not be assessed to be a voluntary self-disclosure in one or more of the following circumstances:
- (1) A third party has provided a prior disclosure to the Department of the Treasury of the conduct or similar conduct related to the same pattern or practice, regardless of whether the disclosing person knew of the third party's prior disclosure;
  - (2) The disclosure includes materially false or misleading information;
  - (3) The disclosure, when considered along with supplemental information timely provided by the disclosing person, is materially incomplete;
  - (4) The disclosure is not self-initiated, including when the disclosure results from a suggestion or order of a federal or state agency or official;
  - (5) The disclosure is a response to an administrative subpoena or other inquiry from the Department of the Treasury or another government agency;
  - (6) The disclosure is made about the conduct of an entity by an individual in such entity without the authorization of such entity's senior management;
- or

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- (7) The filing is made pursuant to a required notification under this part, including § 850.403 or § 850.406.
- (e) A voluntary self-disclosure to the Department of the Treasury must take the form of a written notice describing the conduct that may constitute a violation and each of the persons involved. A voluntary self-disclosure must include, or be followed within a reasonable period of time by, a report of sufficient detail to afford a complete understanding of the conduct that may constitute the violation. A person making a voluntary self-disclosure must respond in a timely manner to any follow-up inquiries by the Department of the Treasury.

## **Subpart H—Provision and Handling of Information**

### **§ 850.801 Confidentiality.**

- (a) Except to the extent required by law or otherwise provided in paragraphs (b) and (c) of this section, information or documentary materials not otherwise publicly available that are submitted to the Department of the Treasury under this part shall not be disclosed to the public.
- (b) Notwithstanding paragraph (a) of this section, except to the extent prohibited by law, the Department of the Treasury may disclose information or documentary materials that are not otherwise publicly available, subject to appropriate

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confidentiality and classification requirements, when such information or documentary materials are:

- (1) Relevant to any judicial or administrative action or proceeding;
  - (2) Provided to Congress or to any duly authorized committee or subcommittee of Congress; or
  - (3) Provided to any domestic governmental entity, or to any foreign governmental entity of a United States partner or ally, where the information or documentary materials are important to the national security analysis or actions of such governmental entity or the Department of the Treasury.
- (c) Notwithstanding paragraph (a) of this section, the Department of the Treasury may disclose to third parties information or documentary materials that are not otherwise publicly available when the person who submitted or filed the information or documentary materials has consented to its disclosure to such third parties.
- (d) The Department of the Treasury may use the information gathered pursuant to this part to fulfill its obligations under the Order, which may include publication of anonymized data.

**§ 850.802 Language of information.**

All materials or information filed with the Department of the Treasury under this part shall be submitted in English. If supplementary or additional materials were originally written in a

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foreign language, they shall be submitted in their original language. Where English versions of those documents exist, they shall also be submitted.

## **Subpart I—Other Provisions**

### **§ 850.901 Delegation of authorities of the Secretary of the Treasury.**

Any action that the Secretary is authorized to take pursuant to the Order and any further executive orders relating to the national emergency declared in the Order may be taken by the Assistant Secretary of the Treasury for Investment Security or their designee or by any other person to whom the Secretary has delegated the authority so to act, as appropriate.

### **§ 850.902 Amendment, modification, or revocation.**

- (a) Except as otherwise provided by law, and in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies, the Secretary may amend, modify, or revoke provisions of this part at any time.
- (b) Except as otherwise provided by law, any instructions, orders, forms, regulations, or rulings issued pursuant to this part may be amended, modified, or revoked at any time.
- (c) Unless otherwise specifically provided, any amendment, modification, or revocation of any provision in or appendix to this part does not affect any act done or omitted, or any civil or criminal proceeding commenced or pending, prior to such amendment, modification, or revocation. All penalties, forfeitures, and

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liabilities under any such instructions, orders, forms, regulations, or rulings pursuant to this part continue and may be enforced as if such amendment, modification, or revocation had not been made.

**§ 850.903 Severability.**

The provisions of this part are separate and severable from one another. If any of the provisions of this part, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

**§ 850.904 Reports to be furnished on demand.**

- (a) Any person is required to furnish under oath, in the form of reports or otherwise, at any time as may be required by the Department of the Treasury, complete information regarding any act or transaction subject to the provisions of this part, regardless of whether such act or transaction is effected pursuant to a national interest exemption under § 850.502. Except as provided otherwise, the Department of the Treasury may, through any person or agency, conduct investigations, hold hearings, administer oaths, examine witnesses, receive evidence, take depositions, and require by subpoena the attendance and testimony of witnesses and the production of any books, contracts, letters, papers, and other hard copy or electronic documents relating to any matter under investigation, regardless of whether any report has been required or filed under this section.

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- (b) For purposes of paragraph (a) of this section, the term *document* includes any written, recorded, or graphic matter or other means of preserving thought or expression (including in electronic format), and all tangible things stored in any medium from which information can be processed, transcribed, or obtained directly or indirectly.
- (c) Persons providing documents to the Department of the Treasury pursuant to this section must do so in a usable format agreed upon by the Department of the Treasury.

Paul M. Rosen,

Assistant Secretary for Investment Security.