



September 28, 2023

**BSA Response to US Department of Treasury’s Advance Notice of Proposed Rulemaking re  
*Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products  
in Countries of Concern***

**I. Introduction**

BSA | The Software Alliance<sup>1</sup> appreciates the opportunity to provide comments in response to the US Treasury Department’s (“Treasury”) Advance Notice of Proposed Rulemaking (“ANPRM”) relating to *Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern*.<sup>2</sup> BSA is the leading trade association representing the global enterprise software and technology industry. Our members provide cutting-edge cloud services, data analytics, manufacturing and infrastructure tools, and other digital capabilities to help businesses modernize and grow. The software industry supports nearly 16 million US jobs, including 12.5 million outside the tech sector, and contributes \$1.9 trillion to the US economy. BSA respectfully offers the following comments on the ANPRM.

**II. General Comments**

BSA welcomes the careful and nuanced approach that Treasury has taken in its outbound investment review ANPRM. BSA also is grateful for Treasury’s outreach to industry and other stakeholders.

BSA shares Treasury’s goal of restricting investment that would accelerate the development of military, intelligence, surveillance, and cyber-enabled capabilities in countries of concern. BSA offers the following preliminary observations, which are followed by several detailed recommendations.

First, BSA commends Treasury’s recognition that continued US leadership in emerging technologies is critical to long-term US interests. Maintaining access to global research networks and engineering talent, as well as visibility into the technology edge in countries of concern (e.g., AI-related applications in solar and wind technologies, advanced batteries, and next generation vehicles), are necessary for US enterprises to help solve pressing global challenges. Studies from the Australian Strategic Policy Institute have assessed that China already produces the most scientific research across a number of cutting-edge fields.<sup>3</sup> When US companies are blocked from that access, it threatens their ability to do remain competitive and at the forefront of technological innovation. This is just one of the reasons why Secretaries Yellen, Blinken, Raimondo, and others have repeatedly underscored that a complete and systemic “decoupling” of the US and Chinese economies would be deeply harmful to US interests. These harms would impact US economic, environmental, health, and security interests. “Strategic competition” requires engagement and offers broad-based benefits. Self-defeating isolationism does not, – particularly

where the inherent openness of the US society and economy means that China has and will continue to have more access to the United States than *vice versa*.

Second, BSA observes that the business environment in China has rapidly deteriorated, deterring new investments and prompting efforts to reduce market exposure. Beyond the worsening economic picture, foreign investors now face a less predictable environment in which business activities that were previously deemed legal (e.g., gathering accurate statistical and financial reporting information, or conducting commercial-purpose data transfers) have been suddenly declared to be illegal without reasonable explanation or warning. These transparency and due process challenges undermine the ability to ensure the safety of investments and personnel. As the Secretary of Commerce described the situation, such conditions may render a country “uninvestable.” These and other circumstances (among them, growing US trade and investment restrictions) have reduced China’s attractiveness an investment destination relative to countries that offer a greater degree of transparency, stability, and accountability. Against this backdrop, US investment in China has fallen substantially and heavy-handed action by Treasury is neither necessary nor appropriate.<sup>4</sup>

Treasury’s new outbound investment controls should be carefully calibrated to account for the foregoing circumstances and should be no more burdensome than necessary to achieve their intended aims. BSA makes the following recommendations with the aim of avoiding unintended consequences while ensuring that Treasury’s controls are effective at achieving their stated aim of limiting investment in enumerated sectors that are critical for the military, intelligence, surveillance, or cyber-enabled capabilities of countries of concern.

### III. “Covered Foreign Person” / “Person of a Country of Concern”

**First**, BSA recommends that Treasury clarify the criteria by which an entity is determined to be a “person of a country of concern.” Clarification may be helpful to ensure that US persons are not improperly determined to be a “covered foreign person.” For example, in a scenario in which a US person owns an entity in a “country of concern” that is engaged in “covered national security technologies and products,” would that US owned foreign entity be considered a “covered foreign person” or a “person of a country of concern.” Would the 50% rule described in Section C of the Department’s ANPRM be applicable to any such analysis of US person ownership?

**Second**, the definition of “covered foreign person” may produce unintended consequences to the extent that it is applied to natural persons – rather than legal persons. For example, a natural person of a country of concern who develops software (such as a commercial cybersecurity product that incorporates AI) would appear to meet the definition of “a person of a country of concern that is engaged in . . . an identified activity with respect to a covered national security technology or product.” Several important questions arise in this context.

- Does Treasury intend to capture within this scope:
  - The employees of a US company?
  - The employees of a US company that are legally employed in the United States (e.g., those under a H1B non-immigrant work visa)?
  - The employees of a US company who qualify both as persons of a country of concern and as US citizens or US permanent residents?
- Does Treasury intend to treat a US company as a “covered foreign person” as a result of the employment relationship with any of the natural persons identified above?
- Would an investment into such a US company constitute a covered transaction?

We urge Treasury to carefully consider the potential ramifications of these questions. If the underlying intent of the ANPRM was to focus on “investment” in “legal persons” (rather than “natural persons”), such a clarification would be helpful. Additionally, we recommend that Treasury consider clarifying that employment relationships with persons of a country of concern would not render a US company employer a “covered foreign person.”

Many US companies employ Chinese nationals (who may also be US citizens, permanent residents, or other immigrants) in the United States and abroad. Throughout our country’s history, US innovation has benefited greatly from immigrants, as well as foreign employees of US companies. With respect to certain controlled technologies, the US export control regime and other frameworks have been designed to address and mitigate any risks to US national security in such employment relationships.<sup>5</sup> Imposing similar restrictions on the rights of natural persons in relation to non-controlled technologies could raise significant legal and policy concerns. Narrowing the scope of application to “legal persons” and/or removing employment relationships from the scope this definition would help address these concerns.

**Third**, as regards Treasury’s questions (No. 6-7) relating to the proposed 50% threshold (as a ratio of consolidated revenue, net income, capital expenditures, and/or operating expenses) to qualify as a “covered foreign persons,” we agree with Treasury that US investors may face serious challenges in conducting due diligence to determine whether the precise aggregated amount of Chinese investment exists in a particular third country enterprise or other entity. Given the difficulty in making these determinations, we urge Treasury to adopt an “actual knowledge” standard (*rather than a “constructive knowledge” (i.e., ‘should have known’) standard*) in assessing the due diligence that a US person must undertake to determine whether a potential investment target meets the 50% threshold.

We are concerned that anything other than an “actual knowledge” standard would penalize companies that have conducted good faith due diligence based on all relevant information available to them at the time of the investment. An “actual knowledge” standard is most appropriate here, given that new facts may become available at a later date that were not available at the time due diligence was initially conducted.

#### **IV. “Covered Transactions”**

BSA broadly supports Treasury’s scoping of “covered transactions” from the perspectives of US competitiveness, risk management, and government administrability. We share Treasury’s focus on equity investments, greenfield investments, and similar direct financial investments. We offer the following comments.

**First**, in the case of greenfield investments, we request application of a materiality threshold or other differentiator to clarify that, where minor new legal entities may be created as part of ongoing business operations or as part of insignificant expansions (e.g., to register property or tax reasons), such legal activities do not constitute a notifiable or prohibited “greenfield investment.” Also, we request greater clarification that the coverage of ongoing operating costs is outside the scope of such investments. Additionally, we would recommend that this category of investments be expressly added to the list of “excepted transactions,” as discussed below.

**Second**, in relation to “follow-on transactions” (Question 14), we ask Treasury to provide a clear definition to assist companies in determining what activities would be in scope. For example, if there was an existing joint venture between a US person and a “covered foreign person,” what types of “follow-on transactions” would trigger the requirements for reporting or notification? Would it be an additional equity investment? Transfers of resources such as equipment or materials? A clear definition of “follow-on transactions” is required.

**Third**, In relation to “indirect transactions” (Question 15), we ask Treasury to define or limit the scope of what an “indirect” covered transaction entails. For example, a US person may have many minority

investments worldwide. What if any of those minority-owned entities then decided to invest in a transaction with a covered foreign person? Would the onus be on the US entity to be aware of that transaction and then have to report it? How many degrees of separation does it entail or is it limited to only cases in which the U.S. person would have 50% + investment stake? The indirect involvement scenario can have many permutations and gets to the heart of the challenges surrounding the proposed "knowledge standard" in Section J. What should be the knowledge standard threshold in a direct vs indirect scenario?

**Fourth**, in relation to the list of excluded transaction categories (Question 16), BSA strongly supports Treasury's intent to exclude the listed transaction categories. We would recommend that Treasury also modifying the reference to read "intellectual property licensing and sale activities." The rationale for excluding IP licensing also applies to IP sales.

**Fifth**, Question 16 also states that the listed activities are not covered transactions so long as they are "not undertaken as part of an effort to evade these rules." We urge Treasury to provide further guidance on when that test is met.

**Finally**, the fourth clause of the definition of "covered foreign transaction" lacks the necessary nexus to the element of "an identified activity with respect to a covered national security technology or product." Whereas clauses 1-3 of the definition possess this nexus because those clauses refer to a "covered foreign person" (a term which expressly incorporates a reference to "a covered national security technology or product"), clause 4 refers to "a joint venture" (a term that does not refer to "a covered national security technology or product"). This means that all joint ventures could be subject to investment prohibitions or notification requirements, even if they are not engaged in any activity that relates to a "covered national security technology or product." We expect that Treasury did not intend this result. To address (what may be) a possible drafting error, we would recommend revising clause 4 to refer to: "a joint venture, wherever located, that is formed with a covered foreign person and that engages in an identified activity with respect to a covered national security technologies and products..."

## V. "Excepted Transactions"

We generally support the "excepted transactions" category outlined in the ANPRM. We offer two suggestions.

**First**, as noted under "Covered Transactions" above, we recommend a clarification that, where minor new legal entities may be created as part of ongoing business operations or as part of insignificant expansions (e.g., creation of a legal entity created to register property, created for tax reasons, or for other pro forma or administrative purposes), such legal activities constitute an "excepted transaction."

**Second**, we strongly recommend that the exception for intracompany transfers should apply regardless of when the affiliated entity was created. Given Treasury's view that "the definition of 'covered transaction' under consideration would not apply to most routine intracompany actions such as the sale or purchase of inventory or fixed assets, the provision of paid services, the licensing of technology, or the provision of loans, guarantees, or other obligations," we believe that it would be inadvisable to grandfather only past transactions, but to require US companies to monitor such internal transactions in the future.

## VI. "Covered National Security Technologies and Products" – Prohibitions

In the context of Artificial Intelligence ("AI"), BSA would support the adoption of a prohibition on "US investments into covered foreign persons engaged in the development of software that incorporates an AI

system and is designed to be exclusively used for military, government intelligence, or mass-surveillance end uses.”

BSA strongly supports the inclusion of the adverbial phrase, “exclusively used,” to afford the US government and regulated parties with a bright-line, administrable test. If another adverb, such as “primarily,” were substituted in this phrase, the scope and application of this standard would become unreasonably ambiguous. As defined in the ANPRM, AI (or data analytics or computational analysis) is not a single or limited purpose technology, in contrast to other categories of prohibited investments such as “front-end semiconductor fabrication equipment designed to be exclusively used for the volume fabrication of integrated circuits.” AI technology is being developed and deployed in every sector of the economy, at every stage of the value chain, and in thousands, or tens or hundreds of thousands, of discrete application contexts.

Many applications of AI transcend numerous different business and economic contexts. For example, AI integrated into retinal scanning technology could potentially be improperly deployed for mass surveillance purposes by an authoritarian state. However, such technology also offers numerous benefits to society in the context of neurological, ocular, and oncology disease diagnosis, prevention, and treatment; fraud prevention and identity management; and access controls. Likewise, AI that helps optimize large storage battery capacities or certain vehicular operations could potentially be deployed in military contexts, but such AI could also be deployed in commercial contexts to combat climate change, control vehicle emissions, and reduce traffic fatalities. How would Treasury determine whether such AI was being “primarily” used for military or mass surveillance purposes, or for other commercial purposes? How could private sector entities – with even less visibility into how companies and entities across regions, sectors, and contexts are developing and deploying AI – even begin to know the “primary” use of a particular AI technology?

Given that a list of possible applications of AI would likely run into the hundreds or thousands of pages, the list of necessary narrowing exceptions from a prohibition relating to technologies “primarily used” for certain end-uses would also quickly become complex, unpredictable, and unadministrable.

BSA respectfully urges Treasury to focus the prohibited category of AI-related investments on those that are exclusively used for military, government intelligence, or mass-surveillance end uses. Alternatively, Treasury’s approach to prohibited AI end uses could draw from the approach under US export controls as seen in (i) the temporary designation for Software Specially Designed to Automate the Analysis of Geospatial Imagery under ECCN 0D521, or (ii) more generally the “Specially Designed” language under the ITAR (22 CFR 120.41), and EAR (15 CFR 772.1).

Finally, another potentially meritorious proposal could involve Treasury’s future review of notified AI-related investments to determine whether certain other specific scenarios should be added to the prohibited investment category. Such an approach could be more adaptable, targeted, and effective in addressing the risk scenarios described in the ANPRM than an overbroad prohibition of all potential investments involving AI technologies with more than one use case.

## **VII. “Covered National Security Technologies and Products” – Notification Requirements**

In the context of AI, Treasury should adopt a “dual-use application” qualifier to clarify the scope of notifiable AI investments. Some categories of AI referenced, such as control of robotic systems, include a number of systems that do not have dual-use military applications. Robotic systems may be used for any number of factory applications, and span from traditional computer vision algorithms to algorithms for automated indoor climate control. The same can be said of commercial cybersecurity applications, including those used for digital forensics. Adding the “dual-use application” qualifier would exclude AI systems that have no military applications and better achieve Treasury’s objectives.

## VIII. Knowledge Standard

In relation to the Treasury's proposed knowledge standard,<sup>6</sup> we request that Treasury provide clear standards and guidelines on the elements of due diligence that are required to avoid liability. Stated differently, Treasury should provide clear and unambiguous guidance regarding the applicable knowledge standard for purposes of due diligence regarding *inter alia* the presence of 50% of more participation in a particular investment by a "covered foreign person" or "person of a country of concern."

In addition, we recommend that Treasury develop and maintain a repository identifying entities that are subject to/identified as a "covered foreign person" or "person of a country of concern."

Treasury should also make publicly available any determinations or advisory opinions issued related to whether or not an entity is considered a "covered foreign person" or "person of a country of concern."

We also request that Treasury make clear that its proposed prohibitions or notification requirements would only apply to "covered transactions" as defined in the regulations. Certain portions of the ANPRM propose prohibitions use different language, referring to "undertaking a transaction."<sup>7</sup> For the sake of legal clarity, we request that Treasury use the defined terminology ("covered transactions") throughout its regulations.

## IX. Other Issues

In relation to the definition of "Electronic Design Automation Software," (Question 30), the harmonization of definitions, especially those definitions of a technical nature, should align with the definitions outlined in the Export Administration Regulations (EAR). Such an approach would be consistent with the requirements of Executive Order 13563 of January 18, 2011.<sup>8</sup> The EDA definition should be multilateral and consistent with the Bureau of Industry and Security's (BIS) implementation as adopted by the Wassenaar Arrangement (WA) in its dual use list where BIS has adopted a control under its Export Control Classification Number 3D006. Multi-lateral controls are more effective than unilateral controls and consistency between outbound investment and export controls are highly desirable from an industry perspective. Further, controls should focus only on EDA tools for integrated circuits, rather than tools used for printed circuit board or packaging design.

The regulatory scope of the proposed outbound investment rules would cover many different industries – information technology, manufacturing, research & development, and finance – each with their own regulatory domain knowledge and expertise. Consistent with Executive Order 13563, we urge Treasury to harmonize definitions with the EAR where possible. There are many compliance professionals with deep domain expertise in the EAR and its technical definitions. Coordination between the outbound investment rules and the EAR's technical descriptions and definitions would aid the compliance efforts of industry.

In relation to the definition of "Supercomputer," harmonization with the EAR<sup>9</sup> is important to ensure understanding and compliance with the proposed outbound investment regulations. Nevertheless, the cubic or square footage definition of a Supercomputer in the EAR is not an effective technical parameter to use because it can be circumvented by simply adding additional racks in the supercomputer cluster with fewer nodes.

## X. Conclusion

Thank for the opportunity to share these views. Should you have any questions or comments, please feel to contact me at [josephw@bsa.org](mailto:josephw@bsa.org).

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<sup>1</sup> With headquarters in Washington, DC, and operations in more than 30 countries, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy. *BSA's members include: Adobe, Alteryx, Atlassian, Autodesk, Bentley Systems, Box, Cisco, CNC/Mastercam, Databricks, DocuSign, Dropbox, Elastic, Graphisoft, IBM, Informatica, Juniper Networks, Kyndryl, MathWorks, Microsoft, Okta, Oracle, Palo Alto Networks, Prokon, PTC, Rubrik, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, TriNet, Twilio, Unity Technologies, Inc., Workday, Zendesk, and Zoom Video Communications, Inc.*

<sup>2</sup> 88 Fed. Reg. 54961 (Aug. 14, 2023).

<sup>3</sup> [China leads high-tech research in 80% of critical fields: report - Nikkei Asia](https://asia.nikkei.com/Business/China-tech/China-leads-high-tech-research-in-80-of-critical-fields-report), [https://asia.nikkei.com/Business/China-tech/China-leads-high-tech-research-in-80-of-critical-fields-report?](https://asia.nikkei.com/Business/China-tech/China-leads-high-tech-research-in-80-of-critical-fields-report)

<sup>4</sup> [Irrational Expectations: Long-Term Challenges of Diversification Away from China | Rhodium Group \(rhg.com\)](https://rhg.com/research/irrational-expectations-long-term-challenges-of-diversification-away-from-china/), <https://rhg.com/research/irrational-expectations-long-term-challenges-of-diversification-away-from-china/>

<sup>5</sup> See, e.g., 15 C.F.R. § 734.13(b) (“Any release in the United States of ‘technology’ or source code to a foreign person is a deemed export to the foreign person’s most recent country of citizenship or permanent residency.”).

<sup>6</sup> The ANPRM states in relevant part as follows:

The Treasury Department is considering regulations that condition a person's obligations on that person's knowledge of relevant circumstances— e.g., where the U.S. person has actual or constructive knowledge that the covered foreign person is engaged in, or will foreseeably be engaged in, certain activity regarding the technology or product. One approach under consideration is to adopt a definition similar to that found in the EAR at 15 CFR 772.1, where “knowledge” means knowledge of a circumstance (including variations such as “know,” “reason to know,” or “reason to believe”) including not only positive knowledge that the circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of a person's conscious disregard of facts known to that person and is also inferred from a person's willful avoidance of facts.

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

<sup>7</sup> For example, the ANPRM includes the following excerpts:

Specifically, the Treasury Department is considering a prohibition on U.S. persons undertaking a transaction with a covered foreign person engaged in activities involving: Technologies that Enable Advanced Integrated Circuits, Advanced Integrated Circuit Design and Production, Supercomputers

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

<sup>8</sup> The EO states in relevant part as follows: “Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules. *In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization (emphasis added).*”

<sup>9</sup> The relevant provision states as follows:

Supercomputer. (734, 744) A computing “system” having a collective maximum theoretical compute capacity of 100 or more double-precision (64-bit) petaflops or 200 or more single-precision (32-bit) petaflops within a 41,600 ft<sup>3</sup> or smaller envelope.

Note 1 to “Supercomputer”: The 41,600 ft<sup>3</sup> envelope corresponds, for example, to a 4x4x6.5ft rack size and therefore 6,400 ft<sup>2</sup> of floor space. The envelope may include empty floor space between racks as well as adjacent floors for multi-floor systems.

Note 2 to “Supercomputer”: Typically, a ‘supercomputer’ is a high-performance multi-rack system having thousands of closely coupled compute cores connected in parallel with networking technology and having a high peak power capacity requiring cooling elements. They are used for computationally intensive tasks including scientific and engineering work. Supercomputers may include shared memory, distributed memory, or a combination of both.