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## Export Controls Alert

July 23, 2024

### **Proposed new Part 850 to the CFR to regulate outbound investments**

By David Crosby, Christopher Grigg, Alexandra Lopez-Casero, and Jule Giegling<sup>i</sup>

The proposed regulations will create a new regime of government controls on outbound investments in emerging technology sectors, complementing already existing controls in these sectors and aligning with regulations focused on preventing China from gaining access to US-origin advanced technology.



#### **What's the impact?**

- The new Part 850 will establish yet unprecedented controls for outbound investments by US persons in advanced technology sectors based in China, Hong Kong, and Macau.
- The Notice of Proposed Rulemaking is open for public comment until August 4, 2024.
- Businesses in the affected technological sectors should thoroughly review their operations and investments to ensure compliance with the proposed rules.

On June 21, 2024, the US Department of the Treasury (Treasury) issued a Notice of Proposed Rulemaking (NPRM) to implement Executive Order 14105 of August 9, 2023, "Addressing United

States Investments in Certain National Security Technologies and Products in Countries of Concern” (the Outbound Order). The NPRM became effective upon formal publication in the *Federal Register* on July 5, 2024, and is open for public comment until August 4, 2024. At a later date, Treasury will issue final implementing regulations, which will set an effective date for the program. The NPRM builds on Treasury’s Advance Notice of Proposed Rulemaking (ANPRM) issued on August 14, 2023. While the ANPRM informally presented the proposed rules as a set of issues and questions, the NPRM provides the full draft regulations and explanatory discussion.

## Executive summary

The NPRM proposes to regulate investments by US persons in companies with connections to countries of concern (China, including Hong Kong and Macau) that seek to develop technology and products in specific technical fields. It focuses on the types of US investments that present a likelihood of conveying both capital and intangible benefits, which could potentially be exploited to accelerate the development of sensitive technologies or products critical for military, intelligence, surveillance, or cyber-enabled capabilities in ways that could negatively impact the national security of the United States in three sectors: semiconductors and microelectronics, quantum information technologies, and artificial intelligence. The NPRM would require any US person undertaking a covered transaction 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 technology scope set forth under the proposed rule in connection with a *covered transaction* involving or resulting in the establishment of a *covered foreign person*. 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 *US person* would need to submit specified information about the transaction to Treasury within thirty (30) days. Of particular concern, *US persons* would be required to submit a notification if they acquire actual knowledge after a transaction’s completion date of a fact or circumstance that if known at the time of the transaction would have deemed it a covered transaction—potentially requiring subsequent US investors to inform the Treasury of prior transactions that were covered transactions even where the subsequent US investor was not involved in the prior investment.

## Outbound investments under Executive Order 14105

Executive Order 14105 of August 9, 2023, (Outbound Order) directs the Secretary of the Treasury (Secretary) to establish a program to prohibit or require notification concerning certain types of outbound investments by United States persons (defined below) into certain entities located in, subject to the jurisdiction of, or owned by a person of a country of concern (specifically China, including Hong Kong and Macau) and involved in three categories of advanced technologies and products—semiconductors and microelectronics, quantum information technologies, and artificial intelligence. The Secretary is directed to issue regulations that (i) prohibit US persons

from engaging in certain transactions involving certain technologies and products that pose a particularly acute national security threat to the United States and (ii) require US persons to notify Treasury of certain other transactions involving certain technologies and products that may contribute to the threat to US national security.

The regulatory process started with last year's ANPRM, which provided a high-level overview intended to shape the regulations under the Outbound Order. The ANPRM comment period closed on September 28, 2023, and the newly effective NPRM proposes specific regulations to implement the Outbound Order. It also provides the public with more specific details about the regulatory framework and an opportunity to comment on the formation of the new program.

Treasury proposes to add the regulations as a new Part 850 of Title 31 of the Code of Federal Regulations (CFR). In the following, we provide an overview of the most important regulations.

## **General scope of the rules**

The Outbound Order and the NPRM are intended to complement the US Government's existing authorities and tools, including export controls and inbound investment reviews. The NPRM would place obligations upon any US person connected to a covered transaction (as explained below) involving or resulting in the establishment of a covered foreign person. The NPRM differentiates between a prohibited transaction and a transaction requiring the US person to provide notice to Treasury. A US person would also have obligations concerning transactions undertaken by any non-US person entity that it controls. Additionally, a US person would be prohibited from knowingly directing a transaction that would be prohibited if undertaken by a US person.

As outlined in the ANPRM, the regulations would not entail a case-by-case review by Treasury of covered transactions or any other transactions comparable to the review process of the Committee on Foreign Investment in the US (CFIUS), nor would they establish a licensing process for a US person to seek prior authorization for a covered transaction, comparable to the licensing process conducted by the Commerce Department's Bureau of Industry and Security (BIS). They do not intend to establish comprehensive sanctions with respect to a particular jurisdiction or an entire sector. Notably, transactions will not automatically be considered covered transactions solely because they are denominated in US dollars—unlike under sanctions programs administered by Treasury's Office of Foreign Assets Control (OFAC).

The ANPRM did not propose that the program apply retroactively but noted that Treasury may, after the regulation's effective date, request information about transactions by US persons that were completed or agreed to after the date of the Outbound Order to better inform the development and implementation of the program.

## Covered transaction

The proposed regulations impose obligations on US persons connected to a covered transaction involving or resulting in the establishment of a covered foreign person. Depending on the nature of the covered activity, a covered transaction will be either a prohibited transaction or a notifiable transaction (requiring the US person to submit a notice of the transaction to Treasury). As detailed below, a US person would also have obligations regarding transactions undertaken by any non-US person entity that it controls (a controlled foreign entity) and would be prohibited from knowingly directing a transaction that would be prohibited if undertaken by a US person.

Section 850.210 defines a covered transaction to mean a US person's direct or indirect:

- / 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 US person knows at the time of the acquisition is a covered foreign person;
- / Provision of a loan or a similar debt financing arrangement to a person that the US person knows at the time of the provision is a covered foreign person, where such debt financing:
  - Is convertible to an equity interest or
  - Affords or will afford the US 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;
- / 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 US person knows, at the time of the conversion, is a covered foreign person;
- / Acquisition, leasing, or other development of operations, land, property, or other assets in a country of concern that the US person knows, at the time of such acquisition, leasing, or other development, will result in or that the US person intends to result in the:
  - Establishment of a covered foreign person; or
  - Engagement of a person of a country of concern in a covered activity where it was not previously engaged in such covered activity;
- / Entrance into a joint venture, wherever located, that is formed with a person of a country of concern and that the subject US person knows at the time of entrance into the joint venture will engage in, or the US person intends to engage in a covered activity;
- / 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 US person) that a US 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 US person.

The proposed regulations would also require a US person to make a post-closing submission regarding a transaction that it believed at closing was not a covered transaction when the US person later discovers information that, had it been known at closing, would have made it a covered transaction. Also, the proposed rule would require a US person to inform Treasury of any material omission or inaccuracy in any previous representation, statement, or certification. A template for certifications may be found at the Outbound Investment Security Program Section of Treasury's website.

## **Covered transaction parties**

Each covered transaction will involve at least two stakeholders: one, the investor, usually being the party subject to the authority of the US (the US person) and the foreign party, a (natural or legal) person of a country of concern.

### **US PERSON**

As in the ANPRM, § 850.229 defines the term "US person" as any United States citizen, lawful permanent resident, entity organized under the laws of the United States or any jurisdiction therein, including any foreign branch of any such entity, or any person in the United States.

### **COVERED FOREIGN PERSON**

Section 850.209 defines a "covered foreign person" based on the person's relationship to a country of concern and involvement in one or more covered activities related to certain national security technologies and products. For now, the only country of concern is China, including Hong Kong, and Macau, as determined in the Annex to the Outbound Order. The covered-foreign person definition includes a person that, directly or indirectly, holds any voting interest, board seat, or equity interest in any person of a country of concern that engages in a covered activity (as defined below) or that holds any power to direct or cause the direction of the management or policies of any such person through one or more contractual arrangements, including variable interest entities. In addition, the foreign person must, individually or in the aggregate, derive more than fifty percent (50%) of its revenue, net income, capital expenditures, or operating expenses from any person of a country of concern engaged in a covered activity. In the case of a joint venture, the person of a country of concern who participates in the joint venture is deemed to be a covered foreign person by virtue of its participation in the joint venture.

Whether a person is a covered foreign person will be determined 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.

## **PERSON OF A COUNTRY OF CONCERN**

Section 850.221 defines a “person of a country of concern” as (i) any individual who is a citizen or permanent resident of a country of concern, is not a US citizen, and is not a permanent resident of the United States (i.e., a “Green Card holder”); (ii) 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; (iii) 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 such government; or any entity with respect to which the government of such country of concern holds individually or in the aggregate, directly or indirectly, 50% 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); (iv) any entity in which one or more of persons identified above individually or in the aggregate, directly or indirectly, holds at least 50% of any of the following interests of such entity: outstanding voting interest, voting power of the board, or equity interest; or (v) any entity in which one or more persons identified in the preceding sentence, individually or in the aggregate, directly or indirectly, holds at least 50% of any of the outstanding voting interest, voting power of the board, or equity interest of such entity.

With this definition, the proposed regulations cover not only persons with a direct connection to a country of concern but also every entity in the extended corporate family due to the inclusion of direct and even indirect ownership by a person from a country of concern. This concept is also applied under OFAC sanctions programs and, especially regarding the inclusion of indirect ownership, in the Bureau of Economic Analysis’s (BEA) reporting procedures for foreign direct investments in the US.

## **Covered activity and notifiable and prohibited transactions**

Under § 850.208, the term “covered activity” would mean, in the context of a particular transaction, any of the activities referenced in the definition of notifiable transaction in § 850.217 or prohibited transaction in § 850.224.

For notifiable transactions, as specified in § 850.217, this would mean the design, fabrication, or packaging of specified integrated circuits or the development of specified AI systems that are not otherwise described in the definition of a prohibited transaction under § 850.224.

Prohibited transactions are more extensive. Under § 850.224, they include:

- / The development or production of any electronic design automation software for the design of integrated circuits or advanced packaging;
- / The development or production of any:

- 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),
  - Equipment for performing volume advanced packaging,
  - Commodity, material, software, or technology designed exclusively for use in or with extreme ultraviolet lithography fabrication equipment;
- / The design of any integrated circuit that meets or exceeds the performance parameters in Export Control Classification Number 3A090.a or integrated circuits designed for operation at or below 4.5 Kelvin;
- / The fabrication of any integrated circuit that meets any of the following criteria:
- 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,
  - Integrated circuits designed for operation at or below 4.5 Kelvin;
- / The packaging of any integrated circuit using advanced packaging techniques;
- / The development, installment, sale, or production of 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 development of a quantum computer or production of any of the critical components required to produce a quantum computer, such as a dilution refrigerator or two-stage pulse tube cryocooler;
- / The development or production of any quantum sensing platform designed for or that the relevant covered foreign person intends to use for any military, government intelligence, or mass-surveillance end use;
- / The development or production of any quantum network or quantum communication system designed for or that the relevant covered foreign person intends to use for:
- 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,
  - Any other application that has any military, government intelligence, or mass-surveillance end use;
- / The development of any AI system that is designed to be exclusively used for or that the

relevant covered foreign person intends to use 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).
- Government intelligence or mass surveillance end use (e.g., through mining text, audio, or video; image recognition; location tracking; or surreptitious listening devices);

/ The development of any AI system that is trained using a quantity of computing power greater than:

- $10^{24}$  computational operations (e.g., integer or floating-point operations) or
- $10^{23}$  computational operations (e.g., integer or floating-point operations) using primarily biological sequence data.

We note these definitions are not yet final. The NPRM proposes a variety of alternatives to the level of performance of prohibited activities relating to computing power.

Section 850.224 also covers situations beyond the specific activities listed above. It prohibits transactions in which the covered foreign person meets the definition of a covered foreign person because of its relationship to one or more covered foreign persons engaged in any of the above covered activities. It also applies to situations in which a covered foreign person engages in a covered activity, independent of whether it is covered by the definition of a notifiable or prohibited transaction and is (i) included on BIS's Entity List, (ii) included on BIS's Military End User List, (iii) meets BIS's definition of "Military Intelligence End-User," (iv) included on OFAC'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% or greater interest, (v) included on Treasury's list of Non-SDN Chinese Military-Industrial Complex Companies, or (vi) designated as a foreign terrorist organization by the Secretary of State.

## Technology of covered activities

Similar to the CFIUS regulations, the technology described in the above covered activities follows the language of the Export Administration Regulations (EAR), 15 C.F.R. §§ 730-774, specifically §§ 744.6 and 744.23. Compare, for example, § 850.224(b)(1) and § 744.23(a)(4) or § 850.224(d) and § 744.23(a)(2). In some cases, the proposed regulations expand the covered technology beyond the scope of the EAR, suggesting we could expect to see similar changes to the EAR in the future.

The covered activities pertain to specified categories of technology. The NPRM defines them as follows:

Pursuant to § 850.202, 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). Such systems do not include AI systems intended only for consumer applications or other civilian end uses that do not have potential national security consequences.

Pursuant to § 850.225, the term quantum computer means a computer that performs computations that harness the collective properties of quantum states, such as superposition, interference, or entanglement. According to the explanatory notes, this includes developing or producing any quantum sensing platform designed for or that the relevant covered foreign person intends to use for military, government intelligence, or mass-surveillance end uses. It also includes an end-use limitation to appropriately scope this activity to circumstances that could give rise to a particularly acute national security threat and thereby avoid prohibiting technologies with important civilian purposes. Activities relating to quantum computers also include developing or producing any quantum network or quantum communication system designed for or that the relevant covered foreign person intends to use for (i) networking to scale up the capabilities of quantum computers, (ii) secure communications, such as quantum key distribution, or (ii) any other application that has military, government intelligence, or mass-surveillance end use.

The proposed regulations do not defined supercomputers but address them in explanatory notes. These are computers 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. This definition is the same as that of the term “Supercomputer” in the EAR.

## **Controlled foreign entity**

The obligations of a US person are not restricted to its own transactions. The proposed regulations require US persons to take all reasonable steps to prohibit and prevent foreign entities that they control from undertaking a transaction that would be prohibited if undertaken by a US person and to notify Treasury if the controlled foreign entity undertakes a transaction that would be a notifiable transaction if undertaken by a US person. When determining whether the US person took all reasonable steps, Treasury would consider factors such as the existence and implementation of periodic training and reporting requirements with respect to compliance with the proposed regulations, the implementation of internal controls, and whether such steps were reasonable given the size and sophistication of the parent.

Section 850.206 defines a controlled foreign entity as any entity incorporated in or otherwise organized under the laws of a country other than the United States of which a US person is a parent, meaning a *US person* directly or indirectly holds more than 50% 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.

Notably, whether a foreign entity is a controlled foreign entity turn not only on a parent-subsidary relationship, but also on the indirect downstream holdings of voting interest or voting power of the board, which would be attributed proportionately to the first, i.e., the ultimate parent entity. Where the US person holds both direct and indirect downstream holdings in the same entity, any holdings of voting interest would be aggregated for the purposes of determining whether an entity falls under this definition. This means that where a US person indirectly holds voting interest or voting power of the board via a tiered ownership structure, the voting interest or voting power of the board of a subsidiary in a parent-subsidary relationship would be fully attributed to the parent. By contrast, if an entity holds 50% or less of another entity's voting interest or voting power of the board, 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 US person holds both direct and indirect holdings in the same entity, the direct and indirect holdings of the US person's voting interest or voting power of the board would be aggregated. For the avoidance of doubt, each of the voting interest or voting power of the board would be evaluated independently from the other.

For example, if a US person holds a 49% voting interest in Company G, Company G holds a 52% voting interest in Company H, and Company H holds a 30% voting interest of non-US Company I, the US person's indirect interest in Company I is 14.7%. This is based on the consideration that Company G holds more than 50% of the voting interest in Company H, which makes Company G a parent of Company H. Thus, Company H's 30% interest in Company I is fully attributed to Company G. The US person's indirect interest is then calculated by multiplying the US person's 49% interest in Company G and Company G's 30% interest in Company I and dividing it by 100. As a result, Company I is not a controlled foreign entity of the US person.

With respect to such controlled foreign entities, under § 850.303, the US person controlling such entity would be prohibited from knowingly directing a transaction by its controlled foreign entity that the US person knows at the time of the transaction would be a prohibited transaction if engaged in by a US person. To "knowingly direct" means the US person has authority, individually or as part of a group, to make or substantially participate in decisions on behalf of the controlled foreign entity and exercises that authority to direct, order, decide upon, or approve a transaction. This is, for example, the case when a US person is an officer, director, or senior advisor or otherwise possesses senior-level authority at a non-US person. Importantly, if any US person holding such authority recuses themselves from an investment, such person will

not be considered to have exercised their authority to direct, order, decide upon, or approve a transaction.

## **Knowledge under § 850.216**

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 US 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 determining factor would be whether the US person had knowledge of the relevant facts and circumstances at the time of the transaction.

Treasury is not proposing to hold a US person liable for a transaction that has all of the other attributes of a covered transaction but that the US person did not know at the time (or have reason to know at the time) was involved with or would result in a covered foreign person. If a US 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, Treasury ordinarily would not attribute knowledge of that fact or circumstance to such US person even if the transaction has all of the other attributes of a covered transaction. Additionally, if a US person failed to undertake a reasonable and diligent inquiry but the transaction in question does not involve a covered foreign person, Treasury would not hold the US person liable for the lack of a reasonable and diligent inquiry.

According to the accompanying explanatory notes, this regulation is intended to address a potential loophole whereby a US person parent of a non-US person entity could use such an entity to undertake an investment that would otherwise be a covered transaction if undertaken by the US person directly. Additionally, this approach is aimed at increasing US 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 US person that is a parent.

## **Excepted transaction**

Not all covered transactions fall within the regulations scope. Section 850.501 proposes to exclude certain transactions. These include investments by a US person (i) in any publicly traded security, 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 (a) any "investment company" that is registered with the US Securities and

Exchange Commission, such as index funds, mutual funds, or exchange traded funds; (b) any company that has elected to be a business development company; or (iii) specific investments made as a limited partner or equivalent in a venture capital fund, private equity fund, fund of funds, or other pooled investment fund under conditions that are yet to be ultimately determined (the NPRM proposes different alternates in this regard). Excluded from this exception are investments that afford the US person rights beyond standard minority shareholder protections with respect to the covered foreign person.

Also excluded is (i) the acquisition by a US person of equity or other interests in an entity held by one or more persons of a country of concern, provided the US person is acquiring all equity or other interests in such entity held by all persons of a country of concern, and, following such acquisition, the entity does not constitute a covered foreign person; (ii) a transaction that, generally, would be a covered transaction between a US person and its controlled foreign entity that supports ongoing operations or other activities that are not covered activities, with the exception of the acquisition, leasing, or other development of operations, land, property, or other assets in a country of concern and the establishment of a joint venture; (iii) a transaction made after the effective date of the regulations pursuant to a binding, uncalled, capital commitment entered into before August 9, 2023; (iv) the acquisition of a voting interest in a covered foreign person by a US 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 US person lender(s) has a specified (minor) role in the syndicate; (v) or specific transactions determined excepted by the Secretary.

## Notifications

In its current form, § 850.404 requires a US person to submit a notification no later than thirty (30) calendar days following the completion date of a notifiable transaction. If the US person later acquires knowledge of the circumstances that make a transaction subject to the notification requirement, § 850.404 requires notification no later than thirty (30) calendar days after acquiring such knowledge. This requirement applies regardless of whether the transaction would have been a notifiable transaction or a prohibited transaction. The required content of the notification is specified in § 850.405 and encompasses a broad range of information on the parties and the transaction itself, such as the identity of the parties, the commercial rationale for the transaction, an updated organizational chart, the status of the transaction, and the US person's considerations of why the transaction is subject to the notification requirement. A US person would have to keep records of such notification, including supporting documentation, such as any pitch decks, marketing letters, and offering memorandums; transaction documents, including side letters and investment agreements; and due diligence materials related to the transaction for a period of ten (10) years following the date of filing. The ten-year time period is consistent with the recent amendment of the International Emergency Economic Powers Act

(IEEPA), which extended the statute of limitations for violations of the IEEPA from five to ten years.

It would also seem that the notification requirement also broadly encompasses US persons that seek to make an initial investment in a covered foreign person where, during due diligence, the new investor learns that a prior investment was a covered transaction that was either prohibited or required a notification that had not been timely submitted. In this situation, the new investor could be required to submit a notification even though it was not an investor in a prior round. The proposed regulations do not expressly address this situation, and, to the extent it causes concern, we recommend submitting comments to Treasury before the public comment period closes on August 4, 2024.

The NPRM further proposes under § 850.904 that Treasury, at any time, can require a person to furnish under oath, in the form of reports or otherwise, complete information regarding any act or transaction subject to Part 850.

## **The proposed rules' impact on technology transactions**

The proposed rules cover a broad range of transactions involving US persons, foreign persons of countries of concern (China, Hong Kong, and Macau for now), and activities involving sensitive technologies. This aligns with recent trends in US regulatory developments, which focus increasingly on preventing China from gaining access to US-origin advanced technology, as seen in, for example, recent revisions to the EAR or the regulation of providing Infrastructure-as-a-Service by a US person. The intent to have the NPRM complement existing rules is especially apparent in the above definitions, which are largely borrowed from existing regulations and concepts, such as Parts 800 and 802 of the CFR (CFIUS regulations), OFAC's 50% rule, the determination of relevant indirect ownership (BEA), and in the extensive inclusion of end uses and end users prohibited under the EAR within the scope of prohibited transactions.

Businesses in the affected technological sectors should thoroughly review their operations and investments to ensure compliance with the proposed rules. Experience suggests that the proposed regulations are likely to become effective without major changes.

In addition, since Treasury is authorized to require information on any transaction completed or agreed upon after August 9, 2023, we recommend reviewing and compiling relevant information on transactions that would be covered under the new regulations to prepare for any potential investigation by Treasury. After the rules become effective, the Secretary, in consultation with the other relevant agency heads, may take any action authorized under IEEPA to nullify, void, or otherwise compel the divestment of any prohibited transaction entered after the effective date. Furthermore, Treasury may pursue civil and/or criminal penalties under IEEPA against any persons who violate the new regulations.

Affected parties should further consider participating in the public commentary process. Written comments must be received by August 4, 2024. Comments may be submitted electronically through the Federal Government eRulemaking portal at <https://www.regulations.gov>. Comments sent by mail must be sent to the US Department of the Treasury, Attention: Meena R. Sharma, Director, Office of Investment Security Policy and International Relations, 1500 Pennsylvania Avenue NW, Washington, DC 20220.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

**David F. Crosby**

617.345.1264

[dcrosby@nixonpeabody.com](mailto:dcrosby@nixonpeabody.com)

**Christopher D. Grigg**

213.629.6134

[cgrigg@nixonpeabody.com](mailto:cgrigg@nixonpeabody.com)

**Alexandra López-Casero**

202.213.0171

[alopezcasero@nixonpeabody.com](mailto:alopezcasero@nixonpeabody.com)

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<sup>1</sup> Jule Giegling (Legal Intern–Corporate Practice) assisted with the preparation of this alert.

