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September 28, 2023

U.S. Department of the Treasury
Attention: Meena Sharma
Acting Director, Office of Investment Security
1500 Pennsylvania Avenue, NW
NW, Washington, DC 20220

Re: ICI Comments on Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern

Dear Ms. Sharma:

The Investment Company Institute (ICI)[1] appreciates the opportunity to provide comments on the U.S. Department of the Treasury's (Treasury) Advanced Notice of Proposed Rulemaking regarding Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern (ANPRM),[2] which has been issued as the first step in implementing regulations to effectuate the August 9, 2023, Executive Order "Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern" (Executive Order). ICI is the leading association representing regulated investment funds. Our members include mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts and collective investment trusts in the United States with total assets under management of over $32 trillion. Our mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor.

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[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage $32.0 trillion invested in funds registered under the U.S. Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional $8.8 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London and carries out its international work through ICI Global.

[2] The ANPRM is available at https://home.treasury.gov/system/files/206/Provisions%20Pertaining%20to%20U.S.%20Investments%20in%20Certain%20National%20Security%20Technologies%20and%20Products%20in%20Countries%20of%20Concern.pdf. Undefined, capitalized terms used in this letter refer to the terms as proposed in the ANPRM.

ICI greatly appreciates Treasury's intention and efforts, reflected in the ANPRM, to tailor the implementing regulations appropriately to address the stated national security policy goals while mitigating unintended consequences and without unnecessarily burdening U.S. Persons, and to provide guidance to U.S. Persons regarding the scope of the new outbound investment program. Careful calibration is essential for the adoption of a program that prescribes actionable requirements for U.S. investors to achieve Treasury's goals, while also seeking to maintain the United States' longstanding commitment to open investment that has served the U.S. capital markets well for decades.

Our feedback to the ANPRM focuses on its application to U.S. asset managers and the funds they manage. We address areas that would benefit from greater clarity and precision to enable them to implement a workable and effective compliance program that is consistent with the goals of the U.S. government regarding the U.S. outbound investment program (U.S. Outbound Investment Program). We provide below an executive summary followed by responses to select questions, beginning with those that are most relevant to our members.

I. Executive Summary

We support national security. A thoughtful and carefully calibrated U.S. Outbound Investment Program will prescribe actionable requirements for U.S. Persons that achieve Treasury's goals while mitigating unintended consequences.

We support the proposed exception for publicly traded securities. Treasury has appropriately recognized that investments in publicly traded securities are highly unlikely to present the risks that the Executive Order aims to address. The Chinese Military Companies Sanctions (CMIC) program already provides a mechanism for designating the publicly traded securities of issuers that raise a national security concern.

We support the proposed exception for investments into index funds, mutual funds, exchange-traded funds, or similar instruments. We recommend that Treasury clarify the intended scope of the exception so that this important exception achieves its intended purpose without creating unintended ambiguity.

We urge Treasury to adopt a government-issued, list-based approach for identifying Covered Foreign Persons. We believe such an approach would more effectively achieve the U.S. government's intended goals and prove better suited for broad implementation.

Clarification and/or guidance regarding certain of the terms as proposed to be defined by Treasury would assist U.S. Persons in the operationalization of the program and would improve the effectiveness of the program.

II. Definition of Excepted Transactions

Question 18: "What modifications, if any, should be made to the definition of 'excepted transaction' under consideration to enhance clarity or close any loopholes?"

We strongly support the proposed exceptions to the definition of "Covered Transaction." The proposed exceptions recognize that risks differ between certain categories of investment activities and that applying the restrictions of the U.S. Outbound Investment Program to the excepted activities would not further the intended goals of the program. Accordingly, we request that Treasury preserve the proposed excepted transactions and further clarify the scope of the intended exceptions, as described below.

Publicly traded securities exception

Alignment with the existing CMIC sanctions program

We support the exception for publicly traded securities. Treasury has appropriately recognized that investments in publicly traded securities are highly unlikely to present the risks that the Executive Order aims to address, and that the CMIC program already provides a mechanism for designating the publicly traded securities of issuers that raise a national security concern. Including publicly traded securities within scope of the regulations would significantly impact participation by U.S. Persons in investments that we believe Treasury appropriately seeks to except under the proposal.

Treasury's CMIC program is an existing mechanism through which the U.S. government can affirmatively designate entities that raise national security concerns and explicitly prohibit investment by U.S. Persons in the publicly traded securities of such entities. We therefore believe that aligning the scope of the U.S. Outbound Investment Program with that of the CMIC program with respect to the types of securities that are covered by each is a highly effective way to target investments and arrangements that are of concern. Since publicly traded securities of any entities that are of concern can be addressed by Treasury through the CMIC program, there is no loophole created by the proposed exception, and it is, in fact, a clear and effective approach. Coverage of investments in those same publicly traded securities through the U.S. Outbound Investment Program would be redundant and unnecessary.

We also concur with Treasury's assessment that investment in publicly traded securities would have a low likelihood of raising the stated policy concerns regarding investments that may convey intangible benefits to the investee firms.

If publicly traded securities are not excepted, due to the extremely wide breadth of the definition of Covered Foreign Person, U.S. Persons would need to perform new and complex types of due diligence on each and every investment globally – above and beyond existing compliance procedures to screen for OFAC sanctions – to determine whether a transaction is notifiable or prohibited. The level of diligence would be disproportionate to the very low likelihood of concern presented by these transactions, particularly given that Treasury has a ready tool through the CMIC program that it can deploy as needed. Such situation also would harm Treasury's

stated goal of establishing the program in a manner that minimizes unintended consequences. As such, this exception is consistent with, and works to reasonably achieve, Treasury's stated goals.

Clarifying the scope of publicly traded security

To support operationalizing the proposed restrictions, Treasury should clarify the scope of the term "publicly traded security." Specifically, and consistent with the above, we recommend that Treasury align the definition of "publicly traded security" in the implementing regulations (or confirm alignment with) with the definition of publicly traded security under the CMIC program. In the context of the CMIC program, "publicly traded securities" includes any security "denominated in any currency that trades on a securities exchange or through the method of trading that is commonly referred to as 'over-the-counter' in any jurisdiction" (as well as including reference to the definition of "security" in section 3(a)(10) of the Securities Exchange Act of 1934).

We further request that Treasury clarify that rights, warrants, and derivative contracts that are issued in respect of, or that use as their reference asset, publicly traded securities will themselves be treated as excepted even if not themselves publicly traded or securities. These adjustments would align these provisions with Treasury's other regulatory regimes and would reduce the potential for confusion and unnecessary burdens for U.S. Persons that must operationalize a compliance program across multiple sets of regulations and requirements. We also believe it would help Treasury in overseeing compliance with the program.

Passivity requirement with respect to publicly traded securities

Part 1(b) of the proposed definition of "excepted transaction" states that "any investment that affords the U.S. Person rights beyond those reasonably considered to be standard minority shareholder protections will not constitute an 'excepted transaction,'" and that such rights include "[m]embership or observer rights on, or the right to nominate an individual to a position on, the board of directors or an equivalent governing body of the covered foreign person." Under China's rules and regulations for listed companies, Chinese issuers are required to give shareholders that hold 3 percent or more of their voting shares the right to put forward proposals, including proposals to nominate directors, at a shareholder meeting.[3] While most issuers utilize a 3 percent ownership threshold, some use a lower one. The ability to put proposals to vote in this context is not an indicator of investor control or significant influence over the operations or management of the investee firm. These types of provisions also exist in the United States and are not an unusual feature of share ownership.

We recommend that Treasury clarify that an investment in a security that results in a U.S. Person having the right to put forward a proposal to elect directors to a shareholder vote under the laws

[3] The U.S. has similar requirements for public companies under Rule 14a-8 of the Securities Exchange Act of 1934 that require public companies to include proposals from shareholders that meet certain ownership thresholds in a company's proxy statement for consideration at a company's shareholder meeting.

or rules to which an entity is subject would still be considered an excepted transaction. Alternatively, we recommend that Treasury clarify that such investments are excepted transactions unless and until such time as a U.S. Person exercises the right to nominate a director.

If such a scenario is not clearly excepted, it could undermine the purpose of the publicly traded security exception by capturing a significant number of investments that for technical reasons may not be seen as qualifying for the exception. It could also add unnecessary operational complexity for compliance with the U.S. Outbound Investment Program as due diligence would be required prior to investing in each publicly traded security to ascertain the specific percentage threshold for each security/exchange and monitoring that is tailored to each individual security holding.

Futures contracts on broad-based indexes

We recommend that Treasury additionally except investments in futures contracts on broad-based indexes whose constituents might include one or more Covered Foreign Persons, and options and swaps involving such futures. The proposal currently proposes to except investment into a publicly traded security, with "security" defined as set forth in section 3(a)(10) of the Securities Exchange Act of 1934. However, under the definition of "security" under the Securities Exchange Act, futures on broad-based indexes (such as foreign futures contracts that have been approved by the Commodities Futures Trading Commission), as well as options and swaps on such contracts, are not considered to be "securities" and therefore would not be within the scope of the exception.

Given the publicly traded securities exception, we believe investments in futures contracts related to broad-based indexes whose constituents might include one or more Covered Foreign Persons should not be subject to the requirements of the U.S. Outbound Investment Program. We believe such investments should be outside of the scope as they do not involve any acquisition of an equity interest in the underlying constituents of an index, and also would not involve transfers of any intangible benefits that are of concern under the U.S. Outbound Investment Program. We therefore recommend that Treasury make this clarification.

<u>Investments into index funds, mutual funds, exchange-traded fund, or similar instruments</u>

We support the proposed exception for investments into index funds, mutual funds, exchange-traded funds, or similar instruments. We recommend, however, that Treasury clarify the intended scope of the exception so that this important exception achieves its intended purpose without creating unintended ambiguity. Specifically, we recommend that Treasury revise the regulatory text to clarify that the following types of fund investments are excepted:

(1) investment companies registered under the Investment Company Act of 1940 (1940 Act) (whether mutual funds, ETFs, closed-end funds or unit investment trusts);
(2) business development companies that comply with the regulatory requirements of the 1940 Act; and

(3) common and collective investment funds (which are exempt from registration under the Investment Company Act pursuant to Section 3(c)(3) or Section 3(c)(11) thereof but are subject to federal or state banking authority).

As Treasury has appropriately recognized, investments by U.S. Persons into these types of funds and instruments present a very low likelihood of concern and including these investments within the scope of Covered Transactions would have negative unintended consequences.

As U.S. Persons, these funds and instruments will themselves be subject to the program's restrictions. Without this exception, the U.S. Outbound Investment Program would impose disproportionate and unrealistic due diligence requirements upon the tens of millions of U.S. retail investors that invest in funds offered to retail investors, to individually verify that a fund in which they intend to invest does not itself hold a notifiable or prohibited interest in a Covered Foreign Person. The investment portfolios of such funds and instruments are typically diversified, including for certain tax treatment, and interests in such funds and instruments are widely held by both retail and institutional investors. Further, it is difficult for us to envision how investments by U.S. Persons into such funds would raise the specific concerns with respect to national security targeted in the Executive Order. We therefore agree with Treasury's proposal to exclude investments in such funds.

Question 21: "What other types of investments, if any, should be considered 'excepted transactions' and why? Are there any transactions included in the definition under consideration that should not be considered 'excepted transactions,' and if so, why?"

Treasury should include a de minimis threshold for investments as an "excepted transaction," specifying, for example, that an investment representing less than 5 percent of the equity interests of a Covered Foreign Person would be excepted.[4] The rationale for an exception for a de minimis investment of the equity of an entity is similar to the rationale put forward by Treasury with respect to a de minimis exception for certain limited partner investments. These investments present a lower likelihood of risk as they are less likely to convey the intangible benefits about which the U.S. government is concerned. As described in our response to questions 71 and 72, the due diligence that will be required to be performed on non-excepted transactions will be complex and time-consuming. Requiring U.S. Persons to undertake such extensive due diligence for an investment of less than 5 percent of an entity's equity interest would impose upon U.S. Persons a burden that is not commensurate with the risks that are presented.

[4] Such exception should also include an investment by a U.S. Person in convertible debt that, if exercised or converted on the date of initial acquisition or provision, would result in a U.S. Person holding less than 5 percent of such equity interests.

III. Definition of U.S. Person

Question 1: "In what ways, if any, should the Treasury Department elaborate or amend the definition of 'U.S. person' to enhance clarity or close any loopholes? What, if any, unintended consequences could result from the definition under consideration?"

The ANPRM proposes defining "U.S. Person" to mean "any United States citizen, lawful permanent resident, entity organized under the laws of the United States or any jurisdiction within the United States, including any foreign branches of such entity, and any person in the United States."

Treasury should clarify that, while U.S. branches or subsidiaries of non-U.S. entities are "U.S. Persons" by virtue of their presence in the United States, the requirements of the U.S. Outbound Investment Program apply only to the activities of the U.S. Person branch or subsidiary and not to the activities of the non-U.S. entity or parent where such activities do not involve the U.S. Person branch or subsidiary or other U.S. Persons.

IV. Definition of Covered Foreign Person; Person of a Country of Concern

Question 4: "What additional information would be helpful for U.S. persons to ascertain whether a transaction involves a 'covered foreign person' as defined in section III.C?"

Change in business activities

We request that Treasury clarify that a U.S. Person must determine the applicable requirements for a given transaction at the time of closing of the transaction. This would mean that a U.S. Person would not be at risk of non-compliance if an entity becomes a Covered Foreign Person after the closing of the transaction due to a change in the business activities of such person. This clarification will provide legal and administrative certainty for U.S. Persons. It also acknowledges the lack, or limited ability, of U.S. Persons to have full knowledge or control over the future activities of an entity. Due diligence conducted in connection with a given transaction covers the activities of the entity at the time of the closing of the transaction. It can be problematic and impractical to conduct due diligence on an entity's expected future activities, and such entities could determine to change their activities in the future.

Capital commitments and other contractual obligations

Treasury should clarify that in the case of uncalled, binding capital commitments and other contractual obligations subject to performance after the date of closing of a transaction, an analysis of whether the fulfillment of those obligations is either notifiable or prohibited should be based on the status of the entity at the time of the closing of the original transaction. Providing the clarification requested above would be consistent with the stated intention that the ANPRM, and the resulting implementing regulations, will not have retroactive application.

Application of the 50 percent test

Treasury proposes to define "Covered Foreign Person" as:

(1) a person of a country of concern that is engaged in, or a person of a country of concern that a U.S. Person knows or should know will be engaged in, an identified activity with respect to a covered national security technology or product; or
(2) a person whose direct or indirect subsidiaries or branches are referenced in item (1) and which, individually or in the aggregate, comprise more than 50 percent of that person's consolidated revenue, net income, capital expenditure, or operating expenses (consolidated revenue test).

Treasury should clarify that the 50 percent consolidated revenue test applies to revenues of the relevant counterparty and its subsidiaries (parent holding company).

Question 5: "What, if any, unintended consequences could result from the definitions under consideration? What is the likely impact on U.S. persons and U.S. investment flows? What is the likely impact on persons and investment flows from third countries or economies? If you believe there will be impacts on U.S. persons, U.S. investment flows, third-country persons, or third-country investment flows, please provide specific examples or data."

Identification of Covered Foreign Persons

The ANPRM's proposed approach of relying on U.S. Persons to undertake significant due diligence efforts to identify a "Covered Foreign Person," rather than a government generated list-based approach, will place a significant new compliance burden on U.S. Persons, and a list-based approach would better serve the Administration's goals. Please see our responses to Questions 71 and 72 regarding the compliance and operational challenges posed by the proposed approach.

We are concerned that, in addition to the compliance and operational challenges raised, the lack of a list providing clarity on the entities in or outside of scope will likely result in the application of different standards and tests as parties operationalize compliance with the requirements. The disparate applications may result in significant industry confusion and frustrate the goals of the U.S. Outbound Investment Program. Due to the compliance complexity, some U.S. Persons also may implement broad, overly-cautious restrictions that do not align with the Administration's goal for the program to be narrowly tailored while balancing U.S. national security concerns and U.S. economic policy goals.

We urge Treasury to apply a list-based approach that identifies entities and persons that are Covered Foreign Persons, specifying whether transactions with such persons are notifiable or prohibited. Having clarity regarding the entities in or outside of scope would allow U.S. Persons to focus their compliance efforts on the persons and entities of specific concern to the U.S. government. We believe such an approach would achieve the intended goals and prove better suited for broad implementation, as demonstrated by Treasury's promulgation of the Specially Designated Nationals and Blocked Persons List and the Chinese Military-Industrial Complex

Companies List. A specific list would greatly improve clarity and facilitate compliance by U.S. Persons.

Alternatively, if Treasury determines not to publish a list identifying all Covered Foreign Persons, we request that Treasury at a minimum maintain and make public an updated, non-exhaustive list of those persons that it has determined are Covered Foreign Persons (specifying whether notifiable or prohibited). For example, as companies submit notifications to Treasury, Treasury could make public whether it agrees with such determination as of that date. While this alternative list would provide a reduced benefit to U.S. Persons because they would still be required to perform extensive due diligence with respect to persons not identified on the list, it would reduce the risk of inconsistent application, complexity, and the overall operational burden by (1) providing certainty regarding those entities included in the list, and (2) serving as a useful guide regarding the types of entities that Treasury intends to be in scope.

Optional advisory opinion process

Because of the complexity in identifying Covered Foreign Person, as described above, we recommend that Treasury institute an optional advisory opinion process that would allow U.S. Persons, at their discretion, to engage with Treasury officials to obtain guidance regarding whether a specified transaction is permitted, prohibited, or notifiable at the time of the inquiry.

Anonymized publication of notified transactions

Treasury also should consider publishing anonymized information regarding Covered Transactions in an annual report, similar to the annual reports issued by CFIUS, in a manner that would provide useful guidance to the investing community.

De minimis activity

Under prong (1) of the proposed definition of Covered Foreign Person, any entity that engages in any activities involving "covered national security technologies and products" would be considered a Covered Foreign Person. Prong (1) does not specify a threshold for such activities, however, so even activities that are a miniscule portion of the entity's revenues could result in the entity being considered a Covered Foreign Person. In contrast, prong (2) of the proposed definition of Covered Foreign Person helpfully provides a 50 percent threshold for revenues, net income, capital expenditures, or operating expenses related to subsidiaries that engage in covered national security technologies, which they must meet to be pulled into scope.

The lack of a de minimis threshold in the proposal for prong (1) of the definition risks greatly expanding the scope of Covered Foreign Persons without improving the effectiveness of the U.S. Outbound Investment Program. It also greatly increases the compliance burden without proportionate benefits to determine whether an entity engages in any of the specified activities, no matter how minimally, without proportionate benefits. In many cases, U.S. Persons simply will not have the ability to conduct due diligence comprehensively enough to conclude that there is no possibility of such activity. To avoid such issues and not inadvertently chill investment activity that Treasury otherwise would consider permissible, Treasury should implement a de

minimis threshold for prong (1). We recommend that Treasury define as a Covered Foreign Person an entity that derives greater than 33 percent of its revenues or net income from engagement in activities involving covered national security technologies or products.

Question 6: "What could be the specific impacts of item (2) of the definition of 'covered foreign person'? What could be the consequences of setting a specific threshold of 50 percent in the categories of consolidated revenue, net income, capital expenditures, and operating expenses? Are there other approaches that should be considered with respect to U.S. person transactions into companies whose subsidiaries and branches engage in the identified activity with respect to a covered national security technology or product?"

We recommend that Treasury modify item (2) of the definition of Covered Foreign Person so that it only includes consideration of consolidated revenue and net income and does not also include consideration of capital expenditures or operating expenses. Consolidated revenue and net income serve as a reasonable and familiar test for determining whether an entity should be considered a Covered Foreign Person. This information also is easier to obtain in the ordinary course of business compared to information about capital expenditures or operating expenses.

Question 8: "What other recommendations do you have on how to enhance clarity or refine the definitions, given the overall objectives of the program?"

Prong (3) of the proposed definition of "Person of a Country of Concern" would cover "the government of a country of concern, including any political subdivision, political party, agency, or instrumentality thereof, or any person owned, controlled, or directed by, or acting for or on behalf of, the government of such country of concern" (emphasis added) and prong (4) of the same definition would cover "any entity in which a person or persons identified in prongs (1) through (3) holds individually or in the aggregate, directly or indirectly, an ownership interest equal to or greater than 50 percent." Ascertaining with certainty whether a person or entity should be considered a Person of a Country of Concern under prongs (3) or (4) would be extremely challenging. Such challenges are often exacerbated in certain markets such as China. Given the difficulty of the proposed due diligence exercise, for prongs (3) and (4), Treasury should provide assurance that U.S. Persons can rely on "information available in the ordinary course of business to U.S. Persons" when making this determination.

Determining ownership and control of entities, particularly those that issue different categories of equity and debt, is a complicated and somewhat subjective exercise. For this reason, we request that Treasury introduce an objective element to this determination and clarify that, for prong (3), an entity will only be captured if a government of concern owns more than 50 percent of the equity of voting interests and for prong (4) request that "ownership interest" be interpreted to mean "equity ownership of the voting interests." This will tailor the definition to address entities over which Persons of a Country of Concern have actual control and/or influence.

V. Definition of Covered Transactions

Question 9: "What modifications, if any, should be made to the definition of 'covered transaction' under consideration to enhance clarity or close any loopholes?"

Joint ventures

The proposed definition of Covered Transaction also includes as prong (4) "the establishment of a joint venture, wherever located, that is formed with a covered foreign person or could result in the establishment of a covered foreign person." The term "joint venture" is undefined and, due to the wide range of possible business arrangements between U.S. Persons and foreign persons, the lack of a definition could result in uncertainty regarding whether an arrangement is in scope. Treasury should further specify or define what arrangements are intended to be in scope. We recommend defining the term "joint venture" as "a contractual arrangement undertaken jointly by two or more parties for the development of a joint enterprise in which each party contributes both capital and management resources."

In addition, we recommend that Treasury make clear the application of requirements to joint ventures that have been entered into prior to the effective date of the U.S. Outbound Investment Program. In particular, we request that Treasury:

(1) affirmatively provide that the continued participation by a U.S. Person in an existing joint venture in which a Covered Foreign Person is a counterparty is permissible;
(2) specify whether the acquisition of an additional interest in an existing joint venture in which a Covered Foreign Person is a counterparty is permissible; and
(3) confirm that if a counterparty in an existing joint venture becomes a Covered Foreign Person following the effective date of the program, the U.S. Person is not required to exit the joint venture.

Question 12: "How, if at all, should the inclusion of 'debt financing to a covered foreign person where such debt financing is convertible to an equity interest' be further refined? What would be the consequences of including additional debt financing transactions in the definition of 'covered transaction'?"

We recommend that Treasury specify that the "provision of debt financing" includes only a transaction in which the borrower/issuer receives proceeds from the transaction. In addition, we recommend clarification that secondary market transactions (i.e., a transfer of debt from an existing holder to a new holder) are not within the scope of the implementing regulations as such transactions would not result in any additional proceeds to the borrower/issuer.

We also recommend that the provision of debt financing to a Covered Foreign Person (where such debt financing is convertible to an equity interest) only qualify as a Covered Transaction if the convertible debt automatically converts to equity upon the occurrence of a specified event. In the scenario of a convertible bond that only converts upon the occurrence of an exercise of rights by a U.S. Person, the definition of Covered Transaction should capture only the exercise of that right (i.e., the actual acquisition of equity), and not the provision of the original debt financing.

Question 13: "The Treasury Department is considering how to treat follow-on transactions into a covered foreign person and a covered national security technology or product when the original transaction relates to an investment that occurred prior to the effective date of the implementing regulations. What would be the consequences of covering such follow-on transactions? If you believe certain follow-on transactions should or should not be covered, please provide examples and information to support that position."

We recommend that Treasury except from the definition of Covered Transaction any follow-on transactions resulting from existing investments. For example, if a transaction that was not a Covered Transaction or that is an excepted transaction is restructured, the restructured investment should be excepted. By their nature, the timing and terms of a follow-on investment are not known at the time of an initial investment. Restricting the ability of U.S. Persons to participate in follow-ons could economically harm U.S. Persons by reducing the value of otherwise permissible investments and negatively impacting their ability to protect their capital during the lifecycle of a given investment. For example, a situation may arise in which an investee company goes into distress and additional funding is needed as a temporary stop gap measure. Rather than losing all of the funds invested in such entity, it may be in the best interest of the investor (whether a U.S. Person or a client of a U.S. Person), to provide additional funding.

Question 16: "Please specify whether and how any of the following could fall within the considered definition of 'covered transaction' such that additional clarity would be beneficial given the policy intent of this program is not to implicate these activities unless undertaken as part of an effort to evade these rules: (i) University-to-university research collaborations; (ii) Contractual arrangements or the procurement of material inputs for any of the covered national security technologies or products; (iii) Intellectual property licensing arrangements; (iv) Bank lending; (v) The processing, clearing, or sending of payments by a bank; (vi) Underwriting services; (vii) Debt rating services; (viii) Prime brokerage; (ix) Global custody; and (x) Equity research or analysis."

We strongly support the exclusion of the enumerated services and Treasury's efforts to narrowly tailor the implementing regulations for the U.S. Outbound Investment Program. Such exclusions recognize that risks differ between certain activities.

To provide clarity with respect to the activities of market participants that engage in activities similar to those listed and which we believe the program is similarly not intending to implicate, we recommend that Treasury add to the list of activities the following:

- non-bank lending, which should not be placed on a different footing than bank lending based on the type of lending institution;
- syndicated lending, both bank- and non-bank-funded, which are important sources of capital for the U.S. market;
- non-bank payment services, which provide a critical alternative to bank financing and help support economic activity; and

- property leasing and management, which, similar to the enumerated exclusions, do not involve investment activity.

Similar to the transactions already enumerated by Treasury, these types of transactions, due to their nature, are not likely to provide intangible benefits to the Covered Foreign Person or otherwise raise national security concerns.

VI. Covered National Security Technologies and Products

Question 37: "With respect to 'Quantum Sensors' and 'Quantum Networking and Quantum Communication Systems,' what could be the impact of the language 'designed to be exclusively used'? How would the alternative formulation 'designed to be primarily used' change the scope? Is there another approach that should be considered?"

The current proposals for which categories of Covered National Security Technologies and Products will either be prohibited or require notification rely on a subjective standard regarding whether a technology or product is either designed to be "exclusively" used for certain purposes or designed to be "primarily" used for certain purposes. We recommend that Treasury revise the scope of covered transactions to circumstances in which a technology or product is designed to be "exclusively" used for certain purposes. U.S. Persons will likely not have the ability, or the technical knowledge, to conduct due diligence to determine the "primary" purpose of such technologies and products, nor will they have adequate visibility (or in some cases, any visibility) into the end uses of such technologies or products. While we appreciate the critical importance of identifying Covered National Security Technologies and Products for purposes of successfully executing the U.S. Outbound Investment Program, making the standard "exclusively" will far better serve the goals and success of the program.

VII. Knowledge Standard

Question 49: "How could this standard be clarified for the purposes of this program? What, if any, alternatives should be considered?"

Due diligence standard

Treasury should specify that, in evaluating whether a given transaction is with a Covered Foreign Person, U.S. Persons need only consider information available to U.S. Persons in the ordinary course of business. This standard would impose a reasonable obligation on U.S. Persons and reflect the realities of certain markets, particularly China.

Knowledge standard

Treasury is proposing to condition a person's obligations under the program based on the person's knowledge of relevant circumstances, and is considering applying a knowledge standard that includes situations where a U.S. Person knows or reasonably should know based on publicly available information and other information available through a reasonable and appropriate amount of due diligence. To support clarity on due diligence, Treasury should provide guidance

indicating that reliance on due diligence questionnaires or relevant third-party reports would be considered a "reasonable and appropriate amount of due diligence."

Future activities

Treasury's proposal conditions a U.S. Person's obligations under the implementing regulations on such person's knowledge of "relevant circumstances." "Relevant circumstances" is proposed to include where the U.S. Person has actual or constructive knowledge that the Covered Foreign Person "will foreseeably be engaged in" certain activities regarding a Covered National Security Technology or Product. We believe that it is impractical to impose this standard upon U.S. Persons. U.S. Persons do not typically have this type of knowledge of a Covered Foreign Person's future business operations. We therefore urge Treasury to revise the knowledge standard to exclude constructive knowledge of future activities regarding Covered National Security Technologies and Products.

Question 51: "What are the practicalities of complying with this standard? What, if any, changes to the way that U.S. persons undertake due diligence in a country of concern would be required because of this standard? What might be the cost to U.S. persons of undertaking such due diligence? Please be specific."

As described further in our response to questions 71 and 72, the program, as proposed, will significantly enhance the amount and type of due diligence that U.S. Persons will need to undertake when considering investing in non-excepted securities or otherwise entering into a business arrangement with a non-U.S. Person. Because of the breadth of the definitions of Person of a Country of Concern, this enhanced level of diligence will need to be undertaken not only with respect to persons that are clearly or likely a Person of a Country of Concern, but, in practice, on each and every person globally.

To alleviate the complexity of this and thereby make it more effective, Treasury should clarify that U.S. Persons can reasonably rely on information provided by counterparties when undertaking due diligence process with respect to an investment or other arrangement unless they know or have reason to know that the information is not accurate. This standard would be consistent with guidance issued by OFAC with respect to due diligence standards under U.S. sanctions programs. For example, OFAC has issued numerous Frequently Asked Questions confirming that financial institutions may reasonably rely on information available to them in the ordinary course of business to determine whether a specific activity is prohibited by sanctions or covered by general licenses, as long as the U.S. Person does not know or have reason to know that the transaction is not in compliance with U.S. sanctions requirements. Further, as requested above, Treasury should acknowledge that U.S. Persons may rely on the due diligence analyses provided by such third parties.

VIII. Notification Requirements; Form, Content, and Timing

Question 52: "How could the categories of information requested be clarified? Where might there be anticipated challenges or difficulties in furnishing the requested information? Please be specific and explain why."

Notification requirement: form and content

In the form of notification for applicable covered transaction in semiconductors and microelectronics and AI systems, Treasury is proposing to require U.S. Persons to provide, among other items, "a description of due diligence conducted regarding the investment." Because this proposed requirement is new and unfamiliar, Treasury should describe the level of detail that will be helpful for Treasury to have in overseeing the program. Treasury also should provide a form of notification template that U.S. Persons may use for any required notifications, similar to the template Treasury has provided for declarations under CFIUS. In addition, we request that Treasury confirm whether it expects that such notifications will be provided via an online portal (similar to the CFIUS Case Management System portal) or whether they can be submitted via email or other alternative means.

Notification requirement: date of submission

The proposal currently contemplates that U.S. Persons must file a required notification no later than 30 days following the closing of a Covered Transaction. We request that Treasury clarify that, in a situation in which a determination that a given transaction is a Covered Transaction does not occur until a later date (due to, for example, inaccurate information provided during the due diligence process), U.S. Persons may submit the required notification within 30 days from the date of discovery.

IX. Controlled Foreign Entities – Obligations of U.S. Persons

Question 67: "What are the considerations as to whether a foreign entity is a 'controlled foreign entity' of a U.S. person, as the Treasury Department is considering defining it? What if any changes should be made to the definition of 'controlled foreign entity' to make its scope and application clearer? Why? What, if any, changes should be made to broaden or narrow it? Why?"

We strongly support Treasury's proposal to define Controlled Foreign Entity on the basis of an objective ownership test (i.e., a foreign entity in which a U.S. Person owns, directly or indirectly, a 50 percent or greater interest). To effectively target those entities which U.S. Persons actually control, we recommend that Treasury amend this definition to include only ownership of 50 percent or greater of the voting equity securities in a foreign entity. Otherwise, a U.S. Person that owns a 50 percent or greater ownership interest in an entity but does not have the ability to actually control the entity could be at risk of non-compliance via the actions of such entity under the current proposal.

Question 68: "What, if any, changes should be made to the factors informing 'all reasonable steps' in order to make its scope and application clearer? Why? What would be the consequences and impacts of adopting these factors?"

The proposal obligates U.S. Persons to take "all reasonable steps" to prohibit and prevent transactions by a Controlled Foreign Entity that would be prohibited if engaged in by a U.S. Person. This standard is overly broad and would needlessly result in second guessing, even when significant efforts were made to comply. We therefore request that Treasury instead require U.S. Persons to take "reasonable steps."

X. Compliance and Record-Keeping

Question 71: "What new compliance and recordkeeping controls will U.S. persons anticipate needing to comply with the program as described in this ANPRM? To what extent would existing controls for compliance with other U.S. Government laws and regulations be useful for compliance with this program?

Question 72: "What additional information will U.S. persons need to collect for compliance purposes as a result of this program?

Under the proposed program, with respect to transactions that are not excepted, U.S. Persons will need to perform extensive due diligence to determine whether a potential transaction is with a Covered Foreign Person, including determining (1) whether the transaction is with a Person of Country of Concern and (2) whether the Person of a Country of Concern is engaged in an identified activity with respect to a covered national security technology or product.

For our members – regulated fund and asset managers – this assessment would need to be performed not only with respect to their own potential business relationships and arrangements, but also with respect to the regulated funds and investment accounts that they manage as fiduciaries on behalf of clients. These funds and investment accounts cover a wide range of investments and strategies, including, for example, index-based strategies such as S&P 500 index funds, and actively-managed funds, such as emerging markets debt funds. These funds and accounts are often invested in the securities of hundreds if not thousands of entities. For our members these investments are primarily – but not exclusively – in publicly traded securities. For this reason, we describe below how compliance with the proposed program could impact the portfolio management activity of our members, and how it would differ from the programs that our members have already implemented to comply with existing sanctions and related programs.

Based on discussions with our members, we understand that the due diligence they would need to perform to make the determinations described above would be complex and time-consuming and include a new, manual compliance process. The current sanctions and related programs to which U.S. Persons are subject which prohibit or restrict relationships with or investments in foreign persons are predicated on the provision of a list of foreign persons within scope or are otherwise clear in jurisdictional scope. Depending on the program, the prohibitions may apply only to the foreign person specified, or it may apply to certain of their affiliates. In either case,

U.S. Persons have specific information informing them of the foreign persons that are in scope. Based on this specified list, it is clear to U.S. Persons with whom they can or cannot transact.

Because there is relative clarity under the existing programs regarding the foreign persons in scope, our members are currently able to utilize automated processes that prevent investment professionals from inadvertently trading in restricted securities because they apply a list of persons and/or securities with whom transactions are restricted. Some firms use proprietary systems to create and maintain such lists, whereas other firms may additionally or exclusively use third-party products to assist with compliance. Currently, even in circumstances where a foreign person's affiliates are not specifically listed by the U.S. government, but are otherwise pulled into scope, our members are able to utilize lists that are generated to include such affiliates. By relying on U.S. Persons to identify Covered Foreign Persons, the program as proposed by Treasury would operate in a completely different manner that would not readily accommodate the use of automated systems.

As a first step, our members would need to evaluate whether a security is issued by a Person of a Country of Concern or an in-scope parent of such person. The scope of the definition is very broad. For example, as contemplated, a Persons of a Country of Concern would include a UK-domiciled private company in which a Canadian citizen that is a permanent resident of Hong Kong holds greater than a 50 percent ownership interest. Coming to a definitive conclusion on each prospective investment regarding whether that investment would be in a security issued by a Person of a Country of Concern would require our members to understand the ownership structure and beneficial owners of entities in a level of detail that is much more granular than typically is currently assessed in connection with their investment activity. Further, the information needed to make such determinations may not be publicly available and foreign persons may be reluctant to provide it for various reasons, including privacy concerns.

Secondly, our members would need to conduct detailed diligence on the current and expected business activities of an entity, including with respect to all business lines no matter how material to the entire business, to determine whether the entity's activities include covered national security technologies or products. The diligence they would need to perform differs significantly from, and would be much more detailed than, their existing operationalized process which is typically focused on an entity's financials, general operations, and other features relevant to that type of investment or client. Further, due to the hyper-technical nature of the technologies and products in scope, our members will likely need to hire or retain technical experts to perform the necessary level of diligence in order to make an assessment.

As part of the investment process, our members may utilize third-party lists that classify entities into certain industry-standard sectors or sub-sectors, such as Global industry Classification Standard (GICS) and Industry Classification Benchmark (ICB). In this circumstance, such lists would have extremely limited, or no, utility because (1) the classification system does not include categories that match those identified by Treasury, and (2) the classification is applied to a limited range of securities and would generally not include the non-publicly traded securities potentially in scope of the program.

The time and labor-intensive due diligence process described above would be magnified exponentially if the exception for publicly traded securities was removed. In that case, due to the broad scope of the definition of Person of a Country of Concern (and the inclusion of subsidiaries in the definition of Covered Foreign Person), extensive due diligence would need to be performed on each and every investment globally.

XI. General Relief for Reasonable, Good Faith Compliance

Our members are committed to developing the necessary compliance procedures and operational processes needed to comply with the U.S. Outbound Investment Program. There, however, will be a multitude of judgments they will need to make regarding the identities and activities of potentially complex foreign companies. Accordingly, in addition to guidance on the specified provisions described above, we urge Treasury to provide general relief for good faith compliance efforts. In particular, we request that Treasury confirm that, in the absence of specific guidance, U.S. Persons can rely on reasonable, good faith interpretations of the requirements under the implementing regulations for the U.S. Outbound Investment Program.

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We appreciate your consideration of our comments. If you have any questions or would like to discuss our comments further, please contact Susan Olson (solson@ici.org or 202-326-5800) or Michael N. Pedroni (michael.pedroni@ici.org or 202-326-5876).

Sincerely,

/s/ Susan Olson	/s/ Michael N. Pedroni
Susan Olson General Counsel, ICI	Michael N. Pedroni Chief Global Affairs Officer, ICI, and Head of ICI Global