

Client Alert

International Trade

JULY 10, 2024

For more information,
contact:

Stephen J. Orava (Steve)

+1 202 661 7937

sorava@kslaw.com

Christine E. Savage

+1 202 626 5541

csavage@kslaw.com

J. Philip Ludvigson

+1 202 626 9267

pludvigson@kslaw.com

Jamieson L. Greer

+1 202 626 5509

jgreer@kslaw.com

Sumon Dantiki

+1 202 626 5591

sdantiki@kslaw.com

Adam Harper

+1 202 393 3799

arharper@kslaw.com

King & Spalding

Washington, D.C.

1700 Pennsylvania Avenue,
NW

Suite 900

Washington, D.C. 20006

Tel. +1 202 737 0500

Department of Treasury Issues Proposed Rule Covering Outbound Investments

Regulations ultimately will implement a new program restricting certain investments related to China

On June 21, 2024, the U.S. Department of the Treasury (“Treasury”) issued a [Notice of Proposed Rulemaking](#) (the “Rule”) setting forth regulations that would implement Executive Order 14105 “Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern” (the “Order”), which President Biden signed on August 9, 2023. Treasury also issued a [Fact Sheet](#) describing the Rule.

As described in our [previous client alert](#), the Order directs the creation of a first-ever program (the “Program”) imposing restrictions on outbound foreign investment to address the national security threat posed by certain countries of concern. The Order identifies such countries as those seeking to develop and exploit sensitive or advanced technologies and products critical for military, intelligence, surveillance, or cyber-enabled capabilities. In addition to the Order’s broad guidance, Treasury had simultaneously issued a [Fact Sheet](#) and more detailed [Advance Notice of Proposed Rulemaking](#) (“ANPRM”) to provide clarity about the intended scope of the Program and solicit input from the public before the Program is implemented.

With the input it received on the ANPRM, Treasury has now issued the Rule that sets forth specific regulations (the “Proposed Regulations”) that would implement the Order. The Rule and Proposed Regulations are largely consistent with the proposals set forth in Treasury’s ANPRM, but there are notable additions and changes. Specifically, the Rule made changes to the scope of coverage of transactions involving artificial intelligence (“AI”) systems, explained the applicable knowledge standard,



revised the scope of U.S. Persons “knowingly directing” certain transactions, included an exception for transactions involving persons of third countries that have similar measures aimed at outbound investments, and refined the scope of limited partner (“LP”) investments that would be covered by the Program. In addition, the Rule includes examples to provide further clarification on the Rule’s key concepts and definitions.

Consistent with Treasury’s ANPRM, the Rule will either **require notification** of, or outright **prohibit**, particular **U.S. Person** investment transactions in companies conducting discrete activities in **specified sectors** involving entities in or subject to the jurisdiction of, or certain other entities owned by persons of, a **Country of Concern**. The Order lists the following three sectors: (1) semiconductors and microelectronics, (2) quantum information technologies, and (3) artificial intelligence systems and the Rule further defines the activities in each of these sectors that are subject to a notification requirement or a prohibition. The Order identifies only the People’s Republic of China (“PRC”), including Hong Kong and Macau, as a “Country of Concern.”

KEY QUESTIONS

- **When do we have to comply with the new Program?** The Program is not yet in effect so there are no current requirements. The Rule sets forth the Proposed Regulations that would implement the Program, and the effective date will be set forth in a subsequent final rule that will be issued by Treasury to implement the Proposed Regulations. Treasury is requesting comments from the public on all aspects of the Rule, including at least 25 specific questions set forth in the Rule. The deadline to submit comments to Treasury on the Rule is August 4, 2024. It is important that investors review the Rule and how the Proposed Regulations could impact their funds and investment strategies. It may also be advisable to file comments to help shape the ultimate Program.
- **Will the Program apply to existing investments?** The Program will not be retroactive. Although the Program requirements will apply only to those transactions made after the Proposed Regulations go into effect, Treasury may request information about any transaction that was completed or agreed to after the Order went into effect (*i.e.*, August 9, 2023). It is likely that such inquiries will effectively function like the Program’s version of the Committee on Foreign Investment in the United States (“CFIUS”) non-notified process, rooting out and possibly even enforcing against transactions that were prohibited or notifiable under the Proposed Regulations. Although pre-Order transactions will not be subjected to inquiries or the new restrictions, Treasury could apply the Proposed Regulations to follow-on investments or restructuring of existing investments that are related to those pre-Order transactions, particularly if the new investment would incrementally result in an arrangement that would otherwise be within the Program’s scope.
- **Which investors will the Program cover?** The Program will apply to transactions by **U.S. Persons**, wherever located. The Rule defines a “U.S. Person” to include “any U.S. citizen, lawful permanent resident, entity organized under the laws of the United States or any jurisdiction within the United States, including any foreign branches of any such entity, and any person in the United States.” This definition of U.S. Person is identical to the definition Treasury uses in U.S. economic sanctions programs that are based on the President’s statutory authority under IEEPA. The Rule provides certain important clarifications regarding the scope of U.S. Persons.

First, the Rule confirms that a non-U.S. Person that is the parent of a U.S. Person would not be treated as a U.S. Person solely because of its relationship with the U.S. Person.

Second, non-U.S. Persons who employ U.S. Persons in the United States would not be treated as U.S. Persons solely based on their employment of U.S. Persons.



Third, Treasury addressed comments raising concerns that the Rule's inclusion of "any person in the United States" in the definition of U.S. Persons could capture non-U.S. Persons in transit through the United States, which could result in the non-U.S. Person taking actions that could subject them to the Program, such as signing investment paperwork while in transit through the United States. In response, Treasury *did not* state that such in-transit persons did not fall within the definition of U.S. Persons. Rather, Treasury explained that 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." Therefore, non-U.S. Person investors will need to understand and plan for the applicability of the Program to their investment activities while in or transiting through the United States.

- **For which recipients will the Program limit our investments?** The Program will apply to transactions involving or resulting in the establishment of a **Covered Foreign Person**, wherever located. As described in the Rule, there are three circumstances where a person would be considered a "Covered Foreign Person":
 - It is a Person of a Country of Concern that is engaged in a Covered Activity;
 - If it is not itself a Person of a Country of Concern or engaged in a Covered Activity, but the person has a particular relationship with a Person of a Country of Concern that is engaged in a Covered Activity that includes (1) a specified interest including "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)" and (2) more than 50 percent of the person's revenue, net income, capital expenditure, or operating expenses are attributable to the Person(s) of a Country of Concern (individually or aggregated) engaged in Covered Activity; or
 - It is a Person of a Country of Concern that participates in a joint venture with a U.S. Person if such joint venture is engaged in a Covered Activity.

The Rule defines "Person of a Country of Concern" as:

- 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;
- 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;
- 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);
- Any entity in which one or more persons identified above, 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; or



- Any entity in which one or more persons identified in the preceding bullet, 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.

The Rule defines “Covered Activity” as any activities subject to the Rule’s notification requirements or prohibitions, which are described further below.

Thus, for example, the Program would govern investments not only with a company incorporated in China engaged in Covered Activity, but also with a company incorporated in the United States that is controlled by Chinese shareholders and engaged in Covered Activity. As another example, the Program would cover investments not only with a U.S. branch of a Chinese company, but also with a U.S. company whose Chinese subsidiaries comprise more than 50 percent of the U.S. company’s revenue if the U.S. company is engaged in a Covered Activity.

- **What kinds of transactions will the Program cover?** The Program will apply to certain categories of **Covered Transactions**, which can be either **Prohibited Transactions** or **Notifiable Transactions**. A “Covered Transaction” includes a U.S. Person’s direct or indirect:
 - Acquisition of an equity interest or contingent equity interest in a Covered Foreign Person;
 - Provision of debt financing that is convertible to an equity interest in a Covered Foreign Person or 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 an LP or equivalent into a non-U.S. Person pooled investment fund that invests in a Covered Foreign Person.

Importantly, for each type of Covered Transaction there is a specific **Knowledge** requirement for what a U.S. Person would need to know or intend for a transaction to be a Covered Transaction. Specifically, depending on the category of Covered Transaction, the U.S. Person would need to have Knowledge that (1) the transaction involves a Covered Foreign Person, (2) will result in the establishment of a Covered Foreign Person, or (3) will result in a Person of a Country of Concern’s engagement in a new Covered Activity.

In essence, the Rule will institute a “knew or should have known” standard of liability, explaining that 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.” However, “[i]f 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 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).”



The Rule includes certain factors Treasury will consider to determine whether a U.S. Person undertook sufficient diligence such as inquiries made by the U.S. Person or its counsel, contractual representations, efforts to obtain non-public information, available public information and efforts undertaken to review it, whether there were efforts to avoid learning or discovering information, the presence or absence of warning signs, and the use of public and commercial databases. Thus, investors must ensure adequate diligence is conducted before committing any funds.

- **Will the Program exempt any transactions?** The Rule identifies several types of **Excepted Transactions** based on a “a lower likelihood of the transfer of intangible benefits to the covered foreign person” or where the transaction “is otherwise less likely to present national security concern than a covered transaction.” By carving out purely passive investments, the Program will retain its focus on preventing the intangible benefits that often accompany U.S. investments (*i.e.*, “smart money”), such as enhanced standing and prominence, managerial assistance, access to investment and talent networks, market access, and enhanced access to additional financing. Excepted Transactions will include passive investments into publicly traded securities, index funds, mutual funds, exchange-traded funds, or similar instruments (including associated derivatives) offered by an investment company. Also exempt will be *de minimis* passive investments made as a LP into a venture capital fund, private equity fund, fund of funds, or other pooled investment funds, where the LP contribution is solely capital into an LP structure and the LP cannot make managerial decisions, is not responsible for any debts beyond its investment, and does not have the ability (formally or informally) to influence or participate in the fund’s or a Covered Foreign Person’s decision-making or operations. No investment will be an Excepted Transaction if it affords the U.S. Person rights beyond those reasonably considered to be standard minority shareholder protections (*e.g.*, board membership or observer rights, or any other involvement beyond the voting of shares in substantive business decisions, management, or strategy of the Covered Foreign Person). In addition, the Rule suggests two alternatives for the *de minimis* threshold and requests comments from the public on which alternative to include in the regulations (1) if the LP’s committed capital is not more than 50 percent of the total assets under management of the pooled fund or (2) if the LP’s committed capital is not more than \$1 million.

Also included as Excepted Transactions will be the following:

- U.S. Person acquisitions from Person(s) of a Country of Concern of all equity or other interests of an entity held by the Person(s) of a Country of Concern so long as, following the acquisition, the entity does not constitute a Covered Foreign Person.
- Certain transactions with a U.S. Person’s controlled foreign entity that support ongoing operations or other activities that are not Covered Activities.
- Transactions made pursuant to a binding, uncalled capital commitment entered into before August 9, 2023.
- Certain acquisitions 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.
- Certain transactions involving countries having similar measures aimed at outbound investments, which are to be determined by Treasury.

In response to comments to expand the list of Excepted Transactions to explicitly exclude certain types of transactions (*e.g.*, university-to-university research collaborations; the sale of goods and services; the purchase, sale, and licensing of intellectual property; and various financial and non-financial services ancillary to a transaction



such as the processing, clearing, or sending of payments by a bank), Treasury stated that the Covered Transaction definition is narrowly tailored to specific transaction types, and those not meeting the definition are not included.

- **Are specific authorizations available?** Treasury, in consultation with the Departments of Commerce and State, may exempt certain Covered Transactions if it determines that the Covered Transaction is in the U.S. national interest. Such exemptions will be granted based on case-by-case reviews and would require submitting certain information to Treasury, to include “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.” Treasury plans to provide a list of the required information at a later date. As part of its review, “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.”
- **Which Covered Activities will be prohibited, and which will be notifiable under the Program?** Whether an investment is a Prohibited Transaction or Notifiable Transaction depends on the type of Covered Activity in which the Covered Foreign Person is engaged. The below provides a summary of the Covered Activities subject to the Rule.

Prohibited	Notifiable
Artificial Intelligence	
<ul style="list-style-type: none"> • 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: <ul style="list-style-type: none"> ○ 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); or • Develops any AI system that is trained using a quantity of computing power greater than: <ul style="list-style-type: none"> ○ [10²⁴] OR [10²⁵] OR [10²⁶] computational operations (e.g., integer or floating-point operations); or ○ [10²³] OR [10²⁴] computational operations (e.g., integer or floating-point operations) using primarily biological sequence data. 	<ul style="list-style-type: none"> • Develops any AI system that does not meet the Prohibited Transaction criteria AND that is: <ul style="list-style-type: none"> ○ 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); ○ 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 ○ Trained using a quantity of computing power greater than [10²³] OR [10²⁴] OR [10²⁵] computational operations (e.g., integer or floating-point operations).



Semiconductors & Microelectronics	
<ul style="list-style-type: none"> • 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. 	<ul style="list-style-type: none"> • Designs any integrated circuit that does not meet or exceed the Prohibited Transaction criteria.
<ul style="list-style-type: none"> • Fabricates any integrated circuit that meets any of the following criteria: <ul style="list-style-type: none"> ○ 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; ○ NOT-AND (NAND) memory integrated circuits with 128 layers or more; ○ Dynamic random-access memory (DRAM) integrated circuits using a technology node of 18 nanometer half-pitch or less; ○ Integrated circuits manufactured from a gallium-based compound semiconductor; ○ Integrated circuits using graphene transistors or carbon nanotubes; or ○ Integrated circuits designed for operation at or below 4.5 Kelvin. 	<ul style="list-style-type: none"> • Fabricates any integrated circuit that does not meet the Prohibited Transaction criteria.
<ul style="list-style-type: none"> • Packages any integrated circuit using advanced packaging techniques. 	<ul style="list-style-type: none"> • Packages any integrated circuit using other than advanced packaging techniques.
<ul style="list-style-type: none"> • Develops or produces any electronic design automation software for the design of integrated circuits or advanced packaging. 	
<ul style="list-style-type: none"> • Develops or produces any: <ul style="list-style-type: none"> ○ 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>i.e.</i>, the integrated circuits are processed but they are still on the wafer or substrate); ○ Equipment for performing volume advanced packaging; or ○ Commodity, material, software, or technology designed exclusively for use in or with extreme ultraviolet lithography fabrication equipment. 	
<ul style="list-style-type: none"> • 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. 	



<i>Quantum Computing</i>	
<ul style="list-style-type: none"> • 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. 	
<ul style="list-style-type: none"> • 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. 	
<ul style="list-style-type: none"> • Develops or produces any quantum network or quantum communication system designed for, or which the relevant Covered Foreign Person intends to be used for: <ul style="list-style-type: none"> ○ Networking to scale up the capabilities of quantum computers, such as for the purposes of breaking or compromising encryption; ○ Secure communications, such as quantum key distribution; or ○ Any other application that has any military, government intelligence, or mass-surveillance end use. 	
<i>Universally Applicable</i>	
<ul style="list-style-type: none"> • Is itself a Covered Foreign Person because of its relationship to one or more Covered Foreign Persons engaged in any Covered Activity described in any of the above prohibited activities; or 	
<ul style="list-style-type: none"> • Engages in a Covered Activity, whether prohibited or notifiable, and is: <ul style="list-style-type: none"> ○ Included on the Bureau of Industry and Security’s (BIS) Entity List (15 CFR part 744, supp. no. 4); ○ Included on the BIS Military End User List (15 CFR part 744, supp. no. 7); ○ Meets the definition of “Military Intelligence End-User” by BIS in 15 CFR 744.22(f)(2); ○ 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; ○ Included on the Department of the Treasury’s list of Non-SDN Chinese Military-Industrial Complex Companies (NS–CMIC List); or ○ Designated as a foreign terrorist organization by the Secretary of State under 8 U.S.C. 1189. 	



- **How will the Program be enforced?** First, it is important to note the Program will not entail a case-by-case review of transactions (*i.e.*, a “Reverse CFIUS”) and instead will place the **compliance burden upon investors**, who will have to determine whether a transaction is prohibited, notifiable, or otherwise permissible without notification.

Second, the Program will pursue actions or conspiracies to evade or violate the regulations. For example, the Program will prohibit U.S. Persons from **knowingly directing** transactions that would be prohibited if engaged in by a U.S. Person. In other words, an investor would violate the regulations if the investor orders, decides, approves, or otherwise causes the prohibited action and had Knowledge (knew or should have known) about the conduct, the circumstance, or the result of the prohibited action. The Rule provides additional details regarding what constitutes “knowingly directing,” explaining that “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,” and 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.”

Thus, if a U.S. Person General Partner takes any of these actions with respect to a foreign fund that engaged in a Prohibited Transaction, Treasury would find a violation. Moreover, any U.S. Persons who are senior managers at that fund and act on that General Partner’s direction are also committing a violation. A violation would also be found where several U.S. Person venture partners launch a foreign fund to make prohibited investments.

Third, the Program will place an affirmative obligation on U.S. Person parents of foreign entities to take all reasonable steps to prohibit and prevent, or to provide the notification for, any transactions by those entities that would be prohibited or notifiable if engaged in by a U.S. Person. In considering whether “all reasonable steps” were taken, Treasury will consider factors such as (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, (3) The existence and implementation of periodic training and internal reporting requirements by the U.S. Person and its controlled foreign entity, (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.

Finally, Treasury will have the authority to investigate violations and pursue **civil penalties** up to the maximum value allowed under IEEPA, which is the greater of \$356,579 or twice the value of the transaction (which is notably *double* the maximum penalty amount that CFIUS currently can assess). Penalties would be assessed for making material misstatements or omissions in submissions to Treasury, conducting Prohibited Transactions, and failing to notify a Notifiable Transaction as required. Importantly, the amount can be assessed for each violation, meaning that if Treasury finds multiple violations related to a given transaction (*e.g.*, an initial failure to file followed by a misstatement in a filing), it could assess double the transaction value for each of those violations. The Order also authorizes Treasury to refer potential criminal violations of the Order or resulting regulations to the Attorney General for **criminal prosecution**. Further, the Rule authorizes Treasury, to nullify, void, or otherwise compel the divestment of any Prohibited Transaction.



- **How do we file a notification and what kind of information will the Program require?** Required notifications will need to be filed through the electronic Treasury portal **no later than 30 days after the closing** of a Notifiable Transaction. In circumstances where a U.S. Person learns of a Notifiable Transaction that was not notified to Treasury, the U.S. Person is obligated to notify Treasury **no later than 30 days after learning of the Notifiable Transaction**. The filed information will be protected under confidentiality provisions similar to those used by CFIUS. The Rule provides that the following information must be included as part of the required notifications:
 - Contact information of a representative of the U.S. Person;
 - Description of the U.S. Person;
 - Post-transaction organizational chart of the U.S. Person;
 - Brief description of the commercial rationale for the transaction;
 - Brief description of why the U.S. Person has determined the transaction is a covered transaction;
 - Status of the transaction;
 - 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;
 - 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;
 - Certain information about the Covered Foreign Person;
 - 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;
 - 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;
 - If involving Covered Activities related to integrated circuits, identification of the technology node(s) at which any applicable product is produced; and
 - If involving a Notifiable Transaction that was determined to be a Notifiable Transaction post-transaction (1) identification of the fact or circumstance of which the U.S. Person acquired knowledge post-transaction, (2) the date upon which the U.S. Person acquired such knowledge, (3) a statement explaining why the U.S. Person did not possess or obtain such knowledge at the time of the transaction, (4) a description of any pre-transaction diligence undertaken by the U.S. Person.

In addition, the Rule provides that Treasury may ask questions and request documents from the U.S. Person submitter of the notification and require a response within the timeframe and manner designated by Treasury.

- **Will there be a process to disclose violations?** The Rule provides a process for submitting voluntary self-disclosures for actual or potential violations, which Treasury will take "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."

kslaw.com



NEXT STEPS

Companies should not merely wait for the Proposed Regulations to be finalized. First, if your company has questions or comments on the proposed Program or Proposed Regulations, it should submit comments by the August 4, 2024, deadline so that it can shape the final regulations. Experienced counsel can be helpful in drafting and filing those comments on behalf of clients.

Second, your company should be considering new investments, follow-on investments, and future capital calls through the lens of the proposed Program likely to be in place soon to determine the level of possible exposure risk. Many aspects of the Program comport with CFIUS provisions, which is hardly surprising since the new Program will be overseen by Treasury's Office of Investment Security, which also chairs CFIUS. Thus, CFIUS counsel with experience inside that office may be able to provide valuable insight to companies conducting these strategic analyses and seeking to put new compliance measures into place.

Third, companies should keep an eye out for future expansions in the United States and abroad, particularly given the future exception to be granted to investors from countries having measures like those of Treasury's proposed Program. Additionally, there has been recent Congressional interest in expansions to China's biotechnology and energy sectors, hypersonic technology, satellite-based communications, networked laser scanning systems, and other important technology, as well as in including Russia, Iran, and North Korea as "countries of concern." Expansions would not only further complicate compliance but may also prompt China to retaliate against companies with a China presence. Engaging counsel with a strong Federal affairs practice and international presence may be useful to clients as these expansions take shape.

King & Spalding has a global footprint, substantial industry experience, and deep bench of former trade and national security government officials, including a former U.S. Department of Treasury official who recently helped lead the Office of Investment Security, which chairs CFIUS and will oversee the new outbound investment screening regime. King & Spalding is uniquely positioned to guide companies through preparing for the historic implementation of this new regulatory program.

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,300 lawyers in 24 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising." View our [Privacy Notice](#).

ABU DHABI	CHARLOTTE	DUBAI	LONDON	NORTHERN VIRGINIA	SILICON VALLEY
ATLANTA	CHICAGO	FRANKFURT	LOS ANGELES	PARIS	SINGAPORE
AUSTIN	DALLAS	GENEVA	MIAMI	RIYADH	TOKYO
BRUSSELS	DENVER	HOUSTON	NEW YORK	SAN FRANCISCO	WASHINGTON, D.C.