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GIBSON DUNN

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U.S. Outbound Investment Goes Live with Treasury Providing Additional Clarity—and European Outbound Investment Programs Get a Nudge Forward

On January 17, 2025, the Treasury Department issued new guidance on the Outbound Investment Security Program, which—for the first time—prohibits or requires notifications for certain U.S. investments in Chinese companies. And, across the Atlantic, the European Commission recently issued a recommendation to Member States to conduct their own outbound investment reviews.

I. Introduction

On January 2, 2025, the Outbound Investment Security Program (the umbrella term for the program under which the Rules are administered, herein, the Program) came into effect. The Program, administered by the U.S. Department of the Treasury (Treasury) pursuant to final regulations issued on October 28, 2024 (Rules), targets certain investments by U.S. persons into Chinese companies engaged in certain activities in the semiconductors and microelectronics, quantum information technology, and artificial intelligence (AI) sectors. The Rules specifically prohibit certain investments outright, and require post-closing notification to Treasury for others. Notably, the Rules also include a range of exemptions and exceptions. Please refer to our prior client alert for a detailed primer on the Rules.

In addition to the Rules, Treasury has provided informal guidance on the Program website. As part of the Rules' rollout, Treasury released Frequently Asked Questions (FAQs) on December 13, 2024 and again on January 17, 2025. Through over 40 FAQs, Treasury attempts to clarify the scope and applicability of the Rules. Treasury includes, among other topics, guidance on the contours of "covered transactions" (i.e., transactions that are now prohibited or subject to notification under the Rules), assessing whether an individual or entity is a "covered foreign person" (i.e., a person of the type the Rules intend to target), and Treasury's due diligence expectations for U.S. persons.

In this alert, we provide an update on treatment of the Program under the Trump Administration and a brief update on steps taken by Treasury to implement and administer the Rules. Next, we discuss select key takeaways from the FAQs and suggest some preliminary practices that can assist U.S. investors in complying with the Rules. Finally, we provide an overview of the development of outbound investment screening and restrictions in the EU.

II. What to Expect Under the New Trump Administration

On January 20, 2025, President Trump issued an order for a "Regulatory Freeze Pending Review." While this order directed agencies to consider postponing the effective date for any rules that have been issued which have not taken effect, it will not impact the Program, which was already effective prior to President Trump taking office. However, the "America First Trade Policy" memorandum (the Memorandum) calls for a review of Executive Order 14105, which provided the basis for the Program and the Rules, and may impact the Program. The Memorandum directs Treasury to assess whether the current controls in the Program are sufficient to address national security interests and make recommendations for any further modification by April 1, 2025. Some members of Congress have also called for additional or stronger restrictions on outbound flows of U.S. capital to China in sensitive industries. A failed amendment to the Senate draft of the FY 2025 National Defense Authorization Act proposed to expand the Rules' "covered sectors" to also include hypersonics, satellite-based communications, and networked laser scanning systems with dual-use applications, suggesting that Treasury's review could result in an eventual broadening of the Program.

Effective for only a few weeks, the Rules have already created meaningful compliance challenges as companies and financial institutions grapple with ways to implement and adjust policies, procedures, and corporate agreements to comply, and account for shifting legal and commercial risk profiles and appetites. While it is difficult to anticipate future actions by the new Trump Administration, there has been a steady consensus from the first Trump Administration through the Biden Administration – and with AI developments increasingly top of mind for national security and technological competitiveness reasons – there is a reasonable chance that the Program becomes more muscular after April 2025 following the aforementioned regulatory review.

III. Treasury Website and Outbound Notification System

The Program website provides the following information and features about the Rules:

- Treasury published over 40 FAQs, described further below.

- In addition to the FAQs, Treasury provided further detail on the process for requesting a national interest exemption—an exemption from the Rules for transactions that the U.S. government determines are in the national interest.[1] Treasury notes that these exemptions, which will be determined by the Secretary of the Treasury in consultation with the Secretaries of Commerce and State and heads of other relevant agencies, will be made "only in exceptional circumstances," and will be assessed based on the totality of relevant facts and circumstances.[2]
- Treasury launched the Outbound Notification System portal for reportable transactions, which functions very similarly to the portal used by the Committee on Foreign Investment in the United States (CFIUS). Templates for each type of notification are available on the Treasury website here.
- An Enforcement Overview and Guidance document for the Program, enumerating aggravating and mitigating factors to be used in enforcement actions, and an update to the civil monetary penalty amounts.
- Treasury provides several ways to contact the Office of Investment Security, including to ask questions about the Rules, report a transaction, or request a national interest exemption.

IV. Key Takeaways from the FAQs

The FAQs are organized along eight categories: general, defined terms, covered transactions, notifiable and prohibited transactions, U.S. person due diligence, the knowledge standard and "knowingly directing," excepted transactions, and operational considerations.

1. ***The FAQs expand upon due diligence expectations for U.S. persons, including what efforts constitute a "reasonable and diligent inquiry."***

The Rules place compliance requirements on U.S. persons including diligence, recordkeeping, and notification requirements, and Treasury "anticipates that U.S. persons should be able to comply with the Rules through a reasonable and diligent transactional due diligence and compliance process."[3] The FAQs provide some insight into what a reasonable and diligent approach may entail, but Treasury declines to provide discrete instructions to U.S. persons, in part because "each transaction is different."[4]

In the FAQs, Treasury acknowledges that relevant information about the ownership and activities of transaction counterparties may, in some cases, be difficult to obtain through due diligence. However, Treasury nevertheless expects U.S. persons to make concerted efforts to gain, verify, and consider relevant information from an investment target to ascertain the applicability of the Rules including through publicly available information, public and commercial databases, and available non-public information. Where information is difficult to ascertain and/or verify, Treasury recommends efforts to obtain representations or warranties from the target regarding its ownership, investments, and activities as part of a "reasonable and diligent" compliance process. It is important to note that, while contractual representations and warranties from an investment target do not necessarily create a safe harbor for a U.S. person in the event of a violation of the Rules, they can provide an indication—absent other red flags—that a U.S. person lacked a "reason to know" that it was undertaking a covered transaction.[5]

2. ***The FAQs provide relevant indicators for how Treasury will assess a U.S. person's "plans" when evaluating a greenfield or brownfield transaction.***

In a departure to the so-called "greenfield exception" under the CFIUS regulations, under the Rules, a covered transaction includes a U.S. person's direct or indirect acquisition, leasing, or other development of land, property, or other assets in a country of concern that the U.S. person "plans" to result in the establishment of a covered foreign person or the engagement of a person of a country of concern in a covered activity.[6] In the FAQs, Treasury explains that it will assess a U.S. person's "plans" by considering, among other things: correspondence with the investment target or relevant government counterparty, written business plans, board presentations, and presentations to potential investors.[7] Examples of activities that demonstrate a U.S. person's plans to establish a covered foreign person include researching the feasibility of undertaking covered activities and securing financing for covered activities.[8]

3. ***The FAQs address how a U.S. person can assess whether an investment target "intends" to use its AI system for certain end uses.***

For covered transactions involving the development of an AI system, the covered foreign person's "intended" end use of the system can inform whether a transaction is prohibited. The development of AI systems intended by the covered foreign person to be used for cybersecurity applications, digital forensic tools, penetration testing tools, or the control of robotic systems may be notifiable on that basis.[9] The development of AI systems that the covered foreign person intends to be used for a military end use, government intelligence use, or mass surveillance may be prohibited on that basis.[10] In the FAQs, Treasury suggests that "pre-transaction discussions and meetings with counterparties" will inform the U.S. person's understanding of the covered foreign person's intent.[11] In practice, U.S. person diligence will likely include directly asking a counterparty about their plans for the technology they are developing, as well as considering other sources of available information that could demonstrate intent.

4. ***The FAQs clarify that underwriting services alone do not give rise to a covered transaction.***

Underwriting services provided by a U.S. person to a covered foreign person that do not involve an acquisition of equity interest in the covered foreign person by the U.S. person would not be a covered transaction – i.e., such services are not prohibited, nor do they trigger the notification requirements under the Rules.[12]

5. ***The FAQs elaborate on what the phrase "engages in" means with respect to a "covered activity," which excludes the mere purchase of goods or services.***

For the Rules to apply to a transaction, the person of a country of concern must be someone who "engages in" a covered activity.[13] Treasury notes that the term "engages in" should be understood as capturing activities like "designs, fabricates, packages, develops, [and] produces, among others."[14] The FAQs clarify that the mere purchase of a good or service, absent other facts, is not considered "engaging in" a covered activity.[15]

6. ***The FAQs address U.S. persons' responsibilities to prevent their controlled foreign entities from engaging in transactions that would be prohibited for a U.S. person.***

A U.S. person must take "all" reasonable steps to prohibit and prevent any transaction by its controlled foreign entity that would be prohibited if engaged in by a U.S. person.[16] If a controlled foreign entity engages in a transaction that would be prohibited if conducted by a U.S. person, Treasury will consider, among other factors, the following in order to assess whether the U.S. person took all reasonable steps to prohibit and prevent such transaction:

- Agreements with respect to compliance between the U.S. person and its controlled foreign entity;
- Governance or shareholder rights of the U.S. person with respect to the controlled foreign entity;
- Periodic training and internal reporting requirements on compliance by the U.S. person and its controlled foreign entity;
- Internal controls, including internal policies, procedures, or guidelines that are periodically reviewed internally, by the U.S. person and its controlled foreign entity; and
- A documented testing and/or auditing process of internal policies, procedures, or guidelines.[17]

7. ***The FAQs provide guidance on how to evaluate an entity that has multiple covered foreign person subsidiaries or minority investments.***

An entity can be classified under the Rules as a "covered foreign person" based on (i) being headquartered, based, or incorporated in China and (ii) engaging in a covered activity. Alternatively, an entity can be classified as a "covered foreign person" based on the equity it holds in another entity that is a covered foreign person. For example, Entity X would be a covered foreign person if Entity X (a) owns an equity interest in a "covered foreign person," say Entity Y, and (b) either (i) derives over 50% of its revenue and/or net income from Entity Y or (ii) over 50% of its capital expenditures and/or operating expenses are attributable to Entity Y.[18] If Entity X has equity ownership in multiple covered foreign persons, then each of the four financial metrics noted above would be aggregated across the covered foreign persons for the 50% test. In effect, an investment target's existing ownership of equity in other companies presents additional, and potentially significant, risk considerations for U.S. investors.

The fact that a higher-tier entity can be a covered foreign person based on characteristics of its subsidiaries tends to increase the burden on U.S. parties who must reasonably conduct diligence not only of a counterparty, but also of its subsidiaries. Treasury has clarified that, when conducting due diligence on downstream entities of an investment target to determine whether they are covered foreign persons, there is not necessarily an expectation of an individualized inquiry for every single entity in which an investment target has or may have an interest.[19] That said, Treasury has provided clarification on the expected standards for conducting due diligence, which we discuss in more detail below.

8. ***The FAQs reiterate Treasury's expansive view of who can be a "person of a country of concern."***

Being a "person of a country of concern" is one of two required prongs for a person to be deemed a covered foreign person (the other requirement is engaging in a covered activity).[20] The FAQs make clear Treasury intends for U.S. persons to pierce the corporate veil and assess an investment target's ownership and control structure, including the nationalities of its directors (or equivalent individuals) to make this assessment. The FAQs clarify that an entity could be a "person of a country of concern" even if it does not have its principal place of business, headquarters, or place of formation in a country of concern.[21] For U.S. persons, this imposes added due diligence burdens as, technically, an investment target in any jurisdiction could ultimately fall within these broad parameters, and therefore assessments would need to be conducted on a global basis.

9. ***The FAQs address post-closing transaction due diligence expectations, including when a target or fund investment pivots to conducting a covered activity after closing.***

The Rules and FAQs provide multiple examples of transactions that are covered transactions based on the knowledge the U.S. person investor has at the time of the transaction. For example, an investment by a U.S. person limited partner into a fund which, in turn, later acquires equity interests in a covered foreign person is a covered transaction if, at the time of the investment into the fund, the U.S. person has a reason to know that the fund was likely to invest in a covered foreign person.[22]

Separately, Treasury acknowledges situations may arise where certain changes occur after a transaction closes or where a U.S. person becomes aware of information that was not known at the time of the transaction that may result in a U.S. person owning equity interests in a covered foreign person. In these situations, Treasury outlines post-closing due diligence expectations in the FAQs, stating that the Rules are "not intended to create an ongoing obligation for a U.S. person to monitor or prevent post-closing transaction changes to an investment target's activities."[23] However, if an investment target pivots to a covered activity post-closing, *and* the U.S. person later acquires actual knowledge of a fact or circumstance that, if known to the U.S. person at the time of the transaction would have resulted in a notifiable or prohibited transaction, the U.S. person must submit a notification under the Rules within 30 days of acquiring such actual knowledge.[24]

10. ***The FAQs provide examples of how a U.S. person "knowingly directs" a transaction, including through participation on a committee, and how to properly recuse oneself.***

The Rules prohibit U.S. persons from "knowingly directing" a transaction by a non-U.S. person when that transaction would be prohibited if conducted by a U.S. person.[25] Mere employment by or engagement as a consultant or service provider to a non-U.S. person is insufficient to rise to the U.S. person "directing" the transaction. The FAQs provide the example of an accountant conducting standard financial due diligence as an example of an individual providing support to a transaction that does not rise to the level of "directing" the transaction.[26] In order to "knowingly direct" a transaction, the U.S. person must (i) have the authority to make or substantially

participate in decisions to approve a transaction and (ii) exercise such authority.[27] Under the Rules, a U.S. person may have authority to "direct, order, decide upon, or approve a transaction" when that U.S. person is "an officer, director, or otherwise possesses executive responsibilities at a non-U.S. person."[28] In the example of the accountant, the accountant does not have that role-based authority.

The FAQs also elaborate on the scope of authority necessary to "knowingly direct" a transaction in the context of an advisory board or committee of an investment fund. If the board or committee has the authority to approve or disapprove certain transactions, then a member of the board or committee has the authority to "substantially participate in the decisions" of the fund.[29] Thus, a U.S. person on that advisory board or committee who participates in certain aspects of decision-making regarding a covered transaction—even if that person does not hold a majority vote on the relevant committee—is responsible for "knowingly directing" such a transaction.[30]

The Rules provide the option for a U.S. person to recuse themselves from specific activities to negate their authority to direct a transaction. The U.S. person would do so by recusing themselves from *all* of the following: participating in deliberations and making recommendations; reviewing, editing, commenting on, approving or signing relevant transaction documents; and engaging in negotiations with the investment target or other transaction counterparty.[31]

11. ***The FAQs provide clarity on who can be considered a "U.S. Person" under the Rules.***

The FAQs clarify that, while foreign located branch offices of U.S.-incorporated companies are considered "U.S. persons" under the rules,[32] foreign subsidiaries of U.S. companies are not considered "U.S. persons" as a definitional matter,[33] although, as discussed above, the Rules impose responsibilities on a U.S. parent to take all reasonable steps to ensure its foreign subsidiary does not engage in transactions that would be prohibited for a U.S. person. A foreign company is not rendered a "U.S. person" merely by employing U.S. persons[34] (although the U.S. person employees themselves would be subject to the Rules), nor does the presence of a U.S. subsidiary render the foreign parent a "U.S. person"[35] (although, again, the U.S. subsidiary itself would be a U.S. person subject to the rules). Thus, it is essential to carefully review the defined terms in the Rules when evaluating individual parties to a transaction to determine if a potential transaction is prohibited or subject to a notification requirement.

V. Looking Ahead: Compliance Considerations for U.S. Persons

U.S. person investors contemplating potential acquisitions of equity (including contingent equity) of covered foreign persons should consider the following list of preliminary steps to facilitate compliance with the Rules. As a reminder, engaging in prohibited transactions and failing to submit required notifications can subject U.S. persons to civil and criminal penalties, up to and including divestment of completed acquisitions or fines of up to twice the value of a transaction. U.S. person investors should:

- Implement comprehensive Rules-related compliance policies and procedures, including due diligence procedures tailored to assess potential covered foreign person counterparties and recusal policies for U.S. persons employed by foreign subsidiaries;

- Set clear standards for pre-transactional due diligence and ensure that such standards satisfy Treasury's "reasonable and diligent inquiry" expectations;
- Include Rules-related representations, warranties, and covenants in contracts with relevant counterparties;
- Train relevant employees on the types of factors that could subject potential transactions to the Rules and provide them with pre-transaction questionnaires and guidance designed to apprise them of Rules-related risks;
- Given the broad definition of a "person of a country of concern," implement Rules-related compliance measures on a global basis, and not just within China- or Asia-focused divisions/teams; and
- Comprehensively review current investments and operations to determine whether any add-on investments or other corporate activity could be captured as a covered transaction. Some ambiguity remains as to what specific activities constitute an excepted "ongoing operation" of a company versus a new activity covered by the Rules. Note that Treasury has clarified that the following types of transactions completed after January 2nd are not subject to the Rules based on activities occurring prior to January 2, 2025:
    - Transactions made pursuant to a binding, uncalled capital commitment to a fund or similar investment entity made prior to the effective date, even if the capital is called after the effective date.
    - Certain intracompany transfers between a U.S. person and its controlled foreign entity that occur after the Rules are in effect, if the transfer supports either (i) ongoing operations with respect to covered activities or (ii) ongoing or new activities that are not covered activities.
    - The conversion of a contingent equity interest that was acquired by the U.S. person before January 2, 2025.

VI. European Union Initiatives to Regulate Outbound Investment

A year after a European Commission (Commission) White Paper found that European Union (EU) Member States do not systematically review and assess outbound investments for national security purposes, apprehension relating to possible strategic technology leaks continued to brew in Brussels. Driven by these concerns, the Commission has now published a Recommendation calling on Member States to conduct outbound investment reviews relating to semiconductors, artificial intelligence and quantum technologies—technology areas identified as being of strategic importance and posing the highest national security risk. The Recommendation forms part of the EU's Economic Security Strategy, and was prepared in tandem with the Commission's ongoing work on inbound foreign direct investment screening.

Despite neither identifying particular countries nor actors driving the concerns which led to the issuance of the Recommendation, the Recommendation was published just weeks after the Rules went into effect. Indeed, as with the Rules, the Commission's press release makes explicit its intention to coordinate with allies. The EU has historically refrained from explicitly referencing China in policy papers and legislative proposals but, in recent years, steps have been taken to

prepare for a more antagonistic relationship with Beijing and equip the EU with tools to protect its economic security.

As the Recommendation is not legally binding, its main purpose is to nudge Member States to assess risks to economic security potentially arising from outbound investments made by EU investors in the three key technologies in third countries, with a view of enabling the Commission to propose further action. The review by Member States is set to cover both ongoing and past transactions, going back to January 1, 2021. Member States are asked to submit to the Commission a comprehensive report on their implementation of the Recommendation and any risks identified by June 30, 2026. Further developments are expected before such date.

[1] *See* 31 C.F.R. § 850.502.

[2] *See* U.S. Department of the Treasury, National Interest Exemption Submission Instructions, https://home.treasury.gov/policy-issues/international/outbound-investment-program/national-interest-exemption-submission-instructions.

[3] *See* U.S. Department of the Treasury, Frequently Asked Questions ("FAQs") [hereinafter Rules FAQs], (last updated January 17, 2025) https://home.treasury.gov/policy-issues/international/outbound-investment-program/frequently-asked-questions, Section I, FAQ No. 7.

[4] *See id*.

[5] *See id*., Section VI, FAQ No. 2.

[6] *See* 31 C.F.R. § 850.210(a)(4).

[7] *See* Rules FAQs, Section III, FAQ No. 2.

[8] *See id*. Section III, FAQ No. 1.

[9] *See* 31 C.F.R. § 850.217.

[10] *See id*. § 850.224.

[11] Rules FAQs, Section IV, FAQ No. 2.

[12] Rules FAQs, Section III, FAQ No. 1, Example 1.3.

[13] 31 C.F.R. § 850.209.

[14] Rules FAQs, Section II, FAQ No. 3.

[15] *See id.*

[16] *See* 31 C.F.R. § 850.302(a).

[17] *See* Rules FAQs, Section V, FAQ No. 1.

[18] *See* 31 C.F.R. § 850.209.

[19] *See* Rules FAQs, Section V, FAQ No. 4.

[20] *See* 31 C.F.R. § 850.209.

[21] *See* Rules FAQs, Section II, FAQ No. 2.

[22] *See id*. Section III, FAQ No. 49, Example 4.3.

[23] *Id*. Section III, FAQ No. 31.

[24] *See id.*

[25] *See* 31 C.F.R. § 850.303(a).

[26] *See* Rules FAQs, Section II, FAQ No. 2, Example 2.9.

[27] *Id.*

[28] 31 C.F.R. § 850.303(a).

[29] *See* Rules FAQs, Section VI, FAQ No. 1.

[30] *See id*. Section II, FAQ No. 2, Example 2.8.

[31] 31 C.F.R. 850.303(b).

[32] *See* Rules FAQs, Section II, FAQ No. 2, Example 2.4.

[33] *See id.* Example 2.5.

[34] *See id.* Example 2.6.

[35] *See id.* Example 2.7.

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