DEPARTMENT OF THE TREASURY

Office of Investment Security

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Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern

AGENCY: Office of Investment Security, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This final rule sets forth the regulations that implement Executive Order 14105 of August 9, 2023, ''Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern,'' which declares a national emergency to address the threat to the United States posed by countries of concern that seek to develop and exploit sensitive technologies or products critical for military, intelligence, surveillance, or cyber-enabled capabilities. The final rule requires United States persons to provide notification to the U.S. Department of the Treasury regarding certain transactions involving persons of a country of concern that are engaged in activities involving certain national security technologies and products that may contribute to the threat to the national security of the United States; and prohibits United States persons from engaging in certain other transactions involving persons of a country of concern that are engaged in activities involving certain other national security technologies and products that pose a particularly acute national security threat to the United States.

DATES: This final rule is effective on January 2, 2025.

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SUPPLEMENTARY INFORMATION:

I. Background

A. Outbound Order

On August 9, 2023, the President issued Executive Order 14105 (88 FR 54867), ''Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern'' (the Outbound Order), pursuant to his authority under the Constitution and the laws of the United States, including the International Emergency Economic Powers Act (IEEPA), the National Emergencies Act (NEA), and section 301 of title 3, United States Code (U.S.C.). In the Outbound Order, the President found that the advancement by countries of concern in sensitive technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities of such countries constitutes a threat to the national security of the United States, which has its source in whole or substantial part outside the United States, and that certain U.S. investments risk exacerbating this threat. In response, the President declared a national emergency to deal with this threat. On August 6, 2024, the President continued the national emergency (89 FR 65163) declared in the Outbound Order.

The Outbound Order identifies three sectors of national security technologies and products to be covered by the program: semiconductors and microelectronics, quantum information technologies, and artificial intelligence. As described in the Outbound Order, countries of concern are exploiting or have the ability to exploit certain U.S. outbound investments, including certain intangible benefits that often accompany U.S. investments and that help companies succeed. In an Annex to the Outbound Order, the President identified one country, the People's Republic of China (PRC), along with the Special Administrative Region of Hong Kong (Hong Kong) and the Special Administrative Region of Macau (Macau), as a country of concern. The President may modify the Annex to the Outbound Order and update the list of countries of concern.

Advanced technologies and products that are increasingly developed and financed by the private sector form the basis of next-generation military, intelligence, surveillance, or cyber-enabled capabilities. As stated in the Outbound Order, advancements in sensitive technologies and products in the areas of semiconductors and microelectronics, quantum information technologies, and artificial intelligence will accelerate the development of advanced computational capabilities that will enable new applications that pose significant national security risks, such as the development of more sophisticated weapons systems, breaking of cryptographic codes, and other applications that could provide a country of concern with military advantages. The potential military, intelligence, surveillance, or cyber-enabled applications of these technologies and products pose risks to U.S. national security, particularly when developed in or by a country of concern in which the government seeks to (1) direct entities to obtain technologies to achieve national security objectives and (2) compel public or private entities to share or transfer these technologies to the government's military, intelligence, surveillance, or security apparatuses.

U.S. investments are often more valuable than their capital alone, because they can also include the transfer of intangible benefits. Intangible benefits that often accompany U.S. investments and help companies succeed include: enhanced standing and prominence, managerial assistance, access to investment and talent networks, market access, and enhanced access to additional financing. Certain investments by United States persons into a country of concern can be exploited to accelerate the development of sensitive technologies or products—including military, intelligence, surveillance, or cyber-enabled capabilities—in ways that negatively impact the national security of the United States. Such investments, therefore, risk exacerbating this threat to U.S. national security.

The Outbound Order outlines two primary components that serve distinct but related objectives with respect to the relevant technologies and products. The first component requires notification to the Secretary of the Treasury (the Secretary) regarding certain types of investments by a United States person in a *covered foreign person* engaged in *covered activities* pertaining to specified categories of technologies and products. The second component requires the Secretary to prohibit certain types of investment by a United States person in a *covered foreign person* engaged in *covered activities* pertaining to other specified categories of advanced technologies and products. Both components focus on investments that could enhance a country of concern's military, intelligence, surveillance, or cyber-enabled capabilities through the advancement of technologies and products in particularly sensitive areas.

The Outbound Order directs the Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies, to issue, subject to public notice and comment, regulations that, among other things, require *U.S. persons* to submit information to the

U.S. Department of the Treasury (Treasury Department) regarding *notifiable transactions* and prohibit *U.S. persons* from engaging in *prohibited transactions.* Under section 10(a) of the Outbound Order, the President authorizes the Secretary to promulgate rules and regulations, including elaborating upon the definitions contained in the Outbound Order. The Secretary's promulgation of regulations under the Outbound Order is consistent with the President's authority to ''issue such regulations, including regulations prescribing definitions, as may be necessary for the exercise'' of authorities granted under IEEPA (50 U.S.C. 1704) and the President's authority to designate and empower the head of any department or agency in the executive branch to perform any function which is vested in the President by law (3 U.S.C. 301).

The Outbound Order instructs the Secretary to identify in such regulations categories of *notifiable transactions* that involve covered national security technologies and products that the Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies, determines may contribute to the threat to the national security of the United States identified in the Outbound Order. The Outbound Order also instructs the Secretary to identify categories of *prohibited transactions* that involve technologies and products that the Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies, determines pose a particularly acute national security threat to the United States. Consistent with the Outbound Order, the Secretary may exempt from the notification requirement or prohibition any transaction determined by the Secretary, in consultation with the heads of relevant agencies, as appropriate, to be in the national interest of the United States. Additionally, the Outbound Order requires the Secretary to investigate, in consultation with the heads of relevant agencies, as appropriate, violations of the Outbound Order or the regulations and pursue civil penalties for such violations.

B. Advance Notice of Proposed Rulemaking

Concurrent with the issuance of the Outbound Order, on August 9, 2023, the Treasury Department issued an Advance Notice of Proposed Rulemaking, 88 FR 54961 (published August 14, 2023) (ANPRM), to provide transparency and clarity about the intended scope of the program and solicit early stakeholder participation in the rulemaking process. The ANPRM outlined key concepts under consideration and sought public comment on a range of topics related to the implementation of the Outbound Order.

The Treasury Department received 60 comment letters in response to the ANRPM, many from business associations that represented a wide variety of stakeholders across industries as well as from individuals and companies in the financial services, legal, and technology sectors. (The comments to the ANPRM are available on the public rulemaking docket at *https://www.regulations.gov* (Docket TREAS–DO–2023–0009)). In general, the comments focused on enhancing the clarity of the scope of the program and the definitions under consideration, aligning the program where possible with other relevant U.S. Government programs, and supporting program development in a targeted manner to reduce unintended consequences for U.S. competitiveness. The Treasury Department considered each comment in developing the Notice of Proposed Rulemaking discussed in the next section.

C. Notice of Proposed Rulemaking

On June 21, 2024, the Treasury Department issued a Notice of Proposed Rulemaking, 89 FR 55846 (published July 5, 2024) (Proposed Rule), setting forth the full proposed regulations for implementing the Outbound Order. The Proposed Rule built on the ANPRM and reflected the Treasury Department's consideration of comments received in response to the ANPRM. The Proposed Rule included the full draft regulations and explanatory discussion regarding the intent of the proposal. It also solicited additional comments from the public.

Obligations on U.S. Persons

The Proposed Rule would have placed obligations on *U.S. persons,* including a notification requirement for certain transactions and prohibition of certain other transactions. A *U.S. person* was defined to include any United States citizen or lawful permanent resident, as well as any entity organized under the laws of the United States or any jurisdiction within the United States, including any foreign branch of any such entity, and any person in the United States.

Knowledge Standard

The obligations of a *U.S. person* under the Proposed Rule would have applied if such person had knowledge of relevant facts or circumstances related to a transaction. Under the proposed standard, a *U.S. person* may have been assessed to have had knowledge if the *U.S. person* possessed actual knowledge that a fact or circumstance existed or was substantially certain to occur, if the *U.S. person* possessed an awareness of a high probability of a fact or circumstance's existence or future occurrence, or if the *U.S. person* could have possessed such information through a ''reasonable and diligent inquiry.'' To provide clarity, the Proposed Rule listed factors that the Treasury Department would consider in assessing whether a *U.S. person* undertook a ''reasonable and diligent inquiry.'' Such factors reflected information that should have been ascertainable and/or contractual assurances that should have been obtainable through reasonable due diligence.

Specific Categories of Covered Transaction

The Proposed Rule would have applied to certain transactions by *U.S. persons,* including the acquisition of an equity interest or *contingent equity interest;* certain debt financing convertible to an equity interest or that afforded certain rights to the lender; the conversion of a *contingent equity interest;* a greenfield investment or other corporate expansion; a joint venture; and certain investments as a limited partner or equivalent (LP) in a non-*U.S. person* pooled investment fund.

Involving a Covered Foreign Person

The Proposed Rule would have applied to certain transactions by a *U.S. person* that also involved a *covered foreign person*—that is, a *person of a country of concern* engaged in a *covered activity* related to defined subsets of technologies and products or a *person* that had a specified relationship with such a person. Under the Proposed Rule, *a person of a country of concern* included an individual who is a citizen or permanent resident of a *country of concern* (and not a U.S. citizen or permanent resident of the United States); an entity organized under the laws of a *country of concern,* or headquartered in, incorporated in, or with a principal place of business in a *country of concern;* the government of a *country of concern;* or an entity that is directly or indirectly owned 50 percent or more by any persons in any of the aforementioned categories. Additionally, the Proposed Rule would have applied to certain transactions involving an entity that had a voting interest, board seat, or equity interest in a *covered foreign person* where more

than 50 percent of one of several key financial metrics of the entity was attributable to such *covered foreign person.*

Excepted Transaction

The Proposed Rule would have excepted certain types of transactions from coverage, provided that such transactions did not afford a *U.S. person* certain rights that were not standard minority shareholder protections. These included: investments in publicly traded securities, certain LP investments, buyouts of *country of concern* ownership; intracompany transactions; investments made pursuant to pre-Outbound Order binding commitments; certain syndicated debt financings; and certain transactions involving a person of a country or territory outside of the United States based on a determination by the Secretary.

National Interest Exemption

Under the Proposed Rule, a *U.S. person* could have sought an exemption from the application of the prohibition or notification requirement on the basis that a transaction was in the national interest of the United States.

Notification Requirement

A *U.S. person* subject to the notification requirement under the Proposed Rule would have been required to file a notification form with the Treasury Department that included information related to the transaction such as details about the *U.S. person,* the *covered transaction,* relevant national security technologies and products, and the *covered foreign person.* The Proposed Rule would have required that such notification be filed no later than 30 days after a transaction is completed or, where a *U.S. person* acquires actual knowledge after the completion date of a transaction that the transaction would have been a *covered transaction* if such knowledge had been possessed at the time of the transaction, no later than 30 days after the *U.S. person's* acquisition of such knowledge.

National Security Technologies and Products

The Proposed Rule identified the subsets of national security technologies and products identified in the Outbound Order that would have been subject to the Proposed Rule.

- *Semiconductors and microelectronics. Covered transactions* related to electronic design automation software; certain fabrication and advanced packaging tools; the design, fabrication, or packaging of certain advanced integrated circuits; and supercomputers would have been prohibited. *Covered transactions* related to the design, fabrication, or packaging of integrated circuits not otherwise covered by the *prohibited transaction* definition would have been subject to the notification requirement.
- *Quantum information technologies. Covered transactions* related to the development of quantum computers and production of critical components; the development or production of certain quantum sensing platforms; and the development or production of quantum networking and quantum communication systems would have been prohibited.
- *Artificial intelligence (AI) systems. Covered transactions* related to the development of any *AI system* designed to be exclusively used for, or intended to be used for, certain end uses would have been prohibited. The Proposed Rule also included proposed alternatives for a prohibition on *covered transactions* related to the development of any *AI system* that was trained using a specified quantity of computing power, and trained using a specified quantity of computing power using primarily biological sequence data. *Covered transactions* related to the development of any *AI system* not otherwise covered by the *prohibited transaction* definition, where such *AI system* was designed or intended to be used for certain end uses or was trained using a specified quantity of computing power (set below the levels in the *prohibited transaction* definition), would have been subject to the notification requirement.

Violations

The Proposed Rule outlined the penalty and disclosure framework for violations. A violation would have been subject to civil and criminal penalties as set forth in IEEPA. In the event of a violation, the Treasury Department would have been authorized to impose civil penalties and could also have referred criminal violations to the Attorney General. The Secretary also could have taken any action authorized under IEEPA to nullify, void, or otherwise require divestment of any *prohibited transaction.* The Proposed Rule would have provided a process for a *U.S. person* to submit a voluntary self-disclosure if they believed their conduct may have resulted in a violation of any part of the Proposed Rule. Such self-disclosure would have been taken into consideration during the Treasury Department's determination of the appropriate response to the self-disclosed violation.

II. Overview of Comments on the Proposed Rule

The public was given an opportunity to comment on the Proposed Rule, and comments were due by August 4, 2024. The public comments received are available on the rulemaking docket at *https://www.regulations.gov* (Docket TREAS–DO–2024–0012). The Treasury Department received over 40 comment letters in response to the Proposed Rule reflecting a range of views. The Treasury Department considered each comment before issuing this final rule (Final Rule). Discussed below are the comments received and the Treasury Department's responses in consideration of the comments.

III. Discussion of the Final Rule

A. Scope and Objective of the Final Rule

The preamble to the Proposed Rule noted that its focus was on the types of U.S. investments that presented a likelihood of conveying both capital and intangible benefits that could be exploited by countries of concern to accelerate the development of sensitive technologies or products in ways that negatively impact the national security of the United States. With an interest in minimizing unintended consequences and addressing the national security risks posed by countries of concern developing technologies that are critical to the next generation of military, intelligence, surveillance, or cyber-enabled capabilities, the Proposed Rule included detailed definitions and descriptions of terms and elements to appropriately scope coverage and facilitate compliance by United States persons. At the same time, the Proposed Rule sought to avoid loopholes that could have undermined the national security objectives of the Outbound Order.

Several commenters noted their support for the overall goals of the Outbound Order and Proposed Rule. One commenter commended the Treasury Department for taking action to stop U.S. investment in entities backed by the Chinese Communist Party that threaten U.S. national security. Another commenter endorsed U.S. Government efforts to ensure entities that pose national security threats are denied access to all U.S. investors and U.S. capital markets. Several commenters expressed support for the Treasury Department's goal of restricting investment that would accelerate the development of military, intelligence, surveillance, and cyber-enabled capabilities in countries of concern. Another commenter emphasized the importance and difficulty of countering

the undesired transfer of emerging technologies. One commenter commended the Treasury Department's recognition that U.S. leadership in emerging technologies is critical to long-term U.S. interests, while another noted that maintaining a healthy U.S. semiconductor industry is an essential component to protecting national security.

Several commenters noted the importance of balancing the protection of national security with the maintenance of economic competitiveness and an open investment policy. One commenter stated that a well-designed rule would have actionable requirements that achieve the Treasury Department's goals while mitigating unintended consequences.

Several commenters highlighted the importance of clarity in the Proposed Rule, especially in the definitions, or requested further clarification. Other commenters requested that the rule be no more burdensome than necessary to achieve its aims. One commenter encouraged the Treasury Department to be mindful of the implications of the U.S. Supreme Court decision in *Loper-Bright* v. *Raimondo,* 144 S. Ct. 2244 (2024), particularly related to implementation of broad authorities and industry's reliance on a stable, clear, and predictable regulatory environment.

One commenter highlighted a think tank report about outbound investment that encouraged authorities to target the highest risk transactions and recommended establishing a rule that is proportionate, easy to understand, nonduplicative of existing tools, and that enables dialogue with allies about adopting similar regimes.

Other commenters expressed the view that the Proposed Rule was too broad or not designed to address the threat identified in the Outbound Order. Some commenters requested the notification requirement be removed from the rule, with one commenter expressing the view that the notification requirement would not address the threat identified in the Outbound Order. One commenter asserted that the investment restriction in the Proposed Rule was based on misconceptions and assumptions about the PRC government and PRC businesses that are not supported by evidence. Another commenter asserted that the Proposed Rule represents a departure from the United States' traditional support for free and open capital flows. Another commenter characterized the Proposed Rule as unreasonable and contrary to principles of free and fair trade. The commenter alleged that the Proposed Rule would obstruct opportunities for PRC companies, limit the innovation capacity of the United States, and destroy the global industrial supply chain. Another commenter expressed concern that the Proposed Rule is overly broad and that it underestimates the potential negative impacts on investment managers.

In response to these comments, the Treasury Department notes that the United States has long maintained an open investment policy and supported cross-border investment where consistent with U.S. national security interests. In developing the Final Rule, the Treasury Department has sought to maintain the goals of both open investment and protection of national security by focusing on U.S. investments that present a likelihood of conveying both capital and intangible benefits that can be exploited to accelerate the development of sensitive technologies or products critical for military, intelligence, surveillance, or cyber-enabled capabilities of countries of concern in ways that threaten the national security of the United States.

The Treasury Department also recognizes the potential for unintended consequences that may arise under the Final Rule and has sought to further minimize the impact of those consequences, including through changes to the definitions of *covered transaction* and *excepted transaction* in the Final Rule that are described below. The Treasury Department made these changes to provide additional clarity, improve administrability, and facilitate compliance by *U.S. persons,* while also cognizant of the need to close loopholes that could undermine the national security objectives of the Outbound Order. In addition, as discussed further below, the Treasury Department anticipates providing additional information on its Outbound Investment Security Program website to facilitate compliance by *U.S. persons.*

Similar to the Proposed Rule, the Final Rule seeks to complement existing authorities and tools of the U.S. Government, such as export controls and inbound investment reviews. The Final Rule addresses the complex and evolving national security threat identified in the Outbound Order.

The Treasury Department also notes that the Final Rule is based on the President's finding in the Outbound Order that *countries of concern* are ''engaged in comprehensive, long-term strategies that direct, facilitate, or otherwise support advancements in sensitive technologies and products that are critical to such countries' military, intelligence, surveillance, or cyber-enabled capabilities.'' The President's finding also notes that ''[a]s part of this strategy of advancing the development of these sensitive technologies and products, *countries of concern* are exploiting or have the ability to exploit certain United States outbound investments, including certain intangible benefits that often accompany United States investments and that help companies succeed.'' The Treasury Department assesses that the requirements of the Final Rule are narrowly scoped to focus on a limited subset of investment activity and to avoid unintended impacts in broader sectors of the U.S. or global economies. The Treasury Department also notes that imposing targeted measures to address acute national security risks is consistent with trade and investment agreements to which the United States is a party. The Treasury Department further notes that the two components of the program—that is, requiring notification of certain transactions and prohibiting other transactions—helps limit the impact on market participants while providing the Treasury Department with visibility into the volume and nature of *U.S. person covered transactions* and informing future policy development and decisions. Finally, regarding the potential unintended impact on asset managers, the Treasury Department notes that some modifications made to the Final Rule are specifically intended to limit the applicability to certain routine cross-border financial activity that the Treasury Department has determined is unlikely to result in the transfer of intangible benefits along with capital that can be exploited to threaten U.S. national security.

B. Statutory Authority

As described above, the Outbound Order was issued by the President pursuant to his authority under the Constitution and the laws of the United States, including IEEPA, the NEA, and section 301 of title 3, U.S.C. The Outbound Order directs the Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies, to issue, subject to public notice and comment, regulations that, among other things, require *U.S. persons* to submit information to the Treasury Department regarding *notifiable transactions* and prohibit *U.S. persons* from engaging in *prohibited transactions.* Under section 10(a) of the Outbound Order, the President authorizes the Secretary to promulgate rules and regulations, including elaborating upon the definitions contained in the Outbound

Order. The Secretary's issuance of the Proposed Rule and this Final Rule under the Outbound Order is consistent with the President's authority to ''issue such regulations, including regulations prescribing definitions, as may be necessary for the exercise'' of authorities granted under IEEPA (50 U.S.C. 1704) and the President's authority to designate and empower the head of any department or agency in the executive branch to perform any function which is vested in the President by law (3 U.S.C. 301).

One commenter raised questions about whether the Treasury Department had appropriate authority to issue and administer the rule. The commenter noted that Congress did not explicitly authorize the Assistant Secretary of the Treasury for Investment Security to oversee an outbound investment program in the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA; Subtitle A of Title XVII of Pub. L. 115–232, 132 Stat. 2173), the legislation that established the position of Assistant Secretary of the Treasury for Investment Security. The commenter noted that the establishment of the Outbound Investment Security Program would mean that the Assistant Secretary's duties would no longer be principally related to the Committee on Foreign Investment in the United States (CFIUS) as FIRRMA requires. The commenter also asserted that personnel hired under FIRRMA's hiring authority likewise must have CFIUS-related work as their primary responsibility, which in the commenter's view, does not encompass the rulemaking to implement the Outbound Order. The commenter also expressed the view that IEEPA could not be a source of authority for the Proposed Rule. The commenter expressed that in practice, the Proposed Rule sought to regulate access to expertise and professional networks, and that this was ''sharing of information'' that could not be prohibited under IEEPA unless such information was subject to espionage or export control laws.

The Treasury Department appreciates these comments and the opportunity to respond to the legal points they raise. IEEPA (50 U.S.C. 1701 *et seq.*) authorizes the President to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat. Nothing in FIRRMA limits the President's authority under IEEPA. As described in more detail above, consistent with the framework of the NEA and IEEPA, the President declared a national emergency in the Outbound Order and directed the Secretary to issue regulations to address that emergency. As noted, the Secretary's promulgation of regulations under the Outbound Order is consistent with the President's authority to ''issue such regulations, including regulations prescribing definitions, as may be necessary for the exercise'' of authorities granted under IEEPA (50 U.S.C. 1704) and the President's authority to designate and empower the head of any department or agency in the executive branch to perform any function which is vested in the President by law (3 U.S.C. 301).

As directed by the President, the Final Rule addresses the declared national emergency and threat to national security by prohibiting certain transactions and requiring notification of certain other transactions by *U.S. persons* involving subsets of sensitive technologies and products critical for military, intelligence, surveillance, or cyber-enable capabilities of *countries of concern.*

The commenter states that a provision of IEEPA exempting from regulation ''the importation from any country, or the exportation to any country . . . of any information or informational materials'' (50 U.S.C. 1702(b)(3)) forecloses the Treasury Department from issuing the rule under IEEPA. Consistent with the statute, neither the Proposed Rule nor the Final Rule regulates the export of ''information or informational materials.'' Section 850.503 of the Final Rule explicitly provides that conduct referred to in 50 U.S.C. 1702(b) shall not be regulated or prohibited, directly or indirectly, by this part. Instead, the Proposed Rule would have regulated, and the Final Rule will regulate, *covered transactions.* Consistent with the national emergency framework described above, IEEPA unambiguously authorizes the President to, among other things, ''regulate . . . transactions involving[ ] any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States'' (50 U.S.C. 1702(a)(1)(B)), and the Outbound Order, ANPRM, Proposed Rule, and Final Rule rely on this authority. The existence of a *covered transaction* is a fundamental prerequisite for the application of the notification requirement and prohibitions under the Proposed Rule or Final Rule, and the concept of a *covered transaction* has been crafted in a manner consistent with both section 1702(b) of IEEPA and section 850.503 of the Final Rule. *Notifiable transactions* and *prohibited transactions* are each defined as *covered transactions* in which the relevant *covered foreign person* undertakes (or in certain instances, the *U.S. person* knows will or plans to undertake) specified *covered activities.* The types of transactions that may constitute a *covered transaction* are the acquisition of an equity interest or *contingent equity interest;* certain debt financing that affords certain rights to the lender; the conversion of a *contingent equity interest;* a greenfield investment or other corporate expansion; a joint venture; and certain investments as an LP in a non-*U.S. person* pooled investment fund. Granting access to expertise or professional networks via a *U.S. person* is not a *covered transaction,* and thus is not subject to regulation under the Final Rule.

The commenter observes that the duties of the Assistant Secretary of the Treasury for Investment Security, as defined in 50 U.S.C. 4565(k)(4)(A)(ii)(II), must be ''principally related to [CFIUS].'' The Final Rule and the establishment of the Outbound Investment Security Program within the Treasury Department's Office of Investment Security are consistent with this requirement. Taking into account factors such as budget, personnel, and allocation of time, the Assistant Secretary for Investment Security's duties, and those of relevant Treasury Department staff, will remain principally related to CFIUS, even with the Outbound Investment Security Program coming under the Assistant Secretary's purview.

C. Summary of Comments to the Proposed Rule and Changes From the Proposed Rule

The discussion below summarizes comments submitted to the Proposed Rule and the Treasury Department's responses to those comments. For provisions that are not discussed below, the Treasury Department did not receive any substantive comments on those provisions and is implementing them in the Final Rule without substantive change from the Proposed Rule.

Subpart A—General

§ 850.101—Scope

Section 850.101 of the Proposed Rule outlined the scope of the Proposed Rule. Section 850.101(a) explained that the Proposed Rule implemented the Outbound Order, and § 850.101(b), (c), and (d) discussed at a high level certain key terms and requirements in the

Proposed Rule, namely *covered transactions* and *excepted transactions,* along with *notifiable* and *prohibited transactions* and the requirements for *U.S. persons* and *controlled foreign entities* regarding *notifiable* and *prohibited transactions.* Section 850.101(e) described requirements in the Outbound Order for the Secretary to communicate with Congress and the public with respect to implementation of the Outbound Order and consult with specified departments and agencies on various aspects of the Outbound Order and regulations.

The Treasury Department did not receive any comments on § 850.101 of the Proposed Rule. The Final Rule adopts § 850.101 in a form nearly identical to that in the Proposed Rule but makes some non-substantive edits to the structure of paragraphs (c) and (d) to clarify the requirements applicable to the Secretary's determination with respect to *covered activities.*

§ 850.104—Knowledge Standard

Under § 850.104 of the Proposed Rule, certain provisions, including in the definition of *covered transaction,* would have applied only if a *U.S. person knew* of a relevant fact or circumstance. The definition of *knowledge* in the Proposed Rule at § 850.216 included the following: actual knowledge that a fact or circumstance existed or was 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 definition of *covered transaction* in the Proposed Rule at § 850.210 generally would have required the *U.S. person* to *know* (or in some circumstances, to intend) at the time of a transaction that the transaction involved a *covered foreign person,* would have resulted in the establishment of a *covered foreign person* (in the case of a greenfield, brownfield, or a joint venture investment), or would have resulted in a *person of a country of concern's* engagement in a new *covered activity* (in the case of a business pivot). The Proposed Rule noted that the Treasury Department was not proposing to hold a *U.S. person* liable for a transaction that had all of the other attributes of a *covered transaction* but that the *U.S. person* did not *know* at the time (which would have included not having ''reason to know'' at the time) was involved with or would have resulted in a *covered foreign person.* As discussed in the Proposed Rule, if a *U.S. person* failed to conduct a ''reasonable and diligent inquiry'' at the time of a transaction and undertook the transaction where a particular fact or circumstance indicative of a *covered transaction* was present, the Treasury Department might have found in the course of determining compliance with the Proposed Rule that the *U.S. person* had reason to know of such fact or circumstance (and therefore, for purposes of the Proposed Rule, *knew*). To provide further clarity, the Proposed Rule, in § 850.216, included some of the factors that the Treasury Department would have considered in assessing whether a *U.S. person* undertook such an inquiry, as applicable. These included efforts to obtain contractual assurances and information that should have been obtainable through a reasonable transactional due diligence process with respect to the determination of a transaction's status as a *covered transaction* or relevant entity's status as a *covered foreign person.*

The Treasury Department received comments on several aspects of § 850.104 of the Proposed Rule. In response, the Treasury Department has made changes to clarify this provision in the Final Rule and discusses other issues below.

Commenters sought clarification or guidance on how the Treasury Department will evaluate the sufficiency of a *U.S. person's* due diligence as part of determining whether a ''reasonable and diligent inquiry'' occurred, citing potential obstacles to conducting due diligence in the PRC. Several commenters asked that the Treasury Department explicitly acknowledge the challenges of conducting due diligence in foreign jurisdictions and provide specific due diligence guidance, include language in the rule that makes clear that it will evaluate a *U.S. person's* due diligence efforts based on the totality of the facts and circumstances, and/or provide a safe harbor from enforcement if the *U.S. person* takes specific due diligence steps, such as soliciting or securing representations and warranties or using representative due diligence questions that some commenters requested be provided by the Treasury Department. A few commenters suggested that, with respect to the language in the Proposed Rule regarding a ''relevant counterparty,'' a *U.S. person's* due diligence obligations should be limited to obtaining certain representations and warranties in the relevant investment agreement.

As in the Proposed Rule, § 850.104(c) of the Final Rule sets forth an illustrative list of factors that the Treasury Department will consider in assessing whether a *U.S. person* has undertaken a ''reasonable and diligent inquiry'' with respect to a particular transaction. The Treasury Department recognizes that some of the considerations in 850.104(c) may be inapplicable to a given transaction. In response to comments seeking clarity regarding how the Treasury Department will evaluate the sufficiency of a *U.S. person's* due diligence, the Treasury Department has added a new paragraph (d) to § 850.104 of the Final Rule to clarify that the Treasury Department's assessment of whether a *U.S. person* has undertaken a ''reasonable and diligent inquiry'' will be made based on a consideration of the totality of relevant facts and circumstances. This new language accounts for the circumstance where a *U.S. person* may face obstacles to conducting due diligence, while preserving the necessary flexibility to consider the individual facts and circumstances of a transaction when assessing whether a ''reasonable and diligent inquiry'' has occurred.

The Treasury Department declines to include a safe harbor provision or to prescribe specific due diligence obligations in the Final Rule. Rather, the Final Rule is designed to address the fact-specific and individualized nature of each transaction by offering an illustrative list of considerations at § 850.104(c), in combination with § 850.104(d), as described above.

One commenter stated that the Treasury Department should not consider an entity's refusal to make representations or warranties to be a warning sign, by itself, while another commenter stated that they did not believe they would be able to credibly assess information received from an investment target for warning signs. Given the variety of forms a warning sign could take, the Final Rule does not prescribe what a warning sign or red flag would be, but § 850.104(d) addresses commenter concerns by stating that the totality of the relevant facts and circumstances shall be considered in determining if the *U.S. person* has undertaken a ''reasonable and diligent inquiry.'' If, for example, a *U.S. person* is unable to obtain certain information from a transaction counterparty, or unable to obtain relevant representations or warranties, the presence or absence of other relevant factors may be relevant to the consideration of whether, in totality, the *U.S. person* undertook a ''reasonable and diligent inquiry.''

Commenters also requested clarification that a *U.S. person* will not be held responsible for an investment target's provision of false or inaccurate information or failure to provide information, or at least will have safe

harbor for good faith reliance on the information provided absent warning signs or contradictory information. Another commenter noted that *U.S. persons* would have to rely on unverified responses from prospective portfolio companies because much of the information would be in the exclusive possession of the target company and may be proprietary.

The Treasury Department acknowledges that in certain instances, information required to assess whether a transaction is a *covered transaction* may be difficult to ascertain. In such circumstances, and in the absence of warning signs, a *U.S. person* may wish to obtain representations or warranties from the relevant transaction counterparty regarding pertinent information such as the investment target or counterparty's ownership, investments, and activities.

Multiple commenters sought clarification regarding how the Treasury Department will evaluate a *U.S. person's* efforts to obtain information in the context of an assessment of a ''reasonable and diligent inquiry.'' One commenter asked that the Treasury Department not evaluate a *U.S. person's* efforts to obtain non-publicly available information, but merely assess whether they evaluated what was in their possession. The commenter stated that it would be sufficient for the Treasury Department to make clear that this factor, and others, would be evaluated in light of the totality of the facts and circumstances, including the sophistication of the *U.S. person.* One commenter asked for clarification regarding the degree of effort that a *U.S. person* must exert to obtain non-publicly available information. Another questioned what ''available'' means—whether it refers to information in the *U.S. person's* possession, information that the *U.S. person* could obtain in the normal course of business, or information that must be sought. A few commenters indicated that they did not believe they would be able to review all publicly available information about a target due to the voluminous amount of public information often available regarding a target, much of it not in English, and the timeframes on which many venture capital deals occur. One commenter asked whether a risk-based approach was sufficient. Another commenter asked for clarification that only *U.S. persons* who are party to *covered transactions* are obligated to conduct the required ''reasonable and diligent inquiry.''

Other commenters sought information about the degree to which a *U.S. person* must access commercially available databases, while another commenter requested guidance regarding which sources for non-publicly available information a *U.S. person* should review. Another commenter suggested that, in absence of specific guidance, the Treasury Department include a safe harbor for good faith reliance on a reasonable interpretation of the rule's requirements.

Under the Final Rule, a *U.S. person* is responsible for *knowledge* the *U.S. person* had or could have had through a ''reasonable and diligent inquiry.'' The Treasury Department expects a *U.S. person* to make a reasonable effort, taking into account the context of a given transaction and any warning signs, among other factors.

The Final Rule adopts, with minor changes, the text of § 850.104(c)(3) and (4) from the Proposed Rule regarding ''available non-public information'' and ''available public information'' as well as a *U.S. person's* efforts to obtain it. The text of § 850.104(c)(3) now refers to the ''efforts,'' rather than effort, of the *U.S. person,* for consistency with § 850.104(c)(4). Both sub-paragraphs now focus on the efforts of the *U.S. person* ''as of''—instead of ''at''—the time of the transaction. The Treasury Department assesses that the phrase ''as of'' better describes the process of due diligence leading up to and including the time of the transaction. Sections 850.104(c)(3) and 850.104(c)(4) have been further revised to describe efforts by the *U.S. person* to ''obtain and consider'' available non-public and public information, respectively, clarifying that the *U.S. person's* evaluation or assessment of the available public and non-public information is relevant. The Treasury Department assesses that the language in § 850.104(c) is otherwise sufficiently clear on its face, particularly in combination with the added § 850.104(d) that, as discussed above, explains that the ''the totality of the relevant facts and circumstances'' should be considered. Limiting consideration only to the information already in a *U.S. person's* possession, as one commenter requested, could incentivize purposeful blindness and is inconsistent with the intent of the Final Rule to require reasonable ''inquiry'' where certain relevant facts may not already be known to the *U.S. person.*

At the same time, § 850.104(c) of the Final Rule does not require a *U.S. person* to obtain and consider ''all'' publicly available information, and this is clear from the fact that the word ''all'' is not included in this paragraph. Instead, the expectation is that a *U.S. person* undertake a reasonable and diligent approach to gathering and assessing information. The practical implication of such an approach may mean that, for example, a *U.S. person* investor is generally expected to view a transaction counterparty's responses or statements in light of other information contained in commercially available information sources in addition to information that is freely available to the general public. Such diligence is commonplace when investors are considering a transaction—such as when conducting diligence with respect to risks related to sanctions, bribery and corruption, or litigation exposure.

The Final Rule also includes a related technical edit to § 850.104(c)(7), adding ''available'' before ''public and commercial databases.'' This edit is being made to clarify the scope of databases that may be reviewed and to be consistent with how other sources of information in § 850.104(c) are qualified with ''available.'' It is not intended to affect the substance of the requirement.

One commenter requested that the Treasury Department identify specific standards or considerations for what constitutes a ''reasonable and diligent inquiry'' for an LP in an investment fund where the LP cannot reasonably know the specific targets of the fund. Another commenter asked that the Treasury Department publish a list of *covered foreign persons* to supplement—not replace—*U.S. person* due diligence efforts.

The Treasury Department notes that the foregoing discussion of the knowledge standard and a ''reasonable and diligent inquiry'' is generally applicable to an investment by a *U.S. person* and, like the Final Rule's approach to *knowledge* generally, is intended to account for a variety of situations and transaction structures. This also applies in the context of a *U.S. person* LP's investment into a non-U.S. pooled investment fund. The Treasury Department declines to prescribe, in the Final Rule, particular assurances for an LP to seek from the manager of a fund or specific standards or considerations in situations where a *U.S. person* LP does not *know* a fund's specific investment targets at the time of the *U.S. person* LP's investment. As discussed further in the discussion of the definition of an *excepted transaction* below, the Treasury Department has determined to except *U.S. person* LP investments into funds if the *U.S. person* has obtained a binding contractual assurance that its capital in the fund will not be used to engage in a transaction that would be a *notifiable transaction* or a *prohibited transaction,* as applicable, if engaged in by a *U.S.*

person. Consistent with the Treasury Department's approach to the knowledge standard, the Treasury Department does not specify the particular language of such a binding contractual assurance. The Treasury Department also declines to provide a list of *covered foreign persons* in § 850.104 or elsewhere for the reasons set forth in the discussion of the definition of *covered foreign person* below.

One commenter requested the reference to legal counsel in § 850.104(c)(5) be deleted, arguing that it would permit an inappropriate imputation of knowledge to the *U.S. person.* In response and for consistency throughout § 850.104(c), the Treasury Department has removed the references to ''legal counsel'' from § 850.104(c)(1) and (5) of the Final Rule. Under the Final Rule, a *U.S. person* is responsible for information such person *knew* or should have known, following a ''reasonable and diligent inquiry,'' although the Treasury Department notes that due diligence may be conducted on behalf of a *U.S. person* by the *U.S. person's* legal counsel or other representative.

A number of commenters requested clarification regarding the definition of ''relevant counterparty'' in § 850.104(c), stating that if the term were to include other investors of the relevant fund or other owners of the target portfolio company, then the necessary due diligence would be unduly burdensome. As such, one commenter asked that the term be defined to mean a party to the transaction, while others requested limiting the required diligence to parties participating in the transaction.

In response, the Treasury Department has adopted the suggestion made by commenters and modified § 850.104(c) to refer to ''an investment target or other relevant transaction counterparty (such as a joint venture partner)'' where applicable. This change is intended to clarify that as a general matter, the Treasury Department does not expect diligence to be conducted on *persons* who are not parties to the transaction. However, inquiries related to non-parties, such as beneficial owners or downstream entities that are not technically parties to the transaction, may be necessary to determine, for example, whether a party to a transaction is a *person of a country of concern* or a *covered foreign person.* Further, the Treasury Department believes the language regarding a ''reasonable and diligent inquiry'' is clear, as written, in referring to a *U.S. person* that is party to a transaction, rather than unrelated *U.S. persons.*

Commenters expressed similar views with respect to the feasibility of conducting due diligence to determine whether the criteria for a *person of a country of concern* is met. Some commenters expressed concern that the definition would require due diligence with respect to all investments. One commenter requested a standard with specific factors for investments in private equity or venture capital funds, such as researching past investments, engaging with the general partner, and reviewing a fund's prospectus. Another commenter recommended that the rule include factors for identifying a *person of a country of concern,* as well as language deeming an inquiry reasonable and diligent, ''if and only if, based on these factors, it will typically be adequate to correctly identify persons of concern.''

Given the wide variety of possible transaction structures and for the reasons stated above, the Treasury Department declines to adopt prescriptive diligence standards as they relate to particular transaction structures or the application of a particular definition in the Final Rule. Instead, the knowledge standard discussed in the Final Rule, the specific factors enumerated in § 850.104(c), and the consideration of the totality of relevant facts and circumstances described in § 850.104(d) explain the obligations and expectations regarding due diligence under the Final Rule.

Knowledge Standard—Final Rule Summary

The Final Rule specifies that certain provisions, including § 850.210, which defines *covered transaction,* will apply only if a *U.S. person* has *knowledge* of the relevant facts or circumstances at the time of a transaction. The definition of *knowledge* set out in § 850.216 includes any of 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 definition of *covered transaction* requires the *U.S. person* to *know* at the time of a transaction that the transaction involves a *covered foreign person,* will result or is planned to result in the establishment of a *covered foreign person* (in the case of a greenfield, brownfield, or joint venture investment), or will result or is planned to result in a *person of a country of concern's* engagement in a *covered activity* (in the case of a brownfield investment). The Treasury Department will not consider a transaction that has all of the other attributes of a *covered transaction* but that the *U.S. person* does not *know* at the time of the transaction (which includes not having ''reason to know'' at the time of the transaction) involves or will result in a *covered foreign person* to be a *covered transaction* subject to the notification requirement or prohibition, as applicable. The Treasury Department notes, however, that if the *U.S. person* subsequently acquires actual knowledge of a fact or circumstance that, if known at the time of the transaction, would have caused the transaction to be a *covered transaction,* the *U.S. person* is required to notify the Treasury Department pursuant to § 850.403 of the Final Rule. If a *U.S. person* fails to conduct a ''reasonable and diligent inquiry'' at the time of a transaction and undertakes the transaction where a particular fact or circumstance indicative of a *covered transaction* is present, the Treasury Department may find in the course of determining compliance with the Final Rule that the *U.S. person* had reason to know (and therefore, for purposes of the proposed rule, *knew*) of such fact or circumstance. To provide clarity, § 805.104 of the Final Rule includes some of the factors that the Treasury Department will consider in assessing whether a *U.S. person* undertook such an inquiry. That inquiry will be based on a consideration of the totality of the facts and circumstances. These include efforts to obtain information and contractual assurances that should be obtainable through a reasonable transactional due diligence process with respect to the determination of a transaction's status as a *covered transaction* or relevant entity's status as a *covered foreign person.* Accordingly, the Final Rule adds a new provision clarifying that an assessment of whether a *U.S. person* has undertaken a ''reasonable and diligent inquiry'' will be made based on a consideration of the totality of relevant facts and circumstances.

If a *U.S. 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 will result in a *covered foreign person* in a way that will render the transaction a *covered transaction,* the knowledge requirements in § 850.210 are not met.

The Treasury Department anticipates making additional information available on its Outbound Investment Security Program website regarding topics such as the application of the knowledge standard.

Subpart B—Definitions

§ 850.202—AI System

As discussed in the Proposed Rule, the U.S. Government is concerned with the development of *AI systems* that enable the military modernization of *countries of concern*—including weapons, intelligence, and surveillance capabilities—and those that have applications in areas such as cybersecurity and robotics. Additionally, the U.S. Government is concerned with software and hardware, among other things, that incorporate such *AI systems.* The policy objective of the definition is to cover U.S. investment into entities that develop *AI systems* with applications that pose, or have the potential to pose, significant national security risks, without broadly capturing investments into entities that develop *AI systems* intended only for consumer applications or other civilian end uses with no potential national security consequences. To address these concerns, the Proposed Rule included a notification requirement and a prohibition with respect to investments into entities engaged in certain *covered activities* involving *AI systems.*

Under the Proposed Rule, *AI system* was defined in § 850.202(a) as a machine-based system with certain specified functions and characteristics. Section 850.202(b) of the Proposed Rule included within the definition of the term any data system, software, hardware, application, tool, or utility that operated in whole or in part using such a machine-based system. As noted in the Proposed Rule, this definition combined the definitions of ''artificial intelligence'' and ''AI system'' from Executive Order 14110, ''Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence'' issued on October 30, 2023 (the AI Order).

Several commenters expressed concern about the breadth of the definition in the Proposed Rule. One commenter argued that the definition did not differentiate products that pose a national security risk from those that do not. Others requested the removal of § 850.202(b) from the definition of *AI system,* noting that its inclusion would cover products, services, or applications that incorporate AI for internal or commercial use, which may not pose national security risks. Commenters cited the recent practice among technology firms to leverage, rather than develop, AI by incorporating AI capability into existing systems. Commenters suggested narrowing the definition of *AI system* to limit the impact on such firms and also make the rule more administrable. One commenter requested that *AI systems* for medical use be excluded from the definition.

The Final Rule makes clarifying edits to the definition of *AI system* at § 850.202(a) by moving the clause ''uses data inputs to'' from (a) to (a)(1) in order to be consistent with the definition in the AI Order, and adjusts the first word at the beginning of each of (a)(2) and (a)(3) accordingly. Otherwise, the Final Rule adopts the text of § 850.202 from the Proposed Rule. The Treasury Department considered the comments requesting a narrower definition of *AI system* and the Final Rule adopts the text of § 850.202 from the Proposed Rule. However, in response to the comments, the Final Rule adds two notes to each of §§ 850.217 and 850.224. Note 2 clarifies how *AI systems* defined at § 850.202(b) are implicated by the criteria of *notifiable* and *prohibited transactions.* The Treasury Department notes that the scope of the *AI systems* definition is intentional, since a *covered transaction* involving an *AI system,* whether that system is an AI model or machine-based system described at § 850.202(a) or a system operating in whole or in part using a system described at § 850.202(a), that meets one or more of the listed end-use or computing power thresholds could contribute to the advancement of military, intelligence, surveillance, or cyber-enabled capabilities by a *country of concern.* While the scope of *AI systems* as defined at § 850.202(b) may implicate a range of persons who use third-party AI models or machine-based systems in a data system, software, hardware, application, tool, or utility, the Treasury Department notes that such persons would be implicated by the Final Rule only to the extent they *develop* the *AI system* defined at § 850.202(b) by engaging in the activities enumerated in § 850.211, such as design or substantive modification, with respect to the relevant third-party AI model or machine-based system being used. For example, a *person* engaging in substantive modifications of a third-party AI model that is being used by a data system, software, hardware, application, tool, or utility to operate in whole or in part, such as removing security measures or safeguards of the third-party AI model, would be *developing* an *AI system.* The addition of Note 2 clarifies this point, consistent with the definition for *develop* at § 850.211. The Final Rule also adds a Note 3 to each of §§ 850.217 and 850.224 to provide a carve-out for customizing, configuring, or fine-tuning a third-party AI model or machine-based system that is being used by a data system, software, hardware, application, tool, or utility to operate in whole or in part, where such customization, configuration, or fine-tuning of the third-party AI model or machine-based system is strictly for a *person's* own internal, non-commercial use. Such activity would not itself trigger the notification requirements or prohibition delineated in § 850.217 or § 850.224, respectively, for *covered transactions* involving *AI systems,* unless it has government intelligence, mass-surveillance, or military end use, or is for digital forensics tools, penetration testing tools, or the control of robotic systems.

One commenter requested that the Treasury Department clarify that the computing power thresholds for a *notifiable transaction* or *prohibited transaction* involving an *AI system* pertain to the combined computing power required to train a given *AI system,* including computing power used to train relevant sub-models or generate inputs to inform such an *AI system.* The purpose of this clarification would be to prevent undercounting of computing power for an *AI system* where a *covered foreign person* may develop an AI system by combining smaller models or the learnings of other models. The same commenter also requested clarification regarding whether different versions of an *AI system* would be considered one system or multiple *AI systems,* and if adaptations of an *AI system* would be considered a new or distinct *AI system.*

The Treasury Department notes that the computing power thresholds refer to the aggregate or combined computing power required to train a given *AI system.* For example, the computing power required to train an *AI system* that is a combination of smaller, pre-trained AI models would be the summation of computing power required to train and combine each component model of the *AI system.* Similarly, developing an AI model based on the transfer of knowledge from one model to another would include the computing power required to train both models. The Treasury Department intends *persons* employing techniques to develop *AI systems* that are derived from, or are a combination of, other *AI systems* to evaluate the aggregate computing power required for training when assessing whether the *AI system* meets the criteria set forth in §§ 850.217(d)(3) and 850.224(k). For the purposes of assessing whether an *AI system* has any of the end-use applications set forth in §§ 850.217(d) and 850.224(j), the Treasury Department

notes that different versions of an *AI system,* including adaptations, derivatives, subsequent generations, or successor systems, should be assessed as distinct *AI systems* since the designed end-use or capabilities of a successor system could vary from a prior version.

One commenter stated the Treasury Department would need to hire technical staff to monitor changes in the AI marketplace and suggested the Treasury Department leverage technical talent at other U.S. Government agencies if the roles cannot be maintained within the Treasury Department. In response to this comment, the Treasury Department notes that the Outbound Order directs the Treasury Department to consult with relevant U.S. Government agencies on the implications for military, intelligence, surveillance, or cyber-enabled capabilities of covered national security technologies and products and potential covered national security technologies and products. The Treasury Department has leveraged the expertise of other U.S. Government agencies through the rulemaking process and will continue to do so in the implementation and administration of the Final Rule.

§ 850.205—Contingent Equity Interest

The Proposed Rule defined a *contingent equity interest* as a financial instrument that ''currently does not constitute an equity interest but is convertible into, or provides the right to acquire, an equity interest upon the occurrence of a contingency or defined event.'' While the Treasury Department did not receive any comments to the Proposed Rule's definition of *contingent equity interest,* there were several comments that sought additional clarity on what types of contingent or convertible equity interests would be included in the definition of *covered transaction* at § 850.210(a)(1) and (3) of the Proposed Rule (defining *covered transactions* involving the acquisition or conversion of a *contingent equity interest*).

In response to these comments, the Final Rule modifies the definition of *contingent equity interest* at § 850.205 of the Proposed Rule. The definition of *contingent equity interest* in the Final Rule refers to a ''financial interest,'' rather than a ''financial instrument'' as in the Proposed Rule. As described below in the discussion to § 850.210 of the Final Rule, this change is intended to more accurately reflect the Treasury Department's intent to cover the acquisition or conversion of interests that are convertible into an equity interest, or provide the right to acquire equity interests. The definition of *contingent equity interest* in the Final Rule also clarifies that debt can constitute a financial interest that is convertible into, or provides the right to acquire, an equity interest.

§ 850.206—Controlled Foreign Entity

The Proposed Rule defined *controlled foreign entity* as an entity incorporated in, or organized under the law of, a country other than the United States of which a *U.S. person* was a *parent.* Section 850.219 of the Proposed Rule defined *parent* as a *U.S. person* that directly or indirectly held more than 50 percent of the outstanding voting interest or voting power of the board of the entity; was a general partner, managing member, or equivalent of the entity; or, if the entity was a pooled investment fund, was an investment adviser to any such fund. Section 850.302 of the Proposed Rule would have placed obligations on a *U.S. person* to take all reasonable steps to prohibit and prevent its *controlled foreign entity* from undertaking a transaction that would have been a *prohibited transaction* if undertaken by a *U.S. person,* and § 850.402 would have required a *U.S. person* to notify the Treasury Department if its *controlled foreign entity* undertook a transaction that would have been a *notifiable transaction* if undertaken by a *U.S. person.* The Treasury Department proposed defining *controlled foreign entity* using a bright line so that a *U.S. person* could easily ascertain whether an entity was its *controlled foreign entity.* The Treasury Department invited comments regarding this definition, including considerations with respect to the definition's inclusion of entities established outside of the United States.

The Treasury Department received several comments on the definition of *controlled foreign entity.* After considering these comments, the Final Rule adopts § 850.206 as in the Proposed Rule without changes.

One commenter expressed support for the 50 percent threshold set forth in the definition of *parent* in § 850.219 of the Proposed Rule (and referred to in the definition of *controlled foreign entity* in § 850.206(a)) because it would provide a bright line framework to assist industry in complying with the rule's requirements. The Treasury Department notes that paragraph 850.206(b) of the Proposed Rule delineated how the holdings of voting interest or voting power of the board of a subsidiary would have been attributed to the *parent.* Where the relationship between one entity and another would have been that of *parent* and subsidiary, attribution would have been full. Where the relationship between an entity and another entity would have not been that of *parent* and subsidiary (*i.e.,* because the holdings of voting interest or voting power of the board of the first entity in the second entity would be 50 percent or less), then the indirect downstream holdings of voting interest or voting power of the board would have been attributed proportionately to the first entity.

Another commenter stated that the Proposed Rule's definition of *controlled foreign entity* applied the 50 percent threshold to voting interest, which the commenter argued ''deviates significantly from ANPRM, which had proposed basing the 50% calculation on revenue, income, expenditure and operating expense.'' The commenter questioned whether a *U.S. person* with a 51 percent voting interest would be able to prevent its *controlled foreign entity* from entering into a *prohibited transaction* and suggested that the requirement would ''impose an unrealistic knowledge standard'' on the *U.S. person,* particularly in certain roles such as an investment adviser. This commenter appears to have conflated the ANPRM's discussion of the term *controlled foreign entity* with its discussion of the term *covered foreign person,* a distinct term with a distinct definition, where revenue, income, expenditure, and operating expenses were discussed as part of the definition in the ANPRM and the NPRM. (See more below regarding the definition of *covered foreign person*.) Additionally, with a threshold above 50 percent of the ''outstanding voting interest'' or ''voting power of the board'' of an entity, it is reasonable to expect the *U.S. person parent* to have the power to influence the compliance infrastructure of its subsidiary. For a non-U.S. pooled investment fund of which a *U.S. person* is an adviser (meaning again that the *U.S. person* is a *parent* and the fund is its *controlled foreign entity*), investment advisers often manage the investment portfolios of such pooled investment funds.

Commenters requested that the Treasury Department clarify that the *U.S. person parent* under 850.206(a) must be the ultimate parent entity and not an intermediary *U.S. person* without ultimate decision-making authority. In response, the Treasury Department has added a note (Note 1) to the definition of *parent* at § 850.219 of the Final Rule to clarify that a *U.S. person* that meets the definitional requirements of *parent* under § 850.219 constitutes a *parent,* including a *U.S. person* that is an

intermediate entity. Further information on the definition of *parent* is below in the discussion of § 850.219.

Controlled Foreign Entity—Final Rule Summary

The Final Rule defines *controlled foreign entity* as an entity incorporated in, or otherwise organized under the laws of, a country other than the United States of which a *U.S. person* is a *parent.* Section 850.219 of the Final Rule defines *parent* as a *U.S. person* that directly or indirectly holds more than 50 percent 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.

In determining whether a *U.S. person* indirectly holds voting interest or voting power of the board via a tiered ownership structure for purposes of this section of the Final Rule, where the relationship between an entity and another entity is that of a *parent* and subsidiary, the voting interest or voting power of the board of a subsidiary will be fully attributed to the *parent.* By contrast, if an entity holds 50 percent or less of another entity's voting interest or voting power of the board—that is, if the relationship is not a *parent*-subsidiary relationship—then the indirect downstream holdings of voting interest or voting power of the board, as applicable, attributed to the first entity will be determined proportionately.

If a *U.S. person* holds both direct and indirect holdings in the same entity, the direct and indirect holdings of the *U.S. person's* voting interest or voting power of the board, as applicable, will be aggregated. For the avoidance of doubt, each of these metrics (voting interest or voting power of the board) will be evaluated independently from the other. For example, if an entity has 20 percent of its voting interest and 15 percent of its voting power of the board each held by a *U.S. person,* these percentages will not be combined to equal 35 percent.

Section 850.206 should be read in connection with §§ 850.302 and 850.402, which place obligations on a *U.S. person* to take all reasonable steps to prohibit and prevent its *controlled foreign entity* from undertaking a transaction that would be a *prohibited transaction* if undertaken by a *U.S. person,* and to notify the Treasury Department if the *controlled foreign entity* undertakes a transaction that would be a *notifiable transaction* if undertaken by a *U.S. person,* respectively.

§ 850.208—Covered Activity

The Proposed Rule identified activities that would provide the relevant nexus between the *covered foreign person* and the covered national security technologies and products described in the Outbound Order. The Outbound Order defines the term ''covered national security technologies and products'' to mean sensitive technologies and products in the semiconductors and microelectronics, quantum information technologies, and AI sectors that are critical for the military, intelligence, surveillance, or cyber-enabled capabilities of a *country of concern,* as determined by the Secretary in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies. The Outbound Order further states that, where applicable, ''covered national security technologies and products'' may be limited by reference to certain end uses of those technologies or products.

The three primary definitions in the Proposed Rule implementing the term ''covered national security technologies and products'' were *covered activity, notifiable transaction,* and *prohibited transaction.* The term *covered activity* meant, in the context of a particular transaction, any of the activities referred to in the definition of *notifiable transaction* in § 850.217 or *prohibited transaction* in § 850.224.

The definitions of *notifiable transaction* and *prohibited transaction* in the Proposed Rule identified specific *covered activities* relevant to the technologies or products within each category. Some such *covered activities* related to semiconductors and microelectronics technology, equipment, and capabilities that enabled the production and certain uses of integrated circuits that underpin current and future military innovations that improved the speed and accuracy of military decision-making, planning, and logistics, among other things; as well as that enabled mass surveillance or other cyber-enabled capabilities. The Proposed Rule also addressed *covered activities* related to quantum information technologies and products that enabled capabilities that could have compromised encryption and other cybersecurity controls and jeopardize military communications, among other things. In the case of a quantum sensing platform or quantum network, the end-use provision would have avoided covering use cases in strictly civilian fields. Finally, the Proposed Rule addressed *covered activities* related to certain *AI systems* with applications that posed or had the potential to pose significant national security risks. The Proposed Rule did not seek to broadly capture *AI systems* intended only for commercial applications or other civilian end-uses that did not have potential national security consequences.

The Treasury Department received several comments related to the definition of *covered activity* that focused on certain aspects of the definitions of *notifiable transaction* and *prohibited transaction.* Those comments are discussed in the sections below on *notifiable transaction* and *prohibited transaction.*

In the Final Rule, the Treasury Department adopts § 850.208 without change from the Proposed Rule. C*overed activity* means, in the context of a particular transaction, any of those activities included in the definition of *notifiable transaction* in § 850.217 or *prohibited transaction* in § 850.224. The term *covered activity* encompasses technologies and products that may contribute to the threat to the national security of the United States by cross-referencing the definition of *notifiable transaction* and also incorporates those technologies and products that pose a particularly acute national security threat by cross-referencing the definition of *prohibited transaction.* The scope of *notifiable transaction* and the scope of *prohibited transaction* are intended to be distinct and not overlap. The Treasury Department intends the notification requirement to increase the U.S. Government's visibility into *U.S. person* transactions involving the relevant technologies and products and expects that these notifications will be helpful in highlighting aggregate sector trends and related capital flows as well as informing future policy development. The prohibitions are tailored restrictions on specific, identified areas to prevent *U.S. persons* from investing in the development of technologies and products that pose a particularly acute national security threat. Both the specific *covered activities* as well as the technical descriptions in the Final Rule were scoped with these objectives in mind.

§ 850.209—Covered Foreign Person

The Outbound Order requires the Treasury Department to prohibit or require notification of certain transactions involving a *covered foreign person* and defines the term as ''a person of a country of concern who or that is engaged in activities, as identified in the regulations issued under [the Outbound Order], involving one or more covered national security

technologies and products.'' The definition of *covered foreign person* in the Proposed Rule described three sets of circumstances that would have caused a *person* to be a *covered foreign person:*

- A *person of a country of concern* that engages in a *covered activity* (§ 850.209(a)(1));
- Any person that has a particular relationship with a *person of a country of concern* that engages in a *covered activity—i.e.,* where (1) the person holds a specific interest in such *person of a country of concern,* such as a voting interest, board seat, equity interest, or the power to direct or cause the direction of the management or policies of the *person of a country of concern* through contractual arrangement(s) (including, for the avoidance of doubt, any contractual arrangement with respect to a variable interest entity); and if there is such an interest, (2) more than 50 percent of the first person's revenue, net income, capital expenditure, or operating expenses is attributable to such *person of a country of concern,* individually or in the aggregate (§ 850.209(a)(2)); or
- A *person of a country of concern* that participates in a joint venture with a *U.S. person* if such joint venture engages or intends to engage in a *covered activity* (§ 850.209(a)(3)).

One commenter stated that the definition of a *covered foreign person* in § 850.209(a)(1) would impact a broad range of businesses and activities because the definition of ''national security technologies and products'' in the Proposed Rule was ''obscure.'' The Treasury Department notes that ''national security technologies and products'' was not a defined term in the Proposed Rule, although the Outbound Order does refer to ''covered national security technologies and products'' as noted above in the discussion of § 850.208. The Outbound Order directs the Treasury Department to issue regulations that identify categories of *notifiable transactions* as well as categories of *prohibited transactions* that involve ''covered national security technologies and products.'' Both the Proposed Rule and this Final Rule define *notifiable transaction* and *prohibited transaction,* and the definition of a *covered activity* in § 850.208 of the Final Rule specifies that it refers to ''any of the activities referred to'' in those definitions. The commenter did not offer concrete suggestions regarding where or how any of the foregoing defined terms could be modified.

Covered Foreign Person—''Engages In''

A number of commenters suggested that the term ''engages in,'' as used in § 850.209(a)(1) of the Proposed Rule to connect a *person of a country of concern* to a *covered activity,* should be further defined or clarified. One commenter stated that without further clarification, ''engages in'' could include ancillary activities such as the ownership of intellectual property, the direction of other companies' or entities' activities, or involvement in *covered activities* by an affiliate of the investment target. Another commenter requested clearer criteria linked to financial or business activities to avoid overbreadth.

As used in § 850.209(a)(1), the function of ''engages in'' is simply intended to provide a link between the *person of a country of concern* and the specified activities described in detail in §§ 850.217 (*notifiable transaction*) and 850.224 (*prohibited transaction*) (which, taken together, comprise the definition of *covered activity* in § 850.208). In other words, the language ''engages in'' is a succinct way to capture the activities described in §§ 850.217 and 850.224, such as designs, fabricates, packages, develops, and produces, among other things. The Treasury Department therefore considers the criteria for a *covered activity* to be sufficiently clear given the specificity with which the enumerated *covered activities* are described in relevant part in §§ 850.217 and 850.224 of the Final Rule. Similarly, various ancillary activities noted by commenters in response to this provision, as well as in response to the definition of *covered transaction* in § 850.210 (see the discussion of *covered transaction* below), would not be within the scope of the Final Rule if they do not meet the criteria set forth in the definition of a *covered transaction* (including the terms used in that definition).

One commenter asked that the rule distinguish between activities that are legitimately part of a *person of a country of concern*'s normal operations and those activities that might be conducted by individual employees or without the guidance or supervision of a *person of a country of concern*'s management. One commenter asked that the Treasury Department clarify that an entity must directly implement the *covered activity.*

Regarding the distinction that one commenter raised between a *covered activity* that is *known* to a *person of a country of concern* investment target and employee-level activity that is not authorized by or not *known* to an investment target's management, under the Final Rule, whether or not a transaction is a *covered transaction* depends in part on whether the *U.S. person knows,* based on a reasonable and diligent inquiry, that the investment target or relevant transaction counterparty (such as a joint venture) is a *covered foreign person.* It may be the case that if the investment target itself was unaware that its employees were engaging in a *covered activity,* the *U.S. person* would not have reason to *know* that the investment target was engaging in a *covered activity,* particularly if no other information was available to indicate the presence of such activity. In response to one commenter's question about whether an entity must ''directly implement'' a *covered activity,* absent other facts (such as an intent to evade the Final Rule), to be assessed to be ''engaging in'' a *covered activity,* a *person of a country of concern* would need to perform one of the specific actions set forth in either § 850.217 or § 850.224. To be assessed to be ''engaging in'' a *covered activity* described in § 850.217(a), for example, would require that the relevant *person of a country of concern* itself *designs* the integrated circuit, as described in that paragraph.

One commenter suggested that a *person of a country of concern* should be considered to ''engage'' in a *covered activity* only if it either conducts or participates in a *covered activity* or has a ''demonstrated business objective'' to conduct or participate in a *covered activity.* The Treasury Department declines to make the changes suggested in this comment. The use of the language ''conducts or participates'' in place of ''engages in'' is not necessary given the Treasury Department's explanation of the role of ''engages in'' above, and the use of two verbs instead of one could introduce ambiguity. Regarding a ''demonstrated business objective,'' under the Final Rule, a *U.S. person* is responsible for information such person *knew* or should have known, following its own ''reasonable and diligent inquiry,'' as to whether a *person of a country of concern* ''engages in'' a *covered activity.* While such inquiry may take into account any ''demonstrated business objectives,'' identification of a ''demonstrated business objective'' is not necessary for a *person of a country of concern* to ''engage'' in a *covered activity,* nor is the identification of such an objective necessarily part of a ''reasonable and diligent inquiry.'' In addition, and independently, the Treasury Department believes that a *person of a country of concern* ''engaging in'' a *covered activity* raises national security

concerns regardless of whether such activity comprises a ''business objective'' at that time. For example, early-stage entities may develop certain technologies that are not yet part of a ''business objective,'' but might become so later. In addition, and independently, a ''demonstrated business objective'' can frequently refer to future intent, while ''engages in'' as used in § 850.209(a)(1) refers to the underlying activities of an investment target at the time of the *covered transaction,* although this does not remove from coverage certain transactions intended to evade the Final Rule, such a *covered foreign person's* raising capital from a *U.S. person* investor for the specific purpose of ''engaging in'' a *covered activity.* (See further discussion of this issue below.)

Commenters asked about the temporal aspects of ''engages in.'' One recommended that ''engages in'' require that engagement in a *covered activity* be ''active and ongoing,'' while another commenter asked whether past activity, ceased at the time of a transaction, would be covered. One suggested a definition of ''engages in'' to address both their questions about the temporal scope of ''engages in'' as well as their requested inclusion of a de minimis threshold (discussed further below), which would define ''engages in'' as: ''(a) conducts or participates in a covered activity or (b) has a demonstrated business objective to conduct or participate in a covered activity.''

The Treasury Department has determined not to change § 850.209(a)(1) in the Final Rule. The Treasury Department notes that in the context of § 850.209(a)(1), ''engages in,'' which is phrased in the present tense, refers to a *person* performing the specific actions described in detail in §§ 850.217 and 850.224 at the time of a transaction, and does not have retroactive applicability. A *person of a country of concern* ''engaging in'' the *covered activity* described in § 850.217(a), for example, would require that the *person of a country of concern* itself *designs* the integrated circuit, as described in that paragraph, at the time of a *covered transaction.* While the use of the present tense of the verb ''engages'' is deliberate, a *person of a country of concern* cannot avoid application of the Final Rule simply by ceasing the *covered activity* during fundraising only to resume the *covered activity* following the fundraising (see § 850.604). Nor does the present tense remove from coverage a *person of a country of concern* that, for example, is raising capital from a *U.S. person* investor for the specific purpose of ''engaging in'' a *covered activity.* In other words, ''engages in'' refers to an attribute of an entity's business, not a condition that it be continuously occupied with a particular activity.

Several commenters requested that the Treasury Department consider a de minimis activity threshold in the definition of a *covered foreign person* as it relates to their ''engagement'' in a *covered activity,* below which the definition of *covered foreign person* would not apply. Several commenters stated that compliance challenges could arise without such a threshold, including ambiguity in the definition of *covered foreign person.* One commenter noted that such a threshold would be necessary to avoid unintended consequences for transactions that have no nexus to national security because the *covered activity* ''engaged in'' by the investment target may be unrelated to the transaction itself.

The Treasury Department declines to institute a de minimis exception with respect to the ''engages in'' language of § 850.209(a)(1). Setting a de minimis threshold based on the level of activity involving a covered technology or product would be challenging from a regulatory and administrative perspective and would likely introduce ambiguity. In response to comments regarding ambiguity in the Proposed Rule's formulation (which has been adopted without changes in the Final Rule), the Treasury Department reiterates that any amount of a *covered activity* by a *person of a country of concern* is sufficient for such person to be defined as a *covered foreign person* in the Final Rule. This is because the Treasury Department has determined that national security concerns arise in the context of any amount of such activity by a *person of a country of concern,* particularly in the context of early-stage companies and/or emerging technologies, the rapid expansion of which could be significantly aided by the intangible benefits provided by a *U.S. person* investor. Regarding one commenter's contention that without a de minimis threshold transactions that lack a national security nexus but where the transaction counterparty undertakes de minimis *covered activities* completely unrelated to the transaction would be prohibited, the commenter does not provide a specific suggestion for how a de minimis threshold would be defined or operationalized, or how the Treasury Department could ascertain that a transaction is ''completely unrelated'' to the *covered activity* given that intangible benefits often accompany investments by *U.S. persons* that help companies succeed, and there is no apparent mechanism by which the company-wide benefits conferred by a *U.S. person* could be relegated only to those operations of an investment target that do not raise national security concerns. However, the definitions of *covered activities* in §§ 850.217 and 850.224 are narrow and precise, and in the context of § 850.209(a)(1) they apply directly to a given *person of a country of concern* and not to an investment target's holding companies or other members of a corporate group.

Section 850.209(a)(2)

Commenters made suggestions related to the scope of § 850.209(a)(2) or requested clarification of this paragraph's application. Commenters discussed the costs related to conducting due diligence to determine whether § 850.209(a)(2) applies to a person receiving investment from a *U.S. person.* One commenter noted that a *U.S. person* may need to rely on an investment target to supply the information required to determine the applicability of § 850.209(a)(2). The Treasury Department has provided further information in the discussion of the knowledge standard (see discussion under Subpart A above) to address a ''reasonable and diligent inquiry'' in situations where a *U.S. person* may have no source other than an investment target to supply information necessary to determine the applicability of the Final Rule.

Several commenters requested that the Treasury Department clarify whether an investment in a *parent* or holding company would be defined as an indirect *covered transaction* only when a downstream entity meets one of the thresholds set forth in § 850.209(a)(2) and further requested that the Treasury Department provide additional guidance as to how certain transactions, such as acquisitions through special purpose vehicles, would be treated under the rule. These commenters also requested that the Treasury Department clarify that if the acquisition of a company that is not a *person of a country of concern* does not meet the thresholds in § 850.209(a)(2), then both the direct acquisition of the company and the indirect acquisition of its interest in its subsidiary are not *covered transactions.* One such commenter wrote that § 850.209(a)(2) would be ''meaningless'' unless the definition of an indirect *covered transaction* was clarified to exclude investments into targets that have subsidiaries that fall short of the financial thresholds specified in § 850.209(a)(2)(i) through (iv) because,

for example, ''investing in a parent company outside a country of concern would be 'indirectly' investing in any of its subsidiaries that was a covered company, even if such a subsidiary only accounted for 1 percent of its revenues and expenses.''

The Treasury Department notes that the bright-line criteria set forth in § 850.209(a)(2) are for purposes of determining whether a *person* is a *covered foreign person* but are not intended to exclude the possibility that other transactions involving intermediary entities could be a *covered transaction* under § 850.210, and therefore the Treasury Department declines to categorically exclude from coverage any and all indirect transactions through *persons* falling outside of § 850.209(a)(2). As explained in the Proposed Rule and as further addressed in the Final Rule (see Note 1 to § 850.210), the definition of *covered transaction* includes indirect transactions, including when a *U.S. person* uses an intermediary entity or acquisition vehicle to engage in a transaction that would be a *covered transaction* if engaged in directly by the *U.S. person.* See the discussion of § 850.210 (*covered transaction*) below for additional discussion of an ''indirect'' *covered transaction.*

Furthermore, meaningful distinctions exist between the scope of § 850.209(a)(2) and an indirect *covered transaction* under § 850.210(a) in both the Proposed Rule and in the Final Rule. Section 850.209(a)(2) defines certain investment targets, wherever located, as *covered foreign persons* given the significance of their financial ties with one or more *covered foreign persons.* In such a case, absent an exception, a *U.S. person's* acquisition of an equity interest in such entity is a *covered transaction.*

One commenter requested clarification as to whether the application of § 850.209(a)(2) ''goes through the group or the portfolio company'' as well as guidance as to the treatment of subsidiaries and affiliates of the company in which a *U.S. person* invests. Because this comment lacks specific information about the relationship between and among a ''group,'' a ''portfolio company,'' or ''subsidiaries and affiliates,'' the Treasury Department is unable to provide the specific information requested beyond the bright-line definitions provided in the Final Rule. As to the general topic of a *U.S. person* investment into a ''group'' but not a portfolio company, various parts of the Final Rule, including but not limited to § 850.209(a)(2), specify those scenarios in which an investment could be a *covered transaction* even if the immediate investment target is not itself a *person of a country of concern* engaged in a *covered activity.*

One commenter asked whether, if a *U.S. person* owns an entity in a *country of concern* that is engaged in a covered national security technology or product, the *U.S. person* as well as the entity in a *country of concern* would be a *covered foreign person* and whether ''the 50% rule described in the [Proposed Rule]'' would be applicable. This query contains insufficient information about the relationships between and among the *U.S. person,* the other entity, and a *country of concern*—for example, information that would aid determination of whether an entity ''in'' a *country of concern* would meet the definition of a *person of a country of concern,* and information that would aid determination of whether the *U.S. person's* relationship with the former entity would meet the definition of a *controlled foreign entity* in § 850.206—for the Treasury Department to provide specific guidance on the hypothetical given. However, as a general matter, § 850.209(a)(2) could apply to a *U.S. person* entity that meets the criteria in that provision regarding interest in, and financial metrics attributable to, a *covered foreign person.*

Two commenters requested additional guidance regarding how the financial metrics cited in the Proposed Rule, *i.e.,* revenue and operating expenses, are calculated for the purposes of the application of § 850.209(a)(2). The Treasury Department notes that Section 850.209(b) refers to an ''audited financial statement,'' and the Treasury Department anticipates that such statements, which typically include those financial metrics covered by § 850.209(a)(2), will have been prepared in accordance with the applicable accounting rules and conventions of the relevant jurisdiction. (The Treasury Department also notes that § 850.209(b) provides for alternatives in the event an audited financial statement is unavailable.)

Several commenters suggested that the Treasury Department attribute the requirement in § 850.209(a)(2) to a single entity, rather than aggregating among entities, or provide clarification for how aggregation would be applied. Additionally, commenters requested that the rule institute a de minimis threshold for a person's vested interest in a *covered foreign person* that would narrow the scope of § 850.209(a)(2). Suggested approaches included de minimis thresholds for a *covered activity* (discussed above in connection with § 850.209(a)(1)) or a de minimis threshold connected to the investment target's ownership interest in a *covered foreign person.* One commenter suggested excluding from such calculations entities in which a *U.S. person* owns less than 10 percent of the outstanding voting power or equity because a transaction counterparty's finances may aggregate revenues or expenses across a substantial number of unrelated companies and assets, while another suggested that any voting or equity interest under 25 percent held by an entity be excluded from the calculations under § 850.209(a)(2). One commenter suggested that as an alternative, the Treasury Department could draw on certain definitions from the CFIUS regulations related to controlling transactions and certain non-controlling, non-passive investments to more clearly explain when a *person* that is not a *covered foreign person* would have a requisite interest in a *covered foreign person* to qualify under this provision.

In response to the comments, the Treasury Department has modified § 850.209(a)(2) of the Final Rule to note that for the purposes of calculating whether one or more *persons of a country of concern* engaged in a *covered activity* exceed the financial thresholds enumerated in § 850.209(a)(2)(i) through (iv), only those *persons of a country of concern* engaged in a *covered activity* in which the relevant person directly or indirectly holds an interest specified in (a)(2) will be considered. Such an interest as specified in § 850.209(a)(2) is any of the following: a board seat on, a voting or equity interest (other than through securities or interests that would satisfy the conditions in § 850.501(a) if held by a *U.S. person*) in, or any contractual power to direct or cause the direction of the management or policies of such *person of a country of concern* engaged in a *covered activity.*

In response to comments on considerations for a *U.S. person* conducting due diligence to assess the application of § 850.209(a)(2), the Final Rule includes in the aggregation calculations of the financial thresholds in § 850.209(a)(2)(i) through (iv) only those *persons of a country of concern* (engaged in a *covered activity*) that account for at least $50,000 (or equivalent) of the relevant financial metric of the *U.S. person's* investment target or relevant counterparty (such as a JV partner). The $50,000 and above threshold for inclusion in the calculation for any given financial metric is intended to ensure there is a meaningful financial relationship between the investment target and a *person* of a *country of concern* and that

de minimis contributions to any of the financial metrics are not required to be included, to address commenter's stated concerns about the diligence burden of the calculations required by § 850.209(a)(2)(i) through (iv).

For example, if an investment target holds a board seat on a *person of a country of concern* engaged in a *covered activity* and such *person of a country of concern* contributed $100,000 to the investment target's revenue for the most recent year, this contribution will be included in determining whether the 50 percent threshold in § 850.209(a)(2)(i) is exceeded. However, if an investment target holds a board seat on a *person of a country of concern* engaged in a *covered activity* and such *person of a country of concern* contributed $25,000 to the investment target's revenue for the most recent year, this contribution will not be included in determining whether the 50 percent threshold in § 850.209(a)(2)(i) is exceeded. Each metric will be evaluated independently in applying this rule. For example, if an investment target holds a board seat on a *person of a country of concern* engaged in a *covered activity* and such *person of a country of concern* engaged in a *covered activity* contributed $25,000 of the investment target's revenue for the most recent year and accounted for $100,000 of the investment target's capital expenditure for the most recent year, the revenue contribution will not be considered for purposes of applying § 850.209(a)(2)(i) but the capital expenditure allocation will be considered for purposes of applying § 850.209(a)(2)(iii).

The Treasury Department determines that the above change will make necessary information easier for a *U.S. person* to ascertain, and addresses issues raised by commenters regarding due diligence considerations. Such minimum financial thresholds on which contributions are to be included in the aggregations may reduce the number of *persons of a country of concern* engaged in a *covered activity* that must be considered for the purposes of aggregating across such *persons of a country of concern* with respect to a given financial metric calculation, and, consistent with the intent of the provision to capture investment targets or transaction counterparties with substantial ties to *persons of a country of concern* engaged in *covered activities,* such thresholds help ensure that only significant financial ties are included.

The Treasury Department declines to adopt a de minimis threshold, as suggested by some commenters, for an investment target or transaction counterparty's equity or voting interest in a *person of a country of concern* engaged in a *covered activity.* Thresholds such as 10 percent or 25 percent, as suggested by some commenters, could exclude downstream investments in a *covered foreign person* with which the immediate investment target has a significant relationship. A minimum financial threshold, rather than excluding entities based on an investment threshold, addresses this issue, and additionally and independently, such a financial threshold is comparatively difficult to manipulate for the purpose of avoiding or evading this provision. The Treasury Department also declines to incorporate the suggested definitions from the CFIUS regulations given the differences in these programs. For example, the concept of ''control'' in the CFIUS context is a heavily fact dependent determination that is assessed by CFIUS for every transaction filed with CFIUS, whereas the Treasury Department uses a threshold approach in § 850.209(a)(2) for ease of administrability for transaction parties who will be determining coverage under this rule themselves.

One commenter requested that for the purposes of determining *covered foreign person* status under § 850.209(a)(2), a person who receives more than 50 percent of revenue or net income from publicly traded securities, or index funds, mutual funds, exchange-traded funds, or similar instruments (including associated derivatives) should be excepted. The Treasury Department views the likelihood of a *U.S. person* transferring intangible benefits in such a situation where an investment target's only relationship with a *person of a country of concern* engaged in a *covered activity* is the holding of certain securities identified in the exception set forth in § 850.501(a) to be similar to the situation where a *U.S. person* directly acquires or holds such securities. The Treasury Department has therefore modified § 850.209(a)(2) in the Final Rule to specify that, for purposes of determining whether an entity holds an equity or voting interest within the meaning of § 850.209(a)(2), the holding of securities or interests that would satisfy the conditions in § 850.501(a) if held by a *U.S. person* will not be included.

The Treasury Department has made additional changes to § 850.209(a)(2) to reflect comments and enhance clarity. These include the removal of an explicit reference to ''one or more contractual arrangements, including, for the avoidance of doubt, variable interest entities'' from the Proposed Rule, which modified the reference to a person's having ''any power to direct or cause the direction of the management or policies of'' a *person of a country of concern* engaged in a *covered activity*. This change is to enhance readability and is not intended to alter the meaning of this provision. The Treasury Department emphasizes that ''contractual power to direct or cause the direction of the management or policies'' can be granted through variable interest entities.

As modified in the Final Rule, § 850.209(a)(2) continues to focus on the significance of the financial relationship between an investment target and one or more *covered foreign persons* while addressing commenter concerns related to diligence of the downstream entities' activities. In setting the relevant threshold for financial metrics between the investment target and *persons of a country of concern* engaged in a *covered activity* at more than 50 percent, the Treasury Department expects that through a ''reasonable and diligent inquiry'' a *U.S. person* will be able to determine whether a potential investment target meets the applicable conditions. The Treasury Department understands that multiple entities may need to be considered in this aggregation, but investment targets with significant financial ties with downstream entities, as demonstrated by meeting any of the thresholds in 850.209(a)(2)(i)-(iv), should be able to answer questions from a *U.S. person* investor during due diligence about the application of § 850.209(a)(2), and/or to provide relevant representations and warranties. The Treasury Department has also made additional changes to § 850.209(a)(2) for clarity; no additional substantive changes were intended.

One commenter suggested that § 850.209(a)(2) consider only consolidated revenue and net income because, among other things, they are easier to obtain in the ordinary course of business than the other metrics. The Treasury Department declines to adopt this change because information about capital expenditure and operating expenses should generally be available. In addition, and independently, considerations related to the ease of obtaining this information are outweighed by the national security concerns that would be implicated by not covering an entity under § 850.209(a)(2) that incurs more than 50 percent of its capital expenditure or operating expenses through a *covered foreign person.* In addition, and independently, the Treasury Department wishes to address situations in which a *U.S. person* is investing in an intermediate entity that acts as a vehicle for investment into early-stage

companies engaged in capital-intensive *covered activities.* Such companies may generate little or no revenue or income in their early stages, and yet the Final Rule is designed to prevent the transfer of *U.S. person* intangible benefits to such investment targets given the significance of the financial ties that do exist between the *U.S. person* and the *person of a country of concern* engaged in a *covered activity.*

One commenter suggested that the Final Rule ''harmonize'' the thresholds in § 850.209(a)(2) with other parts of the rule, such as the threshold for determining control in the case of a *controlled foreign entity,* in order to avoid confusion. The Treasury Department has set bright-line thresholds in various provisions in the Final Rule and each threshold set forth in the Final Rule serves a distinct function and is underpinned by distinct considerations, such that adjusting them to be identical would not serve the policy goals of the Final Rule.

One commenter stated that this provision aligned with the policy goals of the Proposed Rule and suggested that because the thresholds in 850.209(a)(2) are based on the most recent available financial statement, *U.S. persons* should have a grace period to reduce their financial ties with *covered foreign persons.* Because the analysis to determine the application of § 850.209(a)(2) must occur at the time of a transaction, the Treasury Department does not determine that a grace period is necessary; if a transaction would be a *prohibited transaction,* it should not be entered into, while an investment that is permitted at the time of the transaction does not need to be divested later due merely to post-transaction changes in an investment target's finances or activities of which the *U.S. person* did not have *knowledge* at the time of the investment. In addition, and independently, an entity into which *U.S. person* investment may be a *covered transaction* under § 850.209(a)(2) that wishes not to meet the criteria of § 850.209(a)(2) can take as little or as much time as it needs to reduce its underlying exposure to relevant *covered foreign person*(s), obviating the need for a set grace period.

Commenters also raised suggestions relating to the time at which a determination of the applicability of § 850.209(a)(2) is made. One commenter noted that the financials of a given target company could change over time, which could complicate compliance for investors that wish to participate in multiple funding rounds and could ''have a dramatic chilling effect.'' The commenter also suggested exempting subsequent funding rounds from the notification requirements absent a material change or allowing an amendment of a prior notification. In response to this comment, the Treasury Department clarifies that because the analysis to determine the application of § 850.209(a)(2) must occur at the time of a transaction using the information set forth in § 850.209(b), in the context of a single investment, fluctuations in an investment target's finances prior or subsequent to the relevant time period are not relevant to the operation of § 850.209(a)(2). With respect to *notifiable transactions,* the Treasury Department is interested in understanding the volume and nature of investments involving the identified technologies and products and therefore exempting or excepting subsequent funding rounds from the notification requirement will not serve the objectives of the Outbound Order. As discussed more below (see *content of notifications*), the Treasury Department is exploring the ability to allow follow-on notifications involving the same *U.S. person* and *covered foreign person* to be able to incorporate information from a prior notification within the electronic system for submission of notifications.

The Treasury Department declines to create an exemption or exception for a transaction simply because it is part of a subsequent funding round, in § 850.209(a)(2) or elsewhere. Such an exception or exemption could reduce U.S. Government visibility into certain follow-on investments and open a loophole by permitting investments that would otherwise be *prohibited transactions.*

One commenter suggested that the measurements set forth in § 850.209(a)(2) be applied at the time of final closing in the case of a closed-end fund, but at the time of an investment by a *U.S. person* in the case of an open-end fund. Due to the ambiguities such an approach might introduce, as well as the potential for evasion or avoidance that such a differentiated approach could create, the Treasury Department declines to adopt this suggested change in the Final Rule.

One commenter requested that the Treasury Department consider making *U.S. person* transactions in entities meeting the criteria of § 850.209(a)(2) notifiable only, even in cases where an underlying entity is engaged in a *covered activity* enumerated in § 850.224 and a prohibition would therefore otherwise apply. The Treasury Department declines to adopt this suggestion, as doing so would open a significant loophole whereby the intercession of an intermediate entity could, in certain circumstances, be used to convert an otherwise *prohibited transaction* into a *notifiable transaction,* undermining the national security objectives that motivate prohibition of certain transactions.

One commenter suggested striking § 850.209(a)(2) in its entirety. Among the reasons given for this suggestion is that a *U.S. person* scoped in as a *covered foreign person* by this prong may itself not be directly engaging in a *covered activity,* and because this coverage could have adverse effects on U.S. companies, including those with important commercial sales relationships or technology licensing agreements with a *person of a country of concern* that is engaged in a *covered activity.* This commenter suggested replacing the Proposed Rule's § 850.209(a)(2) language with the following: ''(2) Any entity in which a foreign national, foreign government, foreign entity, or another covered foreign person holds a 50% ownership interest and engages in a covered activity.'' In response to this comment, the Treasury Department notes that in order for a *U.S. person* to be scoped in as a *covered foreign person* under § 850.209(a)(2), the *U.S. person* would first have to have a specified relationship with a person of a country of concern that is engaged in a covered activity and second, also be significantly financially connected, as discussed above. The mere fact that a U.S. company has commercial sales relationships or technology licensing agreements, without more, is unlikely to meet the criteria. However, where the criteria under § 850.209(a)(2) is met even in the case of a *U.S. person,* there is a policy desire to address that situation given there is a meaningful relationship with, one or more *persons of a country of control* engaged in *covered activities.* This approach addresses both the potential for evasion and accounts for the range of geographic and organizational structures commonly used by multinational firms to manage their business activities. As one commenter stated, ''most investments are made through holding companies and not directly in operating companies,'' underscoring the importance of retaining this provision. Further, the alternate definition for § 850.209(a)(2) suggested by the commenter referring to, *e.g.,* a ''foreign national'' or ''foreign person,'' could regulate transactions that involve a *person* of a third country but do not involve a *person* with any relationship to a *person of a country of concern* and therefore exceeds the authorities granted

to the Treasury Department by the Outbound Order.

Commenters noted the potential extraterritorial application of § 850.209(a)(2). One commenter stated that a third-country entity ''should not be regarded as the same as a person of a country of concern.'' Another commenter stated that including entities incorporated outside of a *country of concern* but that have subsidiaries in a *country of concern* could limit investments that draw manufacturers of semiconductor components and suppliers away from the PRC market, negatively impacting U.S. competitive and national security interests. The Treasury Department assesses that certain transactions with an entity that is not a *person of country of concern* engaged in a *covered activity* but nevertheless has an interest in, as well as a significant financial relationship with, a *person of country of concern* engaged in a *covered activity,* have a similar potential of exacerbating the threat identified in the Outbound Order as do transactions with *persons of a country of concern* engaged in a *covered activity,* and notes that § 850.209(a)(2) addresses a common transaction structure whereby investments are made into *parent* companies or holding companies. In addition, and independently, § 850.209(a)(2) does not, in fact, treat non-*country of concern* entities the same as *country of concern* entities, because an entity that is not a *person of a country of concern,* and engages in a *covered activity,* would not be a *covered foreign person* under § 850.209(a)(1) of the Final Rule, whereas a *person of a country of concern* would be.

One commenter stated that § 850.209(a)(2) may prevent a *U.S. person* from making investments in the national security interest of the United States, and multiple commenters suggested the Treasury Department may wish to create a licensing regime to facilitate the approval of investments where appropriate. In response, the Treasury Department notes that a *U.S. person* could seek a national interest exemption from the notification requirement or prohibition set out in the Final Rule by following the process described in § 850.502 and further discussed below. The Treasury Department anticipates that this exemption of a *covered transaction* where in the national interest would be granted by the Secretary in exceptional circumstances, unlike a licensing regime which is typically more frequent.

The Final Rule also makes changes to § 850.209(b), which establishes how a person's revenue, net income, capital expenditure, and operating expenses are to be ascertained. One commenter suggested that where an annual financial statement is unavailable, a *U.S. person* could be permitted to rely on independent appraisals or good faith estimates. The Treasury Department has adopted language similar to this suggestion in § 850.209(b)(1) of the Final Rule, as it pragmatically addresses situations in which no financial statement is available. Under § 850.209(b)(1) of the Final Rule, for purposes of identifying any of a person's overall revenue, net income, capital expenditure, operating expenses, and the relevant contributions of one or more *covered foreign persons,* calculations are to be based on an audited financial statement from the most recent year. If an audited financial statement is not available, the most recent unaudited financial statement is to be used instead. If no financial statement is available, an independent appraisal is to be used instead. If no independent appraisal is available, a good-faith estimate is to be used instead.

This provision is intended to apply independently to the ascertainment of each metric or figure. For example, if overall revenue is available in an audited financial statement from the most recent year, but the specific contributions of *persons of a country of concern* engaged in a *covered activity* are only available via good-faith estimates, then an audited financial statement is to be used to calculate overall revenue, but a good-faith estimate is to be used to calculate the individual revenue contributions of such *persons of a country of concern* engaged in a *covered activity.*

The Final Rule also adds § 850.209(b)(2) to address the calculation of exchange rates for the purpose of determining whether the contribution of a *person of a country of concern* engaged in a *covered activity* falls beneath the $50,000 (or equivalent) threshold in cases where the relevant amounts were not in U.S. dollars or where a financial statement did not already convert such figures into U.S. dollar equivalent. In such cases, the most recent published rate of exchange available on the Department of the Treasury's website is to be used instead. Such rates are published quarterly and are not spot exchange rates.

Finally, the Final Rule adds a Note 1 to § 850.209 to clarify that references in that section to revenue, net income, capital expenditure, or operating expenses refer to overall revenue, net income, capital expenditure, or operating expenses, as applicable, without subtracting amounts attributable to a *person of a country of concern* engaged in a *covered activity* of less than $50,000 (or equivalent).

A number of commenters requested the Treasury Department reconsider its decision in the Proposed Rule not to issue a list of entities that are *covered foreign persons.* The Treasury Department has further considered these commenter requests and declines to issue such a list in the Final Rule. Compiling and then publishing a list of *covered foreign persons* would be challenging given that any such list would likely be subject to frequent change and likely underinclusive, which would undermine the national security goals of the Outbound Order. For example, such a list may not capture early-stage companies that would meet the definition of a *covered foreign person* but may not have come to the attention of the Treasury Department. Even if such a list were illustrative or non-exhaustive, market actors may incorrectly determine that entities not listed are therefore not *covered foreign persons* and may decline to undertake the ''reasonable and diligent inquiry'' described in the Final Rule. Another independent reason for this decision is that providing a list of *covered foreign persons* could also result in attempts to evade the Final Rule through corporate restructuring, creating a greater enforcement burden, undermining the national security goals of the Outbound Order, and adding the burden of maintaining such a list. Additionally, a list of entities may be misleading, because some investments in a given entity may be permitted (*e.g.,* a purchase of a small number of publicly traded shares in such entity) while another investment in the same entity (*e.g.,* a controlling stake) may be prohibited. Finally, the Treasury Department has determined that in the case of early-stage companies, market actors making investments have access to more detailed and up to date information than the U.S. Government and are therefore in a better position to determine whether a transaction is covered under the Final Rule, including whether any *covered foreign person* is involved.

Covered Foreign Person—Final Rule Summary

The definition of *covered foreign person* in the Final Rule describes three sets of circumstances that will cause a *person* to be a *covered foreign person.*

First, under § 850.209(a)(1), a *person* is a *covered foreign person* if it is a *person of a country of concern* that is engaged in a *covered activity.*

Second, under § 850.209(a)(2), a person is a *covered foreign person* even

if it is not itself a *person of a country of concern* or engaged in a *covered activity* but has a particular relationship with a *person of a country of concern* that is engaged in a *covered activity.* The relationship must meet two conditions. First, the relevant person must hold a specified interest in a *person of a country of concern* that engages in a *covered activity.* That interest can take the form of a voting interest or equity interest (other than through securities or interests that would satisfy the conditions in § 850.501(a) if held by a *U.S. person*), board seat (voting or observer), or the contractual power to direct or cause the direction of the management or policies of the *person of a country of concern* (this could occur, for example, through any contractual arrangement with respect to a variable interest entity). Second, if there is such an interest, then more than 50 percent of the first person's revenue, net income, capital expenditure, or operating expenses need to be attributable to the *person of a country of concern* for § 850.209(a)(2) to apply. The first person also meets this condition if the person holds a specified interest in more than one *person of a country of concern* engaged in a *covered activity,* and more than 50 percent of the first person's revenue, net income, capital expenditure, or operating expenses is attributable to such *persons of a country of concern,* in aggregate. However, any contributions of less than $50,000 (or equivalent) to any given financial metric from any given *person of a country of concern* engaged in a *covered activity* are not included in the relevant calculations as they relate to contributions from such persons toward the relevant 50 percent thresholds.

Relatedly, the Treasury Department intends the threshold of more than 50 percent of any of the financial metrics to be evaluated independently, not in combination. For example, assuming no other relevant circumstances, if a *person* holds a specified interest in a *person of a country of concern* and such *person of a country of concern* represents 20 percent of the first person's revenue and 31 percent of its capital expenditure, these metrics will be evaluated independently and not combined to equal 51 percent.

Under § 850.209(a)(2), the Treasury Department intends to capture those entities that, while not directly engaged in a *covered activity* themselves, are significantly financially connected to entities that are engaged in a *covered activity.* The Treasury Department considers that if more than 50 percent of an investment target's revenue, net income, capital expenditure, or operating expense is attributable to one or more *persons of a country of concern* that are engaged in a *covered activity,* the intangible benefits associated with a *U.S. person's* investment in the target are likely to be conveyed to such *persons of a country of concern.* Accordingly, the Treasury Department considers that the investment target itself shall be treated as a *covered foreign person.* Moreover, in setting the threshold for financial metrics between the investment target and *persons of a country of concern* engaged in a *covered activity* at more than 50 percent, the Treasury Department expects that through a ''reasonable and diligent inquiry'' a *U.S. person* will be able to determine whether a potential investment target meets the applicable conditions.

Lastly, under § 850.209(a)(3), a *person of a country of concern* will be a *covered foreign person* by virtue of its participation in a joint venture with a *U.S. person* if such joint venture is engaged in a *covered activity.* That is, even though the *person of a country of concern* may not be engaged in a *covered activity* itself, the fact of its participation in a joint venture that is engaged in a *covered activity* would cause the person to be a *covered foreign person.* Consistent with the policy objectives of the Outbound Order, this approach seeks to focus on transactions where there is a likelihood of the transfer of intangible benefits from a *U.S. person* to a *person of a country of concern* in connection with a *covered activity.*

§ 850.210—Covered Transaction

The Proposed Rule defined a *covered transaction* to include a *U.S. person's* direct or indirect:

- Acquisition of an equity interest or *contingent equity interest,* or their equivalent, in a *covered foreign person;*
- Provision of debt financing convertible to an equity interest in a *covered foreign person* or provision of debt financing that affords the lender certain management or governance rights in a *covered foreign person;*
- Conversion of a *contingent equity interest* or convertible debt in a *covered foreign person;*
- Greenfield investment or certain other corporate expansions that either will establish a *covered foreign person,* or will cause an existing *person of a country of concern* to engage in a *covered activity;*
- Entrance into a joint venture, wherever located, with a *person of a country of concern* where the joint venture will undertake a *covered activity;* and
- Investment as an LP into a non-*U.S. person* pooled investment fund that invests in a *covered foreign person.*

Importantly, for each of the above transaction types, the Proposed Rule included a specific requirement for what a *U.S. person* would have needed to know or intend for a transaction to be a *covered transaction.* As set forth in the Proposed Rule, a transaction that otherwise had the attributes of a *covered transaction* ordinarily would have been treated as a *covered transaction* only if the relevant *U.S. person knew* at the time of the transaction that the transaction involved, or would have resulted in the establishment of, a *covered foreign person* (or would have resulted in a *person of a country of concern's* engagement in a new *covered activity*). *Knowledge* for this purpose included both actual knowledge and ''reason to know'' of the relevant facts or circumstances, as set forth in § 850.216.

Covered Transaction—General Scope

A few commenters expressed the view that the Proposed Rule expanded the scope of transactions that would have been considered *covered transactions* as compared to the ANPRM, with one such commenter noting the inclusion of brownfield investment and joint ventures in particular. The scope of *covered transactions* in the Proposed Rule addressed a set of circumstances in which a *U.S. person* could have provided intangible benefits to a *covered foreign person.* Brownfield investment was included within the scope of the Proposed Rule because the Treasury Department assessed that such an investment, that is, an investment into an existing entity that shifts its operations into a new *covered activity,* risked undermining the national security goals of the Outbound Order. Similar to brownfield investment, a joint venture was included within the scope of *covered transaction* to cover situations in which the transaction structure presented the opportunity and incentive for the transfer of intangible benefits from a *U.S. person* to a *person of a country of concern* through the joint venture.

Acquisition of Equity Interest or Contingent Equity Interest; Conversion of Contingent Equity Interest

The proposed definition of *covered transaction* in the Proposed Rule included the acquisition of an equity interest (or equivalent) in a *covered foreign person* and the acquisition of a *contingent equity interest,* which was defined in 850.205 as a financial instrument that did not constitute an

equity interest at the time of the *covered transaction* but was convertible into, or provided the right to acquire, an equity interest in a *covered foreign person* upon the occurrence of a contingency or defined event.

The proposed definition of *covered transaction* included as a separate basis of coverage the conversion of a *contingent equity interest* or convertible debt in a *person* that the *U.S. person* knew at the time of conversion was a *covered foreign person.* As discussed in the Proposed Rule, with respect to a *notifiable transaction,* the policy objective of including the conversion of a contingent equity or convertible debt in the definition of *covered transaction* was to gain visibility into the circumstances in which contingent interests in a *covered foreign person* would convert. Including the conversion of a *contingent equity interest* or convertible debt in the scope of *covered transaction* would also have addressed circumstances where the investment target or borrower was not a *covered foreign person* at the time of the acquisition of the relevant interest but was a *covered foreign person* at the time of conversion of such interest (*e.g.,* as a result of newly engaging in a *covered activity* or the target's new relationship with a *person of a country of concern* engaged in a *covered activity*).

The Treasury Department received a number of comments in connection with § 850.210(a)(1) and (3) of the Proposed Rule, which covered the acquisition or conversion of a *contingent equity interest.* One commenter indicated that § 850.210(a)(1) of the Proposed Rule, via the coverage of indirect acquisitions, could apply to LP investments into U.S. funds that are not captured by § 850.210(a)(6). The Final Rule clarifies in Note 1 to § 850.210 that for purposes of § 850.210(a)(1), a *U.S. person* is not considered to have indirectly acquired an equity interest or *contingent equity interest* in a *covered foreign person* when the *U.S. person* acquires an LP interest in a venture capital fund, private equity fund, fund of funds, or other pooled investment fund and that fund then acquires an equity interest or *contingent equity interest* in a *covered foreign person.* Accordingly, absent other facts (such as an intent to evade this rule), a *U.S. person* LP's investment into a *U.S. person* pooled investment fund would not itself be assessed to be a *covered transaction.* The *U.S. person* pooled investment fund's transaction with or involving a *covered foreign person* is, however, covered by this rule if such a transaction meets the definition of a *covered transaction,* and hence the *U.S. person* pooled investment fund is responsible for making any required notification and for refraining from engaging in any *prohibited transaction.* The Treasury Department further clarifies that § 850.210(a)(6), and not § 850.210(a)(1), describes the types of investment made as an LP in a pooled investment fund that are defined as a *covered transaction,* namely acquisitions of an LP interest in a venture capital fund, private equity fund, fund of funds, or other pooled investment fund where the fund is not a *U.S. person* and where the other criteria set out in § 850.210(a)(6) are met.

Several commenters requested that the Treasury Department either delete or clarify the phrase ''interest equivalent to an equity or *contingent equity interest.*'' In response, the Treasury Department is removing references to an ''interest equivalent to an equity or *contingent equity interest*'' from § 850.210(a)(1) and (3) of the Final Rule.

One commenter stated that the Treasury Department should revise the definition of a *covered transaction* such that it does not include a transaction whereby a *U.S. person* underwriter of an initial public offering (IPO) takes a ''short-term residual position in the issuer's shares in the event of a shortfall in demand'' where the issuer is a *covered foreign person* or otherwise takes possession of the shares of a *covered foreign person* as a market-maker in connection with an IPO. (Other commenters requested that similar transactions be *excepted transactions* in the rule; see also discussion of an *excepted transaction* below.) In response to this comment, the Treasury Department emphasizes that a *U.S. person's* acquisition of an equity interest in a *covered foreign person* that is not yet publicly traded for the purpose of facilitating an IPO, such as a purchase with the intent to create a market for the security or to resell the security on a secondary market (*e.g.,* as part of an underwriting arrangement), is a *covered transaction.* The Treasury Department declines to modify the definition of *covered transaction* to exclude such fact patterns, which combine the acquisition of an equity interest with the transfer of intangible benefits, including enhanced standing and prominence, managerial assistance, access to investment and talent networks, market access, and enhanced access to additional financing. However, absent additional facts, the provision of a service ancillary to an IPO that does not include the acquisition of an equity interest (or other interests set forth in the definition of § 850.210) is not a *covered transaction.*

The Treasury Department is modifying the definition of *contingent equity interest* at § 850.205 of the Final Rule, which is referenced in § 850.210(a)(1) and (3). (See discussion above under *Contingent equity interest.*) The definition of *contingent equity interest* in the Final Rule refers to a ''financial interest,'' rather than a ''financial instrument'' as in the Proposed Rule. This change is intended to more accurately reflect the Treasury Department's intent to cover the acquisition or conversion of interests that are convertible into an equity interest or provide the right to acquire equity interests. The definition of *contingent equity interest* in the Final Rule also clarifies that debt can constitute a financial interest that is convertible into, or provides the right to acquire, an equity interest. Because the definition of a *contingent equity interest* now explicitly refers to debt, the reference to the ''conversion of debt to an equity interest'' has been removed from § 850.210(a)(3) of the Final Rule. Accordingly, to avoid duplication, the Final Rule deletes § 850.210(a)(2)(i) (*i.e.,* the reference to the provision of debt financing that is convertible to an equity interest, as was included in the Proposed Rule) since such a transaction is now covered in the Final Rule by § 850.210(a)(1) as an acquisition of a *contingent equity interest.*

Several commenters stated that the rule should not apply to convertible debt financing more broadly or, in the alternative, should include a safe harbor for any debt financing provided prior to the effective date of the rule. One commenter recommended that debt financing should be a *covered transaction* only if the borrower/recipient receives proceeds from the transaction or if the debt automatically converts upon the occurrence of a specific event. One commenter indicated appreciation for the Proposed Rule's clarity that the acquisition of a *contingent equity interest* and subsequent conversion of that interest are separate *covered transactions.* Another commenter highlighted that because the acquisition of a *contingent equity interest* and the conversion of that interest are each a *covered transaction,* a *U.S. person* investor may find itself unable to convert its interest if an investment target that is a *person of a country of concern* begins engaging in a *covered activity* described in § 850.224 (which defines a *prohibited transaction*) after the interest was initially acquired, such that the conversion would now be prohibited.

Another commenter asserted that covering both the acquisition and the conversion of a contingent interest would have a chilling effect on acquisitions of contingent equity that would be *notifiable transactions,* as a *U.S. person* investor would be uncertain whether it would be able to convert its interest in cases in which the *covered foreign person* investment target subsequently pivots to a *covered activity.* The commenter also noted that venture capital firms generally begin providing non-monetary benefits as soon as they acquire a *contingent equity interest* and thus, any conversion would not trigger the provision of additional intangible benefits. For these reasons, the commenter requested that the Treasury Department provide a safe harbor (or, in the alternative, a licensing regime) that would permit conversion of a *contingent equity interest* provided that, at the time the contingent interest was acquired, the *U.S. person* did not have *knowledge* that the target intended to engage in *covered activities* that would make conversion of the instrument prohibited.

The Treasury Department recognizes that the activities of an investment target in which a *U.S. person* holds a *contingent equity interest* could change during the period between a *U.S. person's* acquisition and conversion thereof, and that this could cause a *U.S. person* either to decide not to enter into an investment or to be unable to convert an existing contingent interest. To avoid a situation in which a *U.S. person* is prohibited from converting a *contingent equity interest* that was obtained prior to the effective date of the Final Rule, the Final Rule provides in § 850.210(a)(3) that conversion of a *contingent equity interest* into an equity interest in a person that the *U.S. person knows* at the time of conversion is a *covered foreign person* is a *covered transaction* only where the *contingent equity interest* was acquired by the *U.S. person* on or after the effective date of the Final Rule. Permitting a *U.S. person* to acquire an equity interest in a *covered foreign person* engaged in one of the specific *covered activities* described in the definition of a *prohibited transaction* as a result of converting a *contingent equity interest* acquired on or after the effective date of the Final Rule would create a significant loophole that could be exploited and would run counter to the goals of the Outbound Order. Like a *U.S. person* that has obtained an equity interest directly, a *U.S. person* that has obtained an equity interest as a result of converting a *contingent equity interest* is positioned to provide intangible benefits that often accompany investments by *U.S. person*s and that help companies succeed. Given this outcome, neither a safe harbor beyond the cutoff date for acquisitions specified above and in the Final Rule nor a licensing regime would be appropriate. The Treasury Department also recognizes that an investor that acquires a *contingent equity interest* in an investment target may be able to obtain contractual assurances from the investment target as to the nature of its future activities, addressing a situation where the activities of the investment target change such that the *U.S. person* would be unable to convert its interest and the target could obtain a windfall. In response to one commenter's contention that venture capital firms generally begin providing non-monetary benefits as soon as they acquire a *contingent equity interest,* even if this statement is descriptively correct as it relates to some investments, it does not mean that the Final Rule should not also cover conversions of contingent interests given the direct channel for the transfer of intangible benefits that such conversions establish between a *U.S. person* and a *covered foreign person* in many transaction structures. Accordingly, the Treasury Department declines to adopt such a recommendation.

Provision of Debt Financing

The Proposed Rule provided that a *U.S. person's* provision of a loan or similar debt financing arrangement to a *person* that the *U.S. person* knew at the time of the provision was a *covered foreign person* would have been a *covered transaction* when the debt financing was convertible to an equity interest or afforded or would have afforded the *U.S. 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.* The intent of this provision was to capture lending by a *U.S. person* lender only where such lending involved the acquisition of equity or equity-like rights by the *U.S. person* lender with respect to a *covered foreign person.*

The Proposed Rule explained that while the issuance of debt secured by equity in a *covered foreign person* would not, absent other circumstances, have been a *covered transaction,* foreclosure on collateral that constituted an equity interest in a *covered foreign person* would have constituted the acquisition of an equity interest under the Proposed Rule and would have been a *covered transaction.*

Several commenters provided input on § 850.210(a)(2) of the Proposed Rule. Several commenters focused on a scenario whereby a *U.S. person* lender issues debt for which equity is pledged as collateral and forecloses on that collateral at some subsequent point. Some commenters urged that the rule not apply to either debt financing secured by equity or to foreclosure on such equity. One commenter requested the Final Rule permit U.S. lenders to foreclose on or restructure existing debt that may be otherwise prohibited if the lender provides a notification under the program and attempts to divest as soon as practicable. One commenter suggested that the Treasury Department clarify that a loan or similar debt financing that is secured using equity held as collateral not be considered ''convertible to an equity interest'' under § 850.210(a)(2)(i). One commenter indicated appreciation for the Proposed Rule's clarity that foreclosure on equity in a *covered foreign person* that secures debt would have been a *covered transaction.* A few commenters recommended that the Treasury Department make explicit in the rule that foreclosure on equity used as collateral for debt is not a *covered transaction.*

One commenter noted that the Proposed Rule could have limited the ability of *U.S. persons* to create supplier relationships with counterparts in whom investment was not otherwise prohibited by the Proposed Rule—*e.g.,* where convertible equity interests were used for purposes of commercial risk mitigation—and requested that supply contracts secured through convertible equity interests be carved out of the rule.

Other commenters requested that the rule not apply to secondary debt market transactions involving debt secured by equity. A few commenters highlighted that purchasers in the debt market do not have access to diligence materials or the power to negotiate representations from the underlying issuer, while another commenter stated that secondary debt market transactions should be carved out because the borrower would not receive any proceeds from that secondary transaction.

Commenters also discussed the description in § 850.210(a)(2)(ii) of the Proposed Rule regarding a lender's ability to make management decisions. Several commenters argued that when a lender seeks to restructure a delinquent loan, for example to change the borrower's management or appoint a

board member, such actions should not be considered a *covered transaction.* Another commenter sought clarification regarding the phrase ''make management decisions'' and inquired as to whether this language would encompass standard debt covenants. The commenter asked that either such covenants be carved out of the rule or that the rule provide further clarity with respect to what activities constitute ''mak[ing] management decisions.'' In response to the above comments, the Final Rule contains changes to § 850.210(a)(2) as well as to Note 2 to § 850.210. Note 2 to § 850.210 of the Final Rule clarifies that neither the issuance of debt financing secured by equity collateral nor the acquisition of such secured debt on the secondary market is an ''acquisition of an equity or *contingent equity interest*'' and hence will not, absent other facts, constitute a *covered transaction.* That note also further clarifies, however, that foreclosure on collateral where the debtholder takes possession of the pledged equity does constitute an acquisition of an equity interest. This is so because where a *U.S. person* obtains an equity interest in a *covered foreign person,* whether as a result of the conversion of a convertible interest or foreclosure on collateral that was pledged as security, the *U.S. person* assumes the position of an equity holder in the *covered foreign person* and therefore has the opportunity and incentive to provide the types of intangible benefits that the Outbound Order and this rule are intended to address.

As such, foreclosure on equity taken as collateral continues to be considered an acquisition of equity for purposes of § 850.210. However, in response to relevant comments, Note 2 further clarifies that foreclosure on collateral where the *U.S. person* does not *know* at the time of issuing or acquiring the secured debt that the pledged equity was in a *covered foreign person* does not constitute a *covered transaction.* This addresses the concerns raised by commenters that a debtholder may be prevented from foreclosing on equity that was pledged as collateral if the entity whose equity was pledged was not engaged in a *covered activity* at the time the debt financing was provided but pivots into a *covered activity* while the debt is outstanding. With this change, foreclosure on equity pledged as collateral will constitute a *covered transaction* when a *U.S. person* has *knowledge* at both the time of the issuance or acquisition of the secured debt, and at the time of foreclosure, that the equity is that of a *covered foreign person.*

Further, as highlighted by the comments, the Treasury Department does not intend to define as a *covered transaction* foreclosure on equity that was taken as collateral prior to the effective date of the Final Rule. As such, Note 2 to § 850.210 of the Final Rule clarifies that foreclosure on equity pledged prior to the effective date of the Final Rule as collateral for secured debt is not a *covered transaction.* Therefore, ''existing'' debt as highlighted by one commenter, *i.e.,* a convertible interest acquired in connection with debt financing provided prior to the effective date of the Final Rule, could be restructured in ways that involve the conversion of such an interest without triggering the definition of a *covered transaction.*

The Treasury Department agrees with commenters' request for clarification of the Proposed Rule's reference to ''mak[ing] management decisions'' in § 850.210(a)(2)(ii). The Final Rule revises § 850.210(a)(2) to specify that the provision of debt financing to a *person* that the *U.S. person knows* at the time of the provision is a *covered foreign person* is a *covered transaction* where the debt financing affords or will afford the *U.S. person* an interest in profits of the *covered foreign person,* the right to appoint members of the board of directors (or equivalent) of the *covered foreign person,* or other comparable financial or governance rights characteristic of an equity investment but not typical of a loan. In the Final Rule, the Treasury Department does not intend to cover debt financing unless it has these equity-like characteristics or is convertible into an equity interest. As noted above, to avoid duplication in light of the revision in the Final Rule to the definition of *contingent equity interest* in § 850.205, the Final Rule removes from § 850.210(a)(2) the reference to the provision of debt financing that is convertible to an equity interest, as was included in the Proposed Rule, since such a transaction is covered in the Final Rule by § 850.210(a)(1) as an acquisition of a *contingent equity interest.*

Greenfield or Brownfield Investment

Under § 850.210(a)(4) of the Proposed Rule, the definition of *covered transaction* included a *U.S. person's* acquisition, leasing, or development of operations, land, property, or other assets in a *country of concern* when the *U.S. person knew* that such acquisition, leasing, or development would, or the *U.S. person* intended it to, either (1) establish a *covered foreign person,* such as the acquisition of land in a *country of concern* with the intent to build a facility that designs an integrated circuit, or (2) pivot an existing entity's operations into a new *covered activity,* such as the acquisition of a factory with the intent to retrofit it to produce equipment for performing volume advanced packaging. A *U.S. person's* intent (as distinct from *knowledge*) would have been sufficient in these cases for the transaction to be a *covered transaction.* This was because in the greenfield and brownfield context, a *U.S. person* may not have *known* at the time of the transaction that the investment would result in a *covered activity,* yet the Treasury Department nevertheless sought to cover activities intended to bring about the establishment of a *covered foreign person* or a *person of a country of concern's* engagement in a new *covered activity,* since such a situation was likely to convey intangible benefits from the *U.S. person* to a *covered foreign person.* That a *covered foreign person* ultimately would have resulted from a greenfield or brownfield investment would not have been necessary for coverage under the Proposed Rule, as long as the intent to establish a *covered foreign person* was present at the time of the transaction. The Treasury Department assessed that requiring a greenfield or brownfield investment to result in the establishment of a *covered foreign person* or a *person of a country of concern's* engagement in a new *covered activity* before triggering obligations associated with *covered transaction* status would have risked undermining the national security goals of the program. For the avoidance of doubt, the Treasury Department did not intend to scope in a real estate transaction where the *U.S. person* did not have the requisite *knowledge* or intent.

One commenter requested clarification that the word ''development'' in § 850.210(a)(4) does not encompass a *U.S. person's* modification, configuration, or testing of a piece of technology acquired from a third-party for the company's own use. This request reflects confusion about the way in which *develop,* as a defined term relating to the activities of a *person of a country of concern* (see § 850.211), interacts with the use of the word ''development'' in § 850.210(a)(4) related to greenfield and brownfield investments. The latter usage is intended to refer to the plain English meaning of the term in the greenfield and brownfield context, *i.e.,* to refer to activities such as the build-out,

expansion, or retrofitting of facilities or land, and not carry the meaning set forth in § 850.211. In response to this comment, the Treasury Department made a change to the definition of *develop* in § 850.211 of the Final Rule to expressly carve out § 850.210(a)(4) from its application.

Multiple commenters asked for clarification regarding what constitutes a change in activity under § 850.210(a)(4)(ii). One commenter stated that an activity ''not previously engaged in'' should refer to a person engaging in a new category of *covered activity,* rather than engaging in a new activity within the same category. Another commenter sought clarification as to when a *person* that engaged in a *covered activity* prior to the issuance of the Outbound Order would be deemed to have shifted to a new activity.

One commenter requested that the Treasury Department justify its assessment that including investments intended to result in the establishment of a *covered foreign person* or the engagement of a new *covered activity* is necessary to accomplish the national security goals of the Outbound Order. That commenter stated that the Treasury Department should eliminate the ''intent'' element from the relevant section of the rule and cover only transactions resulting in the establishment of a *covered foreign person.* Several other commenters requested that the text of the rule explicitly include objective criteria, such as the commitment of capital, as evidence of an intent on the part of a *U.S. person* that its investment result in the engagement of a *person of a country of concern* in a *covered activity* in which it was not previously engaged. A few commenters requested clarification regarding the intent element of § 850.210(a)(4), including how it differs from the *knowledge* standard described in § 850.104. One commenter noted ambiguity as to whose intent is relevant and how intent is to be established.

In response to the above comments, the Treasury Department has revised § 850.210(a)(4) in the Final Rule. Rather than referring to the ''intent'' of the *U.S. person,* the Final Rule refers to the ''plans'' of the *U.S. person.* In assessing whether a *U.S. person* ''plans'' for its actions to result in the establishment of a *covered foreign person* or to shift an existing entity's operations into a *covered activity,* the *U.S. person* is responsible for the information it had or could have had through a ''reasonable and diligent inquiry'' at the time of the transaction. Indicators relevant to what the *U.S. person* plans include, for example, correspondence with the investment target or relevant government, business plans, and presentations to potential investors.

In addition, the Treasury Department responds to the comments through modification to § 850.210(a)(4)(ii) of the Final Rule to specify that it relates to the ''engagement of a person of a country of concern in a covered activity.'' The Final Rule's coverage of a ''brownfield'' investment is intended to capture a *U.S. person*'s acquisition, leasing, or other development of operations that the *U.S. person knows* will result in, or the *U.S. person* plans to result in, an existing *person of a country of concern* engaging in a *covered activity.*

Continuing to capture a forward-looking element in the context of the transactions addressed in § 850.210(a)(4) is important to the national security goals of the Outbound Order. Without such a provision, a *U.S. person* may not be able to invest in an entity that is a *covered foreign person* but could instead establish or contribute to the engagement of such a person in a *covered activity.* With respect to a greenfield or brownfield investment, the Treasury Department assesses that waiting until such an investment has achieved its aims before covering it is insufficient to achieve the national security aims of the Outbound Order. Therefore, the Treasury Department declines to eliminate entirely the forward-looking element of this provision, as one commenter requested.

Multiple commenters also requested clarification of the interplay between § 850.210(a)(4) and the exception for an intracompany transfer at § 850.501(c). As further discussed regarding the definition of an *excepted transaction* (see below), § 850.501(c) of the Final Rule provides an exception for certain intracompany transfers between a *U.S. person* and its *controlled foreign entity* to support ongoing operations with respect to *covered activities* or other ongoing or new activities that are not *covered activities.* Because of this change to the text of 850.501(c), the Treasury Department determined that the Proposed Rule's reference to § 850.210(a)(4) in § 850.501(c) was no longer necessary as the text of § 850.501(c) itself now makes clear that the exception does not apply to *covered transactions* involving new *covered activities,* which remain subject to § 850.210(a)(4).

Entrance Into a Joint Venture

Several commenters provided views on § 850.210(a)(5) of the Proposed Rule, which defined as a *covered transaction* a *U.S. person*'s entrance into a joint venture, wherever located, with a *person of a country of concern* where the *U.S. person* either *knew* or intended that the joint venture would have engaged in a *covered activity.* Like the greenfield or brownfield investment prong discussed above, this provision was intended to capture situations in which a *covered foreign person* did not exist at the time of a transaction, but the transaction structure presented the opportunity and incentive for the transfer of intangible benefits from a *U.S. person* to a *person of a country of concern* through the joint venture. Similar to a greenfield or brownfield transaction, a *U.S. person*'s intent (as distinct from *knowledge*) would have been sufficient for coverage in the joint venture context because a *U.S. person* may not have *known* at the time of the transaction that the joint venture would engage in a *covered activity,* yet the Treasury Department sought to capture transactions likely to convey intangible benefits to a *covered foreign person.* The joint venture would not have had to engage in a *covered activity* for the establishment of the joint venture to be a *covered transaction* under the Proposed Rule, as long as the *U.S. person* intended for it to do so.

Commenters requested that the Treasury Department define ''joint venture'' to provide greater clarity on the application of the provision, and suggested definitions for the Treasury Department's consideration and urged defining this term narrowly. One commenter requested clarity on what constitutes ''intent'' for the purposes of § 850.210(a)(5) and whether ''intent'' would be found where a *U.S. person* had a speculative idea versus a formal business plan.

Two commenters suggested that ''joint venture'' should include only the acquisition of an equity interest and not other forms of commercial cooperation, whereas one commenter recommended that ''joint venture'' only include the establishment of a new legal entity. Two other commenters recommended that the Treasury Department list certain ''routine'' activities that would not be covered as joint ventures.

Several commenters recommended that the Treasury Department provide guidance clarifying that certain transactions, relationships, or activities are not considered to constitute a joint venture for purposes of this provision.

One commenter requested that the Treasury Department clarify whether certain actions related to existing joint ventures are permissible, including participation in an existing joint venture, acquisition of additional interest in an existing joint venture, and engagement in a *covered activity* by an

existing joint venture. Another commenter expressed concern that the coverage of joint ventures would negatively impact the ability of U.S. companies to acquire majority stakes in their competitors in the PRC.

The Treasury Department declines to define the term ''joint venture'' in the Final Rule, after considering whether other regulatory regimes define the term. Instead, the Treasury Department refers to the plain English meaning of the term, *i.e.,* as involving the contribution of capital and/or assets by two parties and the sharing of profits and losses. The term as generally understood in the market does not cover ''any business relationship'' as was of concern to one commenter. Indeed, most of the activities that commenters request be excluded from the application of the term ''joint venture'' are prima facie not joint ventures. For example, absent other facts, a ''joint venture'' would not ordinarily result simply where there is a licensing arrangement, the sale or barter of goods and services, or resale of goods and services.

In response to the comments to § 850.210(a)(5), the Treasury Department is modifying this provision by striking ''the U.S. person intends to engage in a covered activity.'' Instead, in the Final Rule, § 850.210(a)(5) applies when ''the subject U.S. person knows at the time of entrance into the joint venture that the joint venture will engage, or plans to engage, in a covered activity.'' This modification is intended to focus on the *knowledge* of the *U.S. person* with respect to the goals of the joint venture at the time the *U.S. person* enters into the joint venture, rather than applying the definition of a *covered transaction* to situations where a *U.S. person* may have an intent that is not shared by the joint venture.

The Treasury Department clarifies that, as with the Proposed Rule, § 850.210(a)(5) of the Final Rule is intended to cover situations in which a *covered foreign person* does not exist prior to the time of a transaction, but the transaction structure presents the opportunity and incentive for the transfer of intangible benefits from a *U.S. person* to a *person of a country of concern* through the joint venture. Further, the plain language of the provision does not (absent additional facts) cover activities related to an existing joint venture into which a *U.S. person* has already entered, as the Final Rule applies only on a forward-looking basis. However, certain transactions such as the acquisition of an additional equity interest in a joint venture that meets the definition of a *covered foreign person* may nevertheless be a *covered transaction* pursuant to other parts of the definition of this term, and the fact that a *U.S. person* is acquiring equity in a joint venture in which it has already entered does not remove all transactions with such a joint venture entirely from the application of § 850.210.

Investment Made as an LP

Several commenters provided views on § 850.210(a)(6) of the Proposed Rule, which related to an LP interest in certain pooled investment funds. One commenter expressed doubt with respect to the ability of an LP to determine whether a pooled investment fund is ''likely'' to invest in a *person of a country of concern* engaged in one or more of the three specified sectors and sought clarity with respect to the meaning of ''likely'' in this context.

Commenters requested additional clarity with respect to when an LP may be deemed to *know* that a pooled investment fund is likely to undertake a *covered transaction.* One such commenter suggested that the Treasury Department provide a safe harbor for LPs that engage in good faith diligence. The same commenter took the position that a previous *covered transaction* by a general partner (GP) should not in and of itself be dispositive in determining coverage. Another commenter recommended that the Treasury Department narrow the application of the provision because, according to the commenter, it undermines GP controls on information disclosure.

One commenter stated that the provision is overbroad and expressed concerns with what the commenter perceived as burdensome compliance requirements, particularly with respect to post-closing diligence. This commenter also stated that *U.S. persons* might be deterred from investment as an LP because they cannot control the post-investment actions of third parties.

Two commenters stated that LPs should be permitted to rely on the assurances of GPs and one commenter took the position that the GP should bear any and all requirements related to compliance with the rule. Another commenter requested that the Treasury Department issue guidance related to this provision.

One commenter requested clarity with respect to requirements for LPs subject to agreements made prior to the Outbound Order.

The Final Rule adopts the § 850.210(a)(6) from the Proposed Rule without any changes. The Final Rule, as with the Proposed Rule, provides that an LP investment in a non-*U.S. person* pooled investment fund constitutes a *covered transaction* when two things are true: (1) the *U.S. person* knows at the time of the investment that the pooled investment fund will likely invest in a *person of a country of concern* that is in one or more of the three specified sectors, and (2) the fund in fact undertakes a transaction that would be a *covered transaction* if undertaken by a *U.S. person.* The Final Rule also provides an exception under § 850.501(a)(1)(iii) for certain LP investments (see discussion in Subpart E below), which is intended to provide options for LP investors to obtain clarity regarding the application of the Final Rule to their investments into pooled investment funds. The Treasury Department understands that it may not be practicable for a *U.S. person* LP to *know* the specific investment target entity or entities of a pooled investment fund even following a ''reasonable and diligent inquiry'' at the time of its LP investment. However, it is the Treasury Department's understanding that it may be possible for such LP to *know,* through a ''reasonable and diligent inquiry,'' the country and general sector in which the pooled investment fund is likely to invest. Thus, the Treasury Department declines to provide a safe harbor related to this provision because doing so is unnecessary given an LP's ability to engage in a ''reasonable and diligent inquiry.'' Whether an inquiry is a ''reasonable and diligent inquiry'' will be assessed through the evaluation of various considerations described in the Final Rule.

In response to issues commenters identified related to post-transaction monitoring and compliance in the LP context, the Treasury Department reiterates that the knowledge standard as applied to § 850.210(a)(6) of the Final Rule relates to a *U.S. person's knowledge* at the time of its LP investment in the pooled investment fund. With respect to whether a *U.S. person knows* at the time of its investment that a pooled investment fund is likely to invest in a *person of a country of concern* that is in any of the three specified sectors, the LP would ascertain whether the fund is likely to invest in a relevant geographic area and sector through engaging in a ''reasonable and diligent inquiry'' at the time of the investment into the pooled investment fund.

With respect to whether such pooled investment fund actually undertakes a transaction that would be a *covered transaction* if undertaken by a *U.S. person,* if the LP knows at the time of its investment that the pooled investment fund likely will invest in a *person of a country of concern* that is in

any of the three relevant sectors, and such fund subsequently makes an investment that would have been a *notifiable transaction* if made by a U.S. person, the *U.S. person* will be required to file the relevant notification no later than 30 calendar days following the earliest date of the pooled investment fund's investment in a *covered foreign person.* If the LP *knows* at the time of its investment that the pooled investment fund likely will invest in a *person of a country of concern* that is in any of the three relevant sectors, and such fund subsequently makes an investment that would have been a *prohibited transaction* if made by a *U.S. person,* then the LP would have made a *prohibited transaction,* which would be a violation of the Final Rule.

Indirect Covered Transaction

To address a potential loophole, § 850.210(a) of the Proposed Rule defined a *U.S. person's* transaction that was indirect, as well as direct, to be a *covered transaction.* Under Note 1 to § 850.210 of the Proposed Rule, an indirect transaction would have been a *covered transaction* regardless of the number of intermediary entities involved in such transaction if it met the elements of the definition. For example, if a *U.S. person* owned a special purpose vehicle organized in a non-U.S. jurisdiction, that in turn acquired an equity interest in a *covered foreign person,* and the *U.S. person knew* at the time of its transaction that the special purpose vehicle would be acquiring an equity interest in a *covered foreign person,* that transaction would have been a *covered transaction.*

Several commenters provided views on § 850.210 as it related to indirect transactions. One commenter expressed concern that this provision would place a significant compliance burden on *U.S. persons.* Another commenter stated that this provision would be overbroad and suggested that the definition of *covered transaction* not include indirect transactions. Instead, the commenter recommended utilizing the definition of *covered foreign person* to cover indirect transactions.

One commenter requested that the Treasury Department clarify that an indirect *covered transaction* does not include an LP investment into a *U.S. person* fund. The commenter requested that the Treasury Department clarify how intermediate entities are treated in tiered ownership structures and further requested guidance on how this provision is applied with respect to certain complex transactions.

Upon review and consideration of these comments, the Treasury Department is revising Note 1 to § 850.210. The Final Rule provides that an indirect *covered transaction* includes a *U.S. person's* use of an intermediary (either a legal entity or natural person) to engage in a transaction that would be a *covered transaction* if engaged in directly by a *U.S. person.* It is common in mergers and acquisitions transactions to use one or more intermediary legal entities, or so-called ''acquisition vehicles,'' to facilitate a transaction. The Final Rule covers both direct and indirect transactions such that a *U.S. person* that is investing directly into or through an intermediary cannot avoid the notification requirement or prohibition where that intermediary, to facilitate the transaction, then invests in a *covered foreign person.* In such a case, as with the Proposed Rule, a *U.S. person's* investment that is indirect would be a *covered transaction* under the Final Rule regardless of the number of intermediaries involved in such transaction if the transaction meets the elements of *covered transaction.* By contrast, absent other facts (such as intent to evade the application of the Final Rule), where a *U.S. person* has, for example, previously invested in a non-*U.S. person* entity, and later in time and unrelated to the original transaction by the U.S. person, that entity subsequently invests in a *covered foreign person,* that later transaction will generally not constitute an indirect *covered transaction,* subject to §§ 850.210(a)(6), 850.303, and 850.604. In addition, in response to comments, Note 1 to § 850.210 further clarifies that for purposes of § 850.210(a)(1), a *U.S. person* is not considered to have acquired an indirect equity interest or *contingent equity interest* in a *covered foreign person* when the *U.S. person* acquires an LP interest in a venture capital fund, private equity fund, fund of funds, or other pooled investment fund and that fund then acquires an equity interest or *contingent equity interest* in a *covered foreign person* (see the discussion of an acquisition of equity interest above). Consistent with requests from commenters, the Treasury Department anticipates making additional information available via the Treasury Department's Outbound Investment Security Program website.

Stock Options and Other Equity-Based Compensation

Several commenters expressed views with respect to the scope of the definition of *covered transaction* and specifically whether employee compensation in the form of equity would be covered. Multiple commenters stated that compensation in the form of equity should not be a *covered transaction.* One commenter requested clarity as to whether receipt of equity compensation is a *covered transaction,* and several commenters recommended that the Treasury Department either provide clarification within the definition of *covered transaction* or within the definition of *excepted transaction.*

Multiple commenters also requested that carried interest be clarified as beyond the scope of *covered transaction* as it is a form of compensation to a *U.S. person* rather than the acquisition of an equity interest.

The Treasury Department agrees with commenters that while the receipt of compensation by an employee of a *covered foreign person* in the form of equity or an option to purchase equity, as well as the exercise of such an option, would fall within the definition of a *covered transaction,* it should be removed from coverage of the Final Rule. In accepting or converting employee compensation, a *U.S. person* employee is generally not providing capital to a *covered foreign person* employer in a manner implicating the same policy concerns as *covered transactions* that are within the scope of the Final Rule. Considering the potential implications for *U.S. person* individuals, such as employment prospects and personal finances, that could result from the coverage of stock options and other equity-based compensation under the Final Rule, the Treasury Department has added an exception to § 850.501(f) to that effect (see the discussion of an *excepted transaction* below).

As to comments regarding carried interest, the Treasury Department agrees that absent other relevant facts, the payment of carried interest to a *U.S. person* would not trigger any of the prongs of the definition of *covered transaction* because it ordinarily involves a cash payment to a *U.S. person.* However, the fact that carried interest is awarded to a *U.S. person* making an investment (or working at a *U.S. person* entity making an investment) in a *covered foreign person* does not insulate the transaction giving rise to such payments from the application of the Final Rule.

Covered Transaction—Final Rule Summary

The Final Rule defines a *covered transaction* to include a *U.S. person's* direct or indirect:

- Acquisition of an equity interest or *contingent equity interest* (including convertible debt) in a *covered foreign person;*

▪ Provision of debt financing that affords the lender certain management or governance rights in a *covered foreign person* that are characteristic of an equity investment but not typical of a loan;

▪ Conversion of a *contingent equity interest* (including convertible debt) in a *covered foreign person* where the *contingent equity interest* was acquired on or after the effective date of the Final Rule;

▪ Acquisition, leasing, or other development of land, property or other assets that will result in or the U.S. person plans to result in the establishment of a *covered foreign person,* or the engagement of an existing *person of a country of concern* in a *covered activity;*

▪ Entrance into a joint venture, wherever located, with a *person of a country of concern* where the joint venture will engage in or plans to engage in a *covered activity;* and

▪ Acquisition of an LP interest in a non-*U.S. person* pooled investment fund that invests in a *covered foreign person.*

Each of the above transaction types includes a specific requirement for what a *U.S. person knows* (or plans) for a transaction to be a *covered transaction.* Further detail on each of these transaction types is provided below. The definition of *covered transaction* notes that it does not include an *excepted transaction* and, consistent with the Outbound Order and the Proposed Rule, does not include a transaction for the conduct of the official business of the U.S. Government by employees, grantees, or contractors thereof. Note that the mere act of receiving a U.S. Government grant does not make a *person* an employee, grantee, or contractor of the U.S. Government.

Acquisition of Equity Interest or Contingent Equity Interest

The definition of *covered transaction* includes the acquisition of an equity interest in a *covered foreign person* and the acquisition of a financial interest, including debt, that does not constitute an equity interest at the time of acquisition but is convertible into, or provides the right to acquire, an equity interest, either upon the occurrence of a contingency or defined event or at the discretion of the *U.S. person* holding the interest. As clarified in the Final Rule, neither the issuance of a secured loan or similar debt financing for which equity is pledged as collateral, nor the acquisition of such secured debt on the secondary market, is an acquisition of an equity interest. However, foreclosure on collateral where the debtholder takes possession of the pledged equity is an acquisition of an equity interest; *provided that* such an acquisition is not a covered transaction where the equity was pledged prior to the effective date of the Final Rule or where the *U.S. person* did not *know* at the time of issuing or acquiring the debt that the pledged equity was in a *covered foreign person.*

Debt With Equity-Like Characteristics

The definition of *covered transaction* includes the provision of a loan or similar debt financing arrangement to a *covered foreign person* that affords or will afford an interest in profits of the *covered foreign person,* the right to appoint members of the board of directors (or equivalent), or other comparable financial or governance rights characteristic of an equity investment but not typical of a loan.

Conversion of Contingent Interest or Convertible Debt

The definition of *covered transaction* includes as a separate basis of coverage the conversion of a *contingent equity interest,* including debt, in a *covered foreign person* where the *contingent equity interest* was acquired by the *U.S. person* on or after the effective date of the Final Rule. As stated above, in addition to the conversion, the original acquisition of such an interest is a *covered transaction.* With respect to a *notifiable transaction,* the policy objective of including the conversion of a *contingent equity interest* or convertible debt in the definition of *covered transaction* is to gain visibility into the circumstances in which contingent interests in a *covered foreign person* convert. Including the conversion of a *contingent equity interest* or convertible debt in the scope of *covered transaction* also addresses circumstances where the investment target or borrower is not a *covered foreign person* at the time of acquisition of the relevant interest but is a *covered foreign person* at the time of conversion of such interest. The Treasury Department anticipates that if the original acquisition was a *notifiable transaction* and was timely notified, the second notification submitted with respect to the conversion will likely be similar to the first notification and thus less time-consuming to prepare.

The Treasury Department considered alternative approaches such as covering only the acquisition and not the conversion of contingent interests or covering only the conversion. However, each alternative is either over- or under-inclusive in situations where an investment target has pivoted away from, or into, a *covered activity* in the interim between acquisition and conversion. Because the Final Rule does not define a conversion of a *contingent equity interest* as a *covered transaction* in situations where the *U.S. person* acquired the interest prior to the effective date of the Final Rule, no *U.S. person* is disadvantaged for having acquired a contingent interest without first knowing of the scope of the Final Rule.

Greenfield or Brownfield Investment

The definition of *covered transaction* includes a *U.S. person's* acquisition, leasing, or development of operations, land, property, or other assets in a *country of concern* when the U.S. person *knows* that such acquisition, leasing, or development will result in, or that the *U.S. person* plans to result in, either (1) the establishment of a *covered foreign person,* such as the acquisition of land in a *country of concern* with the intent to convert it into a facility that designs an integrated circuit (generally known as a ''greenfield'' investment) or (2) a *person of a country of concern's* engagement in a *covered activity* (generally known as a ''brownfield'' investment).

A *U.S. person's* plans are sufficient in these cases for the transaction to be a *covered transaction.* This is so because in the greenfield and brownfield context, a *U.S. person* may not *know* at the time of the transaction that the investment will result in a *covered activity,* yet the Treasury Department nevertheless seeks to cover activities intended to bring about the establishment of a *covered foreign person* or a *person of a country of concern's* engagement in a *covered activity,* since such a situation is likely to convey intangible benefits from the *U.S. person* to a *covered foreign person.* That a *covered foreign person* ultimately results from a greenfield or brownfield investment is not necessary for coverage under the Final Rule, so long as the specified action coupled with the specified plan is present at the time of the transaction.

The Treasury Department has assessed that requiring a greenfield or brownfield investment to result in the establishment of a *covered foreign person* before triggering obligations associated with *covered transaction* status risks undermining the national security goals of the program. For the avoidance of doubt, the Treasury Department does not intend to scope in transactions, including real estate transactions, where the *U.S. person* does not have the requisite *knowledge* or plan. The Treasury Department will

assess a *U.S. person's* plans via objective indicators, including, for example, correspondence with the investment target or relevant government, business plans, and any presentations to potential investors.

Entrance Into a Joint Venture

The definition of *covered transaction* includes *a U.S. person's* entrance into a joint venture, wherever located, with a *person of a country of concern* where the *U.S. person knows* the joint venture either will engage, or plans to engage, in a *covered activity.* Like the greenfield or brownfield investment prong discussed above, this prong is intended to cover situations in which a *covered foreign person* does not exist at the time of a transaction, but the transaction structure presents the opportunity and incentive for the transfer of intangible benefits from a *U.S. person* to a *person of a country of concern* through the joint venture. Similar to a greenfield or brownfield transaction, the joint venture does need not to engage in a *covered activity* for the establishment of the joint venture to be a *covered transaction* under the Final Rule as long as the *U.S. person knows* the joint venture will do so, or plans to do so.

§ 850.211—Develop

Under the Proposed Rule, *develop* was defined as engagement in any stages prior to serial production, including design or modification, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, and layouts. One commenter requested that the Treasury Department clarify the meaning of ''development'' in § 850.210(a) and *develop* as defined in § 850.211 of the Proposed Rule. The same commenter also requested that the Treasury Department clarify that *develop* at § 850.211 of the Proposed Rule would not include a company's modification, configuration, or testing of a piece of technology acquired from a third party for the company's own use.

In consideration of these comments, the Final Rule modifies the definition of *develop* from the Proposed Rule. First, the Final Rule now clarifies that the definition of *develop* in § 850.211 applies to all provisions of the Final Rule *except for* § 850.210(a)(4). This change is being made because *develop* as defined at § 850.211 is primarily related to the development of technologies and products referenced at §§ 850.217 and 850.224. As described above in the discussion regarding § 850.210(a)(4), the term ''development'' is often used when describing brownfield investments and has the plain English meaning of the term as commonly used in that context (*e.g.* to refer to activities such as the build-out, expansion, or retrofitting of physical facilities or land). Second, the Final Rule adds the term ''substantive'' to qualify ''modification'' so that making a modification to a third-party technology or product that is ''substantive'' constitutes *developing* that technology or product, but making a non-substantive modification to it does not. For example, the Treasury Department considers routine maintenance or repair of a third-party product to constitute a non-substantive modification. In contrast, the Treasury Department considers modification to advance or repurpose the performance, function, or capability of a third-party technology or product, or impact its security features (*e.g.,* by removing security measures or safeguards from a third-party AI model), to be a substantive modification.

§ 850.213—Excepted Transaction

The Proposed Rule included a definition of *excepted transaction* that would refer to a transaction that is not a *covered transaction* because it meets specified criteria that were described in proposed § 850.501. The Treasury Department received several comments related to the definition of *excepted transaction* that focused on the specific criteria described in the operative provision for *excepted transactions* in § 850.501. Those comments are discussed below in the discussion related to § 850.501. The Final Rule adopts § 850.213 without change from the Proposed Rule.

§ 850.216—Knowledge

The Proposed Rule specified that certain provisions, including the definition of *covered transaction,* would apply only if a *U.S. person* had *knowledge* of the relevant facts or circumstances at the time of a transaction. The Proposed Rule defined *knowledge* as either actual knowledge that a fact or circumstance existed or was 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. As discussed in the Proposed Rule, this language was similar to the definition of *knowledge* found in the Export Administration Regulations (EAR) at 15 CFR 772.1.

The Treasury Department received one comment on this section. The commenter suggested that the definition of *knowledge* be based on objective criteria concerning due diligence efforts and stated that including an ''awareness of a high probability of a fact or circumstance's . . . future occurrence'' in § 850.216(b) was concerning especially in connection with greenfield and brownfield investments where new facts may come to light throughout the lifecycle of a project.

The Final Rule adopts the definition of *knowledge* in § 850.216 without change from the Proposed Rule. As noted above, the language of this definition is similar to the definition of *knowledge* found in the EAR, and retaining this language is consistent with the goals and structure of the Final Rule, which implicates certain future events—for example, in § 850.210(a)(5), the entrance into a joint venture where the joint venture will engage in a *covered activity.* In addition, where the Final Rule implicates *knowledge* of a future event, such as the definition of *covered transaction* in § 850.210, such *knowledge* is to be assessed ''at the time'' of the relevant transaction. This language makes clear that the evaluation of *knowledge* as to the relevant facts or circumstances—including in the context of greenfield or brownfield investments—is at the time of the transaction.

§ 850.217—Notifiable Transaction

As discussed in the Proposed Rule, a *notifiable transaction* would have been a *covered transaction* in which the relevant *covered foreign person* undertook (or in the case of certain greenfield, brownfield, or joint venture investments, the *U.S. person knew* would or intended to undertake) any of several specified *covered activities* listed in the proposed definition of *notifiable transaction.*

In the Proposed Rule, the Treasury Department determined that the listed activities may contribute to the threat to the national security of the United States identified in the Outbound Order. Each of the technical descriptions and references to end uses in the proposed definition were designed to achieve the national security policy objectives of the Outbound Order, and the Proposed Rule noted that the Treasury Department may consider further technical refinements consistent with these objectives. Each *covered activity* for purposes of a *notifiable transaction* is discussed below.

The submission of information to the Treasury Department regarding a *notifiable transaction* would increase the U.S. Government's visibility into transactions involving technologies and products relevant to the threat to the

national security of the United States identified in the Outbound Order. This information would be instructive in identifying sectoral trends and related capital flows in the *covered activities.* Additionally, it would inform future policy development with respect to both implementation of the Outbound Order, as well as the establishment or expansion of other U.S. Government programs relevant to the covered national security technologies and products. It is expected that this information would help policymakers determine whether any existing legal authorities should be used, or new action should be taken, to address the threat to the national security of the United States identified in the Outbound Order.

Commenters provided feedback on the nature and scope of *notifiable transactions* defined in § 850.217.

Notifiable Transaction—Integrated Circuit Design and Production

Sections 850.217(a), (b), and (c) of the Proposed Rule defined *notifiable transactions* involving integrated circuits to include any *covered transaction* in which a relevant *covered foreign person* or joint venture designed, fabricated, or packaged any integrated circuit that was not described in the definition for *prohibited transaction* (*i.e.,* an integrated circuit did not meet the performance parameters or criteria set forth in paragraphs (c), (d), and (e) of § 850.224 of the Proposed Rule, as applicable). Commenters suggested that the definition for *notifiable transaction* involving integrated circuits was broad and could implicate integrated circuits at ''legacy'' or ''mature'' process nodes that are commercially available and pose limited national security risk. Commenters cited the administrative or compliance burden for U.S. semiconductor companies adhering to the notification requirement, with one commenter suggesting that the notification and disclosure requirements could lead a company to focus on compliance at the expense of research and development. Commenters suggested narrowing the criteria for *notifiable transactions* involving integrated circuits by aligning the scope of integrated circuits in the rule to integrated circuits controlled under the EAR. One commenter requested the Treasury Department consider expanding the scope of *notifiable transactions* to those that do not involve a *country of concern.* One commenter also noted the importance of timely updates to regulations in the future and engagement with the private sector to ensure that notification requirements involving integrated circuits keep pace with technological and industry developments.

The Final Rule implements § 850.217(a) through (c) without change from the Proposed Rule. In considering comments on the breadth of § 850.217(a) through (c), the Treasury Department assesses that the design, fabrication, and packaging of integrated circuits, including those at ''legacy'' or ''mature'' process nodes, have the potential to contribute to and advance the capability of countries of concern in sensitive technologies and products critical for such countries' military, intelligence, surveillance, or cyber-enabled capabilities. The potential intangible benefits of U.S. investment are particularly relevant in the semiconductor industry given the complex and resource-intensive nature of semiconductor research, development, manufacturing, and scaling, as well as the importance of the semiconductor supply chain to national security applications. The Treasury Department determines that visibility into these transactions is important and thus maintains a notification requirement. The Treasury Department also notes that technical thresholds set forth in the Final Rule, developed in consultation with the Department of Commerce and other agencies, are in many cases consistent with but may not precisely match with the EAR, International Traffic in Arms Regulation (ITAR), or other export control regimes due to differences in policy objectives and legal authorities. Addressing the threat posed by the advancement by countries of concern in areas critical for military, intelligence, surveillance, or cyber-enabled capabilities may require restricting transactions in persons engaged in technologies that are upstream of, at different technical thresholds than, or otherwise distinct from those controlled for export. Moreover, the definition of *country of concern* is set forth in the Outbound Order (listed in the Annex) and is not independently defined by the Treasury Department in the Proposed Rule. The Treasury Department intends to continue engaging with stakeholders in the semiconductor industry and other industries to inform any future updates to the notification requirements involving integrated circuits or related technologies.

Notifiable Transaction—AI System—Overall Approach

Section 850.217(d) of the Proposed Rule defined *notifiable transactions* involving *AI systems* to include any *covered transaction* in which a relevant *covered foreign person* or joint venture *developed* any *AI system* that was not described in § 850.224(j) or (k) of the Proposed Rule and that was designed to be used for any government intelligence, mass-surveillance, or military end use; intended by the *covered foreign person* or *joint venture* to be used for cybersecurity applications, digital forensics tools, penetration testing tools, or the control of robotic systems; or trained using a quantity of computing power greater than a numerical threshold. A few commenters recommended that the Treasury Department revise the AI-related notification requirements to focus on only technical criteria (*i.e.,* the computing power thresholds, rather than the end-use thresholds) when determining whether a target is engaging in *covered activities* involving *AI systems.* One commenter suggested that the definition of a *notifiable transaction* involving an *AI system* revert to the language discussed in the ANPRM, which focused on *AI systems* designed to be exclusively used for certain non-military applications. Another commenter noted that the scope of *AI systems* covered by the notification requirement and prohibition should be defined to avoid negative impacts on investment cooperation between the United States and the PRC in certain sectors such as healthcare, education, and agriculture.

The definition of a *notifiable transaction* involving an *AI system* in the Final Rule includes both end-use thresholds under § 850.217(d)(1) and (2) and technical thresholds under § 850.217(d)(3). This approach captures for notification those transactions involving *AI systems* that are relevant to national security either because of their end use—they are designed for government intelligence, mass-surveillance, or military end use or are intended to be used for cybersecurity applications, digital forensics tools, penetration testing tools, or the control of robotic systems end—or because they meet the technical threshold of greater than 10^23 computational operations. The Treasury Department considered and assessed that limiting *notifiable transactions* involving *AI systems* to systems designed to be exclusively used for certain non-military applications would be too narrow to capture dual-use technologies of potential concern. Similarly, the Treasury Department assessed that sectoral carveouts for *notifiable transactions* would undermine the goals of the Outbound Order, since *AI systems* designed or intended for a listed end use or trained

on greater than 10^23 computational operations are by nature designed or trained with an objective or a level of sophistication that could contribute to capability development in areas critical for military, intelligence, surveillance, or cyber-enabled capabilities by countries of concern.

Substantive changes are discussed below. The Final Rule also implements stylistic changes in conformance with the substantive changes discussed below.

Notifiable Transaction—AI System—End Use—Design Intent

Regarding the end-use thresholds for *notifiable transactions* involving *AI systems,* commenters also noted the challenge of distinguishing between *AI systems* that are ''designed'' for government intelligence, mass-surveillance, or military end uses (which are subject to the notification requirement) from *AI systems* that are ''exclusively designed'' for the same end uses (which are subject to the prohibition). A commenter suggested allowing U.S. investors to rely on information or representations of the target, which would be able to assess the design intent and end use of a given *AI system.* Another commenter suggested clarifying the requirement by replacing ''designed to be used'' with ''may be used'' in § 850.217(d)(1), which would broaden the notification requirement to encompass any *AI systems* with the potential for any of the listed end uses without the need for investors to assess ''design'' or ''exclusive design'' intent. Another commenter requested that the Treasury Department define ''design'' in relation to a *covered activity.*

Sections 850.217(d) and 850.224(j) in the Final Rule retain the use of ''design'' and ''exclusive design'' as an end-use threshold for identifying certain *notifiable* and *prohibited transactions,* respectively, that involve *AI systems.* The Treasury Department notes that the end-use thresholds for *AI systems* are complemented by the technical threshold for computing power at § 850.217(e), which provides criteria for *notifiable transactions* involving *AI systems* trained using a quantity of computing power greater than 10^23 computational operations. In some instances, the technical thresholds would therefore obviate the need for an investor to assess design intent of *AI systems.* The Treasury Department recognizes that while design intent may not always be easy to ascertain, especially in early-stage startup companies, the assessment of the investor is based on information available at the time of the transaction, consistent with the knowledge standard described at § 850.104. The Treasury Department further notes that assessing a given *AI system* for ''design'' or ''exclusive design'' may involve considering an AI developer's source of funding, customer base, nature and extent of model customization, performance indicators from testing and evaluation, and relevant training data, among other factors. The Final Rule does not adopt a specific definition for ''design,'' since the specific applications of ''design'' may vary through their usage in the regulatory text depending on the relevant technology. The Treasury Department notes that the plain English meaning of ''design'' should apply, including but not limited to the process of conceiving, defining, or planning a system for a specific function or end use, such as laying out elements, interfaces, and other characteristics in accordance with identified requirements or architecture.

Commenters also noted that the first parenthetical list under § 850.217(d)(1) in the Proposed Rule seemed to suggest that any *AI system* incorporating any of the features in the serial list would automatically qualify as ''designed to be used for'' mass-surveillance end use. Commenters were concerned that such an approach would implicate many exclusively commercial *AI systems* capable of ''mining text, audio, or video; image recognition; location tracking; or surreptitious listening,'' since such features are more commonplace.

The Final Rule makes an adjustment in the first parenthetical list under § 850.217(d)(1) to clarify that the list is illustrative of the types of features that could contribute to mass-surveillance end use.

One commenter sought clarification regarding whether the terms ''designed to be used'' and ''intended . . . to be used for'' in § 850.217(d)(1) and (2), respectively, are meant to have different meanings. The commenter suggested that the Treasury Department use a single term if the meanings are identical or, alternatively, provide clarification regarding how the terms are meant to operate differently in the regulatory text.

The Treasury Department notes that the terms ''designed to be used'' and ''intended . . . to be used for'' operate distinctly from one another in § 850.217(d). The phrase ''design to be used'' refers to any *AI system* where the development of such system, including for example, research and design considerations, is undertaken in view of potential government intelligence, mass-surveillance, or military end use. The phrase ''intended . . . to be used'' captures *AI systems* that may or may not have been developed specifically for cybersecurity applications, digital forensics tools, penetration testing tools, or the control or robotic systems, but are nevertheless intended by a *covered foreign person* to be used for such purposes.

The Final Rule also adds parenthetical text to § 850.217(d)(1) to clarify that weapons design includes, but is not limited to, chemical, biological, radiological, or nuclear weapons.

Notifiable Transaction—AI System—End Use—Scope

Several commenters requested that the Treasury Department distinguish between *AI systems* with end uses that are offensive in nature from those that are defensive (*e.g.,* the cybersecurity-related applications under § 850.217(d)(2) could include both applications that disrupt another computer network and those that protect one's own network). One commenter suggested that § 850.217(d)(2) should exclude *AI systems* sold to commercial or civilian end users and that are restricted from military, surveillance, or law enforcement uses by technical and contractual safeguards.

In response to the comments, the Final Rule includes Note 3 in § 850.217, which carves out from notification requirements certain transactions involving a *person* engaged in certain *development* of an *AI system* that would otherwise result in the transactions being *covered transactions,* where such *development* is undertaken in a manner that is unlikely to pose a national security concern. Specifically, Note 3 provides that customizing, configuring, or fine-tuning a third-party AI model or machine-based system strictly for internal, non-commercial use would not itself trigger the notification requirements delineated in § 850.217 for *covered transactions* involving *AI systems,* unless such activity has a government intelligence, mass-surveillance, or military end use, or is for digital forensics tools, penetration testing tools, or the control of robotic systems. The effect of this is that a *person* customizing, configuring, or fine-tuning a third-party AI model or machine-based system strictly for its own internal, non-commercial use for cybersecurity applications, or other end uses or applications *not* listed in Note 3, would not implicate the notification requirements solely on that basis.

Notifiable Transaction—AI System—End Use—Scope—Control of Robotic Systems

Commenters suggested that the notification requirement for certain *AI systems* involving the ''control of robotic systems'' could be narrowed to exclude certain commercial or civilian applications, with commenters suggesting specific carveouts for medical and direct patient care, or automotive use.

The Final Rule adopts the sub-paragraph (iv) pertaining to ''the control of robotic systems'' from § 850.217(d)(2) of the Proposed Rule without changes. The Treasury Department recognizes that this provision may implicate certain consumer or civilian applications, due to the dual-use nature of controlling robotic systems, and considered options for rescoping the provision, including carveouts based on direct patient care or robotic systems with lower levels of autonomy. Given the potential and significant capability enhancement afforded by *AI systems* in the area of controlling robotic systems, however, the Treasury Department assesses in consultation with U.S. Government subject-matter experts that a sectoral carveout for medical or automotive applications in the notification requirement would reduce the U.S. Government's visibility into transactions involving dual-use technologies and products relevant to national security.

Notifiable Transaction—AI System—Technical Computing Power Thresholds

Section 850.217(d)(3) of the Proposed Rule defined *notifiable transactions* involving *AI systems* to include any *covered transaction* in which a relevant *covered foreign person* or joint venture developed any *AI system* that is not described in § 850.224(j) or (k) and that was trained on a specific quantity of computing power. Three alternates for such technical thresholds were provided for consideration in the Proposed Rule: 10∧23, 10∧24, or 10∧25 computational operations (*e.g.,* integer or floating-point operations). The Treasury Department did not receive comments with specific preferences for any of the three alternate technical thresholds listed for *notifiable transactions* involving *AI systems* but did receive several comments on the general approach. One commenter suggested that investment restrictions should target *AI systems* trained on more than 10∧26 floating-point operations of compute. Other commenters noted that the Treasury Department should seek to align the AI-related provisions of the Final Rule with other national security-related policies on AI and provide a clear rationale for the computing power threshold chosen. One commenter noted concern about using floating-point operations per second as a metric to assess risk.

Regarding the computing power threshold for *notifiable transactions* involving the development of *AI systems,* the Final Rule sets the threshold at 10∧23 computational operations. As noted above, the technical threshold of greater than 10∧23 computational operations will capture for notification *AI systems* at the lower end (in terms of scale and capability) of large-scale AI models that have been released to date. The Treasury Department, in consultation with U.S. Government subject-matter experts, selected this threshold based on the current number of publicly known AI models originating from the PRC, which is identified as a *country of concern* in the Annex to the Outbound Order, that would be implicated by the Final Rule. The Treasury Department considered other metrics for measuring AI capability and selected computing power for training consistent with the AI Order. The Treasury Department recognizes that new and potentially improved benchmarks for evaluating AI capabilities may become available and will monitor these developments to incorporate, as appropriate, such metrics into future regulatory updates.

Notifiable Transaction—AI System—Changes to Technical Thresholds

Three commenters noted that *AI systems* will evolve over time and that the computing power thresholds for both *notifiable* and *prohibited transactions* will likely need to be updated in the future, suggesting that the Treasury Department should engage with the private sector to ensure such thresholds and other definitions in the rule remain relevant. One commenter requested that the Treasury Department do so through a notice-and-comment process for any updates to the computing power thresholds, as well as other covered products and technologies, including provisions to ensure that such updates do not result in *U.S. persons* being penalized for investing in entities that become *covered foreign persons.* Another commenter recommended that the Treasury Department work closely with the National Institute for Standards and Technology and in line with the AI Order on a process for updating compute thresholds. One commenter suggested that transactions involving connected and electric vehicle technologies should be added to the notification and prohibition requirements, given pending legislation and rulemaking to control and secure connected vehicle, advanced driver assistance, autonomous vehicle, and electric vehicle technologies.

The Treasury Department anticipates that the computing power thresholds included in the Final Rule will likely need to evolve to reflect developments in AI and relevant technologies. The Final Rule includes the note to § 850.217 that was in the Proposed Rule, indicating that the Secretary, in consultation with the Secretary of Commerce, and, as appropriate, the heads of other relevant agencies, shall periodically assess whether the quantity of computing power described in paragraph (d)(3) remains effective in addressing threats to the national security of the United States and make updates, as appropriate, through public notice. The Treasury Department intends to continue engaging with stakeholders to inform future updates, as appropriate, to the notification requirements involving *AI systems* or related technologies. Regarding potential liability for a *U.S. person* that invests in an entity that was not a *covered foreign person* at the time of the transaction but becomes a *covered foreign person* because of a future regulatory update, the Treasury Department would not expect to apply such a regulatory update retroactively.

Several commenters sought clarification regarding identification of *notifiable* and *prohibited transactions* based on how and when a *person of a country of concern* ''engages in'' the *covered activities* referred to in the definitions of *notifiable* and *prohibited transactions.* Multiple other commenters similarly requested that the Treasury Department confirm that *covered activities* would not extend to the provision of customer support in connection with the sale of a product to a *covered foreign person.*

The Treasury Department notes that the *covered person* definition at § 850.209(a)(1) is meant to capture *persons of a country of concern* that are engaging in the *covered activities* delineated in §§ 850.217 and 850.224 and would not implicate third-party entities that supply a product or service to a *covered foreign person,* so long as the third-party entity does not itself perform the *covered activity.*

One commenter requested the Treasury Department develop a notification system requiring *U.S. persons* to file details about *covered transactions* that includes venture capital investments in *countries of*

concern that do not currently fall under the purview of other regulatory agencies. The Treasury Department declines to implement this suggestion to expand the notification requirement, as it would exceed the scope of *covered transactions* contemplated in the Outbound Order.

§ 850.219—Parent

Section 850.219 of the Proposed Rule defined *parent,* with respect to an entity, as (1) a *person* that directly or indirectly held more than 50 percent of the outstanding voting interest in an entity or the voting power of the board of the entity; (2) the general partner, managing member, or equivalent of the entity; or (3) the investment adviser to any entity that was a pooled investment fund, with ''investment adviser'' as defined in the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(11)).

The Treasury Department received one comment on this provision. The commenter stated that the definition of *parent* is too broad and should only include the direct or indirect holding of more than 50 percent of outstanding voting interest in an entity or voting power of the board of an entity. The Treasury Department declines to make this change to narrow the definition of *parent* in the Final Rule. The Treasury Department understands the commenter's suggested revision as requesting the removal of paragraphs (b) and (c) from § 850.219. Doing so would narrow the application of the provision and not account for other types of entities such as limited partnerships or pooled investment funds that are structured differently than an entity with equity ownership or a board. Removing paragraphs (b) and (c) from § 850.219 would therefore result in a gap in coverage. In the Final Rule, the Treasury Department has added Note 1 to § 850.219 to clarify that an entity which satisfies the conditions in paragraphs (a), (b), or (c) is a *parent* within the meaning of this section even where such an entity is the intermediate entity and not the ultimate parent. This addition is in response to a comment to § 850.206 of the Proposed Rule which sought clarity as to whether an intermediate entity could be a *U.S. person parent* under paragraph (a) of that section for the purposes of determining whether an entity is a *controlled foreign entity.* Other than the addition of this note, § 850.219 is finalized without change from the Proposed Rule. A *parent* under the Final Rule, with respect to any entity, is (1) a *person* that directly or indirectly holds more than 50 percent of the outstanding voting interest in an entity or the voting power of the board of the entity; (2) the general partner, managing member, or equivalent of the entity; or (3) the investment adviser to any entity that is a pooled investment fund, with ''investment adviser'' as defined in the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(11)).

§ 850.221—Person of a Country of Concern

Section 850.221 of the Proposed Rule described four sets of circumstances that would cause a *person* to be a *person of a country of concern:*

- An individual who is a citizen or permanent resident of a *country of concern* (excluding U.S. citizens and U.S. permanent residents);
- An entity with a principal place of business in, headquartered in, incorporated in, or organized under the laws of, a *country of concern;*
- The government of a *country of concern,* persons acting on behalf of such a government, and persons controlled by or directed by such a government; or
- Any entity, wherever located, in which one or more *persons of a country of concern,* individually or in the aggregate, holds at least 50 percent of any outstanding voting interest, voting power of the board, or equity interest, regardless of whether the interest was held directly or indirectly.

As stated in the Proposed Rule, this defined term is a component of the definitions of *covered foreign person* and *covered transaction.*

Person of a Country of Concern—General

The Treasury Department received comments on several aspects of § 850.221. A commenter stated that the Proposed Rule would increase the time and complexity of completing due diligence due to the breadth of the definition of *person of a country of concern,* and other commenters noted that regulatory restrictions in a *country of concern* or privacy concerns could impede or prevent a *U.S. person* from collecting information from a *person of a country of concern.* The Treasury Department notes that the definition of *person of a country of concern* is derived from section 9(e) of the Outbound Order and was crafted to cover a variety of persons with relationships to a *country of concern.* As previously discussed, the Treasury Department appreciates the dynamics of conducting due diligence regarding overseas investment targets. However, the Treasury Department expects that, through a ''reasonable and diligent inquiry,'' a *U.S. person* should be able to determine whether a potential investment target involves a *person of a country of concern* as defined in the Final Rule. As in the Proposed Rule, the Final Rule sets forth a variety of non-exclusive factors that are relevant to conducting a ''reasonable and diligent inquiry.'' Further discussion of due diligence as it relates to how *knowledge* will be assessed can be found in Subpart A and the preamble to Subpart A.

A commenter noted that other U.S. national security regulatory programs publish a list of foreign persons subject to certain transactional prohibitions, allowing due diligence to be carried out through automated processes. The commenter stated that a list-based approach would reduce the compliance burden for a *U.S. person* investing in publicly traded securities. The commenter also noted that a *U.S. person* would be required to establish a separate, manual compliance process in the absence of such an approach. In response to this comment, the Treasury Department notes that compiling a list as the commenter suggested would be challenging given that any such list would likely be subject to frequent change and likely underinclusive, which would undermine the national security goals of the Outbound Order. Additional discussion relevant to this point is above in the discussion of a *covered transaction.* The Treasury Department instead expects a *U.S. person* to conduct a ''reasonable and diligent inquiry'' to determine whether a transaction is covered under the Final Rule, including whether any *person of a country of concern* or *covered foreign person* is involved. Note, however, that the definition of *prohibited transaction* provides that any *covered transaction* is prohibited when it is with or involves a *covered foreign person* undertaking any *covered activity*—whether referred to in the definition of *prohibited transaction* or in the definition of *notifiable transaction*—if the *covered foreign person* is included on one of several U.S. Government lists, such as the Entity List maintained by the Bureau of Industry and Security (BIS) within the Department of Commerce. Because the United States has already determined that the inclusion of a person on such a list evidences a threat to the interests of the United States, such as the foreign policy or national security of the United States, if a listed person is a *covered foreign person* engaged in any *covered activity,* then a *U.S. person's covered transaction* with such *covered foreign person* and the transfer of capital and *U.S. person* intangible benefits to them would pose

a particularly acute risk to U.S. national security even when such listed person is engaged in what would otherwise qualify as only a *covered activity* under the *notifiable transaction* definition.

Citizen or Permanent Resident of a Country of Concern

Section 850.221(a) of the Proposed Rule related to those individuals that are defined as a *person of a country of concern.* These included any individual that (1) was a citizen or permanent resident of a *country of concern,* (2) was not a U.S. citizen; and (3) was not a permanent resident of the United States. The Treasury Department adopts this paragraph in the Final Rule without changes.

One commenter requested that the Treasury Department exclude from the definition of *person of a country of concern* individuals who are permanent residents or citizens of third countries and citizens of a *country of concern* (also known as dual citizens). The commenter also suggested excluding individuals who no longer ordinarily reside in a *country of concern.* While the Treasury Department understands that individuals who are citizens of a *country of concern* can have relationships to more than one country, the Treasury Department declines to amend this sub-paragraph. The fact that a *person of a country of concern* may be a dual citizen or permanent resident of a third country does not necessarily diminish their ties or allegiance to a *country of concern,* and they may still be subject to the laws of *a country of concern* that may compel the disclosure of information or other conduct. Creating an exception for such dual citizens could undermine the effectiveness of the Final Rule by introducing a loophole whereby a *person of a country of concern* could avoid coverage through taking up residency in or acquiring citizenship of a third country. The Treasury Department also notes that this sub-paragraph is derived from section 9(e)(i) of the Outbound Order.

One commenter expressed concern that the scope of this sub-paragraph, which includes individuals who are citizens or permanent residents of a *country of concern,* could prohibit U.S. investment in technology startups in the United States where the business was started by an individual who is a *person of a country of concern.* The Treasury Department interprets this comment to refer to a situation in which the *person of a country of concern* that has started a U.S. company both remains in the United States and continues to own a controlling stake such that the company is also defined as a *person of a country of concern* pursuant to § 850.211(d). The Treasury Department notes that an individual who is a U.S. citizen or U.S. permanent resident is not a *person of a country of concern* as set forth in § 850.221. However, where a *person of a country of concern* is merely in the United States (or a third country) and is engaged in a *covered activity,* capturing *U.S. person* transactions involving such persons is consistent with the objectives of the Outbound Order, given the ties between the entity accepting investment and a *country of concern* by virtue of its continued ownership by a citizen or permanent resident of a *country of concern* that is also neither a U.S. citizen nor a U.S. permanent resident.

Another commenter stated that investments by a *person of a country of concern* enterprise in third countries do not usually pose national security risks and requested the definition be adjusted to exclude such investments. The Final Rule, like the Proposed Rule, does not generally regulate investments by a *person of a country of concern entity* into third countries, but rather regulates certain investments by a *U.S. person* into a *person of a country of concern* that engages in a *covered activity.* However, the Treasury Department declines to categorically exclude coverage of certain situations in which a *person of a country of concern* may also be a *U.S. person* (for example, because the entity is majority owned or controlled by *persons of a country of concern* but headquartered in the United States) because doing so could create a loophole that would undermine the national security goals of the Final Rule.

Entity of a Country of Concern

Section 850.221(b) of the Proposed Rule defined as a *person of a country of concern* an entity with a principal place of business in, headquartered in, or incorporated in or otherwise organized under the laws of, a *country of concern.* The Treasury Department did not receive comments on this paragraph and adopts it in the Final Rule without changes.

Control by the Government of a Country of Concern; Acting for or on Behalf of the Government of a Country of Concern

Section 850.221(c) of the Proposed Rule scoped into the definition of a *person of a country of concern* the government of a *country of concern,* including any political subdivision, political party, agency, or instrumentality thereof; any person acting for or on behalf of the government of such *country of concern;* or any entity with respect to which the government of such *country of concern* held individually or in the aggregate, directly or indirectly, 50 percent or more of the entity's outstanding voting interest, voting power of the board, or equity interest, or otherwise possessed 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). The Treasury Department adopts this paragraph in the Final Rule without changes.

Commenters requested that the Treasury Department clarify which actions taken for or on behalf of the government of a *country of concern* would fall within the scope of this provision. A commenter also requested clarity on (or specific examples of) what constitutes an instrumentality or any political subdivision, political party, or agency of the government of a *country of concern.* The Treasury Department notes that ''acting for or on behalf of the government of a country of concern'' may include formal or informal relationships between a person and a government of a *country of concern* resulting in such person engaging in conduct for the purpose of benefitting such government. This provision is not intended to capture persons, such as third-party consultants, operating in an arm's-length commercial relationship with a government.

Person of a Country of Concern—Aggregation and Voting Power

Section 850.221(d) of the Proposed Rule scoped into the definition of a *person of a country of concern* any entity in which one or more persons identified in § 850.221(a), (b), or (c), individually or in the aggregate, directly or indirectly, held at least 50 percent of any of the following interests of such entity: outstanding voting interest, voting power of the board, or equity interest. Section 850.221(e) of the Proposed Rule made explicit that when a *person of a country of concern* held any interest described in paragraph 850.221(d) in another person, which in turn held any interest described in paragraph 850.221(d) in a third person, each of the three persons would be defined to be a *person of a country of concern,* and so on. The Treasury Department adopts these paragraphs in the Final Rule without changes.

A commenter requested that the Treasury Department revise the definition of *person of a country of concern* to exclude those entities scoped in via the language of 221(d) and (e). The commenter asserted that the inclusion of ''in the aggregate'' and

''direct and indirect'' presents broad and impracticable diligence obligations for a *U.S. person* when determining whether an investment target is a *person of a country of concern* and recommended that the 50 percent rule apply only if attributable to a single entity, rather than in the aggregate. Alternatively, the commenter recommended excluding the aggregation of unrelated parties' ownership stakes, and instead establishing a *de minimis* threshold for outstanding voting power or equity below 10 percent. Another commenter similarly suggested revising the rule to only require aggregation of voting interest, voting power of the board, or equity interest where the persons are related or affiliated parties. The commenter noted that this suggestion meant to reduce the burden on the U.S. Government in instances where a *U.S. person* submits a notification out of an abundance of caution due to incomplete information on transactions that may involve a *person of a country of concern.* The Treasury Department notes that the paragraphs requiring aggregation are intended to capture entities located outside of a *country of concern* that are at least 50 percent owned by a *person of a country of concern* or controlled by a government of a *country of concern,* because a *U.S. person* investment into such an entity could result in the transfer of capital and intangible benefits to or for the benefit of one or more *persons of a country of concern* or a government of a *country of concern.* As such, the Treasury Department declines to amend these provisions and reiterates that, as stated in the Proposed Rule, the definition is intended to draw a bright line so that it is straightforward for a *U.S. person* to ascertain whether an entity is a *person of a country of concern.*

One commenter recommended that the Treasury Department define ''voting power of the board'' to avoid uncertainty as to whether it applies based on the citizenships of members of the board. The commenter suggested a definition for the Treasury Department's consideration. The Treasury Department declines to incorporate the definition provided by the commenter because whether it refers to an individual or entity depends on the context.

Person of a Country of Concern—Final Rule Summary

The Final Rule adopts the definition of *a person of a country of concern* without change from the Proposed Rule. This definition includes an individual who is a citizen or permanent resident of a *country of concern* and excludes U.S. citizens and U.S. permanent residents. It also includes an entity with a principal place of business in, headquartered in, incorporated in, or organized under the laws of a *country of concern.* It also includes the government of a *country of concern,* persons acting on behalf of such a government, and persons controlled by or directed by such a government. The Treasury Department expects that, through a ''reasonable and diligent inquiry,'' a *U.S. person* should be able to determine whether a potential investment target involves a *person of a country of concern* as defined in the Final Rule. The definition includes any entity, wherever located, in which one or more *persons of a country of concern,* individually or in the aggregate, hold at least 50 percent of any outstanding voting interest, voting power of the board, or equity interest, regardless of whether the interest is held directly or indirectly.

Finally, the definition includes any entity, wherever located, in which one or more *persons of a country of conce*rn, individually or in the aggregate, hold at least 50 percent of any outstanding voting interest, voting power of the board, or equity interest, regardless of whether the interest is held directly or indirectly. This is intended to capture entities located outside of a *country of concern* that are at least 50 percent owned by *persons of a country of concern,* because a *U.S. person* investment into such an entity could result in the transfer of intangible benefits to or for the benefit of one or more *persons of a country of concern.* When evaluating a tiered ownership structure for any given entity, a *U.S. person* will need to determine whether a *person of a country of concern,* individually or in the aggregate, holds at least 50 percent of the entity's voting interest, voting power of the board, or equity interest, in which case the entity will be considered a *person of a country of concern.* If the entity meets these criteria, another entity in which it holds at least 50 percent of the entity's voting interest, voting power of the board, or equity interest will also be a *person of a country of concern,* and so on.

§ 850.224—Prohibited Transaction

In the Proposed Rule, § 850.224 defined a *prohibited transaction* as a *covered transaction* in which the relevant *covered foreign person* undertook (or in the case of certain greenfield, brownfield, or joint venture investments, the *U.S. person knew* would or intended to undertake) any of several specified *covered activities* listed in the proposed definition of *prohibited transaction.* These *covered activities* included:

- Developing or producing any electronic design automation software for the design of integrated circuits or *advanced packaging,* certain front-end semiconductor fabrication equipment, equipment for performing volume advanced packaging, or other items related to extreme ultraviolet lithography fabrication equipment;
- Designing any integrated circuit that meets or exceeds certain advanced technical thresholds identified by the Department of Commerce, Bureau of Industry and Security, or integrated circuits designed for operation at or below 4.5 Kelvin;
- Fabricating integrated circuits that meets specified technical criteria;
- Packaging of any integrated circuit using *advanced packaging* techniques;
- Developing, installing, selling, or producing any supercomputer enabled by advanced integrated circuits that provide a theoretical compute capacity above a specified threshold;
- Developing a *quantum computer* or producing any of the critical components required to produce a *quantum computer;*
- Developing or producing any quantum sensing platform designed for, or which the relevant *covered foreign person* intends to be used for, military, government intelligence, or mass-surveillance end use;
- Developing or producing any quantum network or quantum communication system designed for, or which the relevant *covered foreign person* intends to be used for: (1) networking to scale up the capabilities of *quantum computers;* (2) secure communications; or (3) any other application that had military, government intelligence, or mass-surveillance end use;
- Developing an *AI system* that is designed to be exclusively used for, or which the relevant *covered foreign person* intends to be used for, any military, government intelligence, or mass-surveillance end use;
- Developing an *AI system* that is trained using a quantity of computing power above a technical threshold (for which the Proposed Rule offered three alternate thresholds for consideration), with a lower computing power technical threshold for *AI systems* using primarily biological sequence data (for which the Proposed Rule offered two alternate thresholds for consideration); and
- Any *covered activity* (either in the definition of *notifiable transaction* or *prohibited transaction*) if the *covered foreign person* is included on certain specified U.S. Government lists.

The Treasury Department received several comments relating to these various aspects of the scope of *prohibited transactions.*

Prohibited Transaction—General

One commenter requested that the Treasury Department revise the definition of *prohibited transaction* to distinguish between civilian and military technologies and products, which would have the effect of limiting the impact on U.S. firms seeking to enter certain civilian markets in a *country of concern.*

The Treasury Department has determined that the specified *covered activities* listed in the definition of *prohibited transaction* pose a particularly acute national security threat to the United States identified in the Outbound Order. Each of the technical descriptions and references to end uses in the definition of *prohibited transaction* is designed to achieve the focused national security policy objectives of the Outbound Order. However, the Final Rule includes Note 3 in § 850.224, which carves out from prohibition certain transactions that involve a *person* engaged in certain *development* of an *AI system* that would otherwise result in the transactions being *covered transactions,* where such *development* is undertaken in a manner that is unlikely to pose a national security concern. Specifically, Note 3 provides that customizing, configuring, or fine-tuning a third-party AI model or machine-based system strictly for internal, non-commercial use would not itself trigger the prohibition delineated in § 850.224 for *covered transactions* involving *AI systems* unless such activity has a government intelligence, mass-surveillance, or military end use, or is for digital forensics tools, penetration testing tools, or the control of robotic systems. The effect of this is that a *person* customizing, configuring, or fine-tuning a third-party AI model or machine-based system strictly for its own internal, non-commercial use for cybersecurity applications, or other end uses or applications *not* listed in Note 3, would not implicate a prohibition solely on that basis.

Prohibited Transaction—Integrated Circuits

Commenters requested that the rule not prohibit but instead require notification for *covered transactions* involving any integrated circuits, including those described at § 850.224(c), (d), and (e). One commenter stated that the prohibition of such transactions could prevent U.S. companies from diversifying critical supply chains to the benefit of U.S. national security by making investments in non-U.S. companies that have operations in the PRC.

The Final Rule adopts the Proposed Rule's definition of *prohibited transactions* involving certain integrated circuits, including those described at § 850.224(c), (d), and (e). The Final Rule does make a technical edit to the chapeau at § 850.224(d), which was modified from ''Fabricates any integrated circuit that meets any of the following criteria'' to ''Fabricates any of the following.'' This is a technical edit for clarity in paragraph (d) and is not intended to affect the substance of the paragraph.

The Treasury Department notes that the criteria for integrated circuits and related technologies were scoped to capture activities that pose an acute national security threat as described in the Outbound Order and Proposed Rule. The Treasury Department further notes that the Final Rule includes certain exceptions and exemptions at §§ 850.501 and 850.502, respectively, that could except or exempt certain transactions involving advanced integrated circuits, including in the event the Secretary makes a determination regarding a national interest exemption for a *covered transaction* that the Secretary determines, in consultation with the heads of relevant agencies, as appropriate, to be in the national interest of the United States.

Prohibited Transaction—AI System—Technical Thresholds

Several commenters requested the Treasury Department set the computing power thresholds for a *prohibited transaction* involving an *AI system* at 10^26 computational operations, the least restrictive of the three potential alternates offered in the Proposed Rule (10^24, 10^25, or 10^26). Commenters noted that this threshold would be more likely to target the type of *AI systems* that pose acute national security threats and be consistent with the thresholds set out in the AI Order. One commenter noted that some widely-available commercial AI models have been trained at 10^25 computational operations. For an *AI system* trained using primarily biological sequence data, one commenter recommended that the Treasury Department set the computing power threshold for a *prohibited transaction* at 10^24 computational operations, while another noted that restrictions on the AI-related use of biological data would be better addressed through separate regulations focused on governing the use of biological sequence data. Another commenter suggested that *AI systems* trained using primarily biological sequence data should be subject to a notification requirement only, citing the inconclusive relationship between AI training compute and bio-related risks, the distinct characteristics and open-source nature of life sciences research, and the value of a notification regime towards better understanding this sub-category of AI models. One commenter remarked that, despite its limitations, the use of a computing power threshold was a more administrable benchmark than other criteria.

The Final Rule sets the computing power threshold for a *prohibited transaction* involving an *AI system* at 10^25 computational operations for an *AI system* generally, and at 10^24 computational operations for an *AI system* using primarily biological sequence data. These determinations are reflected at § 850.224(k)(1) and (2), respectively. In assessing the appropriate technical thresholds for computing power, the Treasury Department considered the comments received on the Proposed Rule and inputs from U.S. Government subject-matter experts; the thresholds identified in the AI Order and related rationales; estimates for how computing power may evolve as AI model development continues; and the nature, number, and origin of current large-scale AI models trained at each of 10^23, 10^24, 10^25, and 10^26 computational operations based on available information. The Treasury Department notes that the computing power thresholds identified in the Final Rule for a *prohibited transaction* involving an *AI system* capture a number of models, including models trained primarily on biological data, that originate from a *country of concern* and exhibit the scale and capability that have implications for national security. The Treasury Department will continue to monitor the development of the AI industry, including engagement with relevant stakeholders, to inform future updates to the prohibition involving *AI systems,* as appropriate.

One commenter recommended that the Treasury Department add a prohibition requirement focused on targeting computing clusters required to train frontier *AI systems.* The commenter provided specific recommendations for technical criteria related to such computing clusters, including networking of over 100Gbits/s and a calculation of theoretical maximum computing capacity. The Treasury Department notes that the suggestion to add computing clusters to

the Final Rule aligns conceptually with a reporting requirement for AI clusters (with a certain networking bandwidth minimum and theoretical maximum computing capacity) under the AI Order. The Treasury Department intends to consider a similar addition in future updates to the Final Rule, since more time, information, and analysis are required to assess the nature and scope of such restrictions, including how to avoid unnecessary impact on computing clusters used for consumer or commercial applications.

Another commenter recommended that the Treasury Department have a mechanism to reevaluate computing power thresholds in response to changes in technology and the development of *AI systems* in *countries of concern.* The Treasury Department notes that the Final Rule includes the note to § 850.224 from the Proposed Rule indicating that the Secretary, in consultation with the Secretary of Commerce, and, as appropriate, the heads of other relevant agencies, shall periodically assess whether the quantities of computing power described in paragraph (k) remain effective in addressing threats to the national security of the United States and make updates, as appropriate, through public notice.

Prohibited Transaction—AI System—General

One commenter recommended that the Treasury Department develop a licensing system that would approve transactions where parties can demonstrate that a relevant *AI system* is not transferred to military, intelligence, or mass-surveillance end users or end uses. The same commenter also suggested publication of a list of AI applications ''authorized'' for investment regardless of computing power. The Final Rule makes no change to § 850.224 in response to this comment, since, as discussed above, a licensing system based on transaction-by-transaction review would be resource- and time-intensive to administer and is unlikely to result in the approvals that the commenter anticipates due to the potential dual-use and national security implications of *AI system*s that meet the end use or computing power thresholds tied to the prohibition. The Treasury Department additionally notes that there are no restrictions on outbound investment involving AI applications that do not meet the relevant definitions and thresholds set forth in the Final Rule, even if there is not a definitive list of such applications. Such AI applications would be challenging to list comprehensively due to the evolving nature of the AI industry and cadence of new or updated AI applications being released. The Final Rule includes additional clarification in § 850.224(j)(2) regarding an *AI system's* government intelligence or surveillance use. The Final Rule also adds parenthetical text to § 850.244(j)(1) to clarify that weapons design includes, but is not limited to, chemical, biological, radiological, or nuclear weapons.

One commenter also requested that the Treasury Department synchronize its definition of an *AI system* as used within *prohibited transaction* with other regulations, such as by basing its definition of *AI systems* on the EAR. The commenter noted that this would better align with companies' existing compliance operations, facilitating implementation of the rule and removing the need for companies to make subjective determinations about the intended use of *AI systems.*

In response, the Treasury Department notes that certain technologies implicated by the Final Rule may be necessarily different from those implicated by the EAR, since the restrictions on certain outbound investments are meant to prevent a *country of concern* from developing or advancing the development of technologies critical to the next generation of military, intelligence, surveillance, or cyber-enabled capabilities, including certain technologies that could be less advanced than, upstream of, or otherwise distinct from items controlled for export.

Prohibited Transaction—Quantum Computer

One commenter expressed concern that § 850.224(g), which defines a *prohibited transaction* to include a *covered transaction* in which the relevant *covered foreign person* or joint venture develops a quantum computer or produces any of the critical components of a quantum computer, could implicate research and commercial applications. The commenter requests that this provision exclude from its scope certain medical and geological applications.

The Treasury Department considered the technologies identified in § 850.224(g), including their potential use in research or commercial applications, and adopts this provision from the Proposed Rule in the Final Rule without changes. The Treasury Department notes that development of a quantum computer, or production of any of the critical components required to produce a quantum computer such as dilution refrigerators or two-stage pulse tube cryocoolers, by a *country of concern* has the potential to pose an acute national security threat to the United States. Advances towards more capable quantum computers, including incremental advances in quality and speed, would likely contribute to a country's capability to develop a cryptographically relevant quantum computer, among other applications, with acute national security implications. To the extent that a *covered foreign person* is engaged in developing a quantum computer or components critical to its function, the Treasury Department assesses that *covered transactions* involving such a *covered foreign person* should be prohibited to prevent a *country of concern* from accelerating its development of sensitive technologies and products critical for military end use.

Prohibited Transaction—Cross-Reference to U.S Government Lists and Programs

Several commenters discussed § 850.224(m) of the Proposed Rule, which provided that any *covered transaction* was prohibited when the transaction was with or involved a *covered foreign person* undertaking any *covered activity*—whether referred to in the definition of *prohibited transaction* or in the definition of *notifiable transaction*—if the *covered foreign person* was included on one of several U.S. Government lists, such as the Entity List maintained by BIS. One commenter recommends expanding the coverage of this provision via executive order or a related authority. Conversely, multiple commenters expressed concern that the Proposed Rule was overbroad and conflicts with policy decisions made by the U.S. Government in administering the other programs referenced in § 850.224(m).

The Final Rule makes no changes to § 850.224(m) as set forth in the Proposed Rule and adopts it in full. A *covered foreign person's* inclusion on these lists evidences a threat to the interests of the United States, such as the foreign policy or national security of the United States. The lists in the Proposed Rule were chosen because the transfer of capital and *U.S. person* intangible benefits to any *covered foreign person* on any such list would pose a particularly acute risk to U.S. national security even when such listed person is engaged in what would otherwise qualify as only a *covered activity* under the *notifiable transaction* definition.

One commenter stated that, because some of the lists effectively already

prohibit *U.S. persons* from engaging in certain transactions with the listed persons, § 850.224(m) may be duplicative. Another commenter reiterated its request that the Treasury Department base the prohibition on a list of entities that are engaged in certain activities rather than rely on the lists in § 850.224(m). Additionally, one commenter requested clarification around the interplay between this program and other U.S. Government programs, particularly through guidance.

As stated above, the Treasury Department considers that § 850.224(m) is necessary to address circumstances in which a *U.S. person* may not otherwise be prohibited from engaging in a *covered transaction* with a listed person. While a *U.S. person* may already be prohibited from undertaking certain types of transactions with a listed person, there may be *covered transactions* under the Final Rule that are not already addressed by the other programs of the programs referenced in § 850.224(m).

The Treasury Department further declines to establish and maintain a de novo list of entities that are engaged in certain activities for the purposes of *prohibited transactions.* As discussed in the Proposed Rule, developing and maintaining a list of *entities* would be challenging given that any such list would likely be subject to frequent change and likely underinclusive, which would undermine the national security goals of the Outbound Order. Providing a list of *entities* could also result in attempts to evade the rule through corporate restructuring and would be overly burdensome to maintain for the reasons discussed in relation to the definition of a *covered transaction* above. Instead, the Treasury Department expects a *U.S. person* to conduct a ''reasonable and diligent inquiry'' to determine whether a transaction is covered under the proposed rule, including whether any *covered foreign person* is involved.

Lastly, the Treasury Department notes that § 850.224(m) should not be construed as altering or affecting any other authority, process, regulation, investigation, enforcement measure, license, authorization, or review provided by or established under any other provision of Federal law.

§ 850.229—U.S. Person

Section 850.229 of the Proposed Rule defined a *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 branch of any such entity, or any person in the United States.

The Treasury Department received comments on certain aspects of this section. A commenter requested that the Treasury Department reconsider prohibiting or regulating investments by foreign-domiciled funds that are controlled or managed by U.S. companies. The Treasury Department reiterates that any branch of a U.S. entity would be a *U.S. person.* With respect to actions by foreign-domiciled funds, the Treasury Department notes that as required by § 850.302, the *U.S. person parent* of a *controlled foreign entity* must take all reasonable steps to prohibit and prevent any transaction by such entity that would be a *prohibited transaction* if engaged in by a *U.S. person.* Further discussion of the requirements of a *U.S. person* related to its *controlled foreign entity* can be found in Subparts C and D and the preamble discussion for those subparts.

A commenter expressed concern about the extraterritorial reach of the definition, particularly as related to U.S. citizens employed by companies operating in third countries. The Treasury Department notes that including U.S. citizens and permanent residents, wherever located, is critical to the effectiveness of the Final Rule, as narrowing the definition may present opportunities for circumvention. Furthermore, the scope of this section is derived from section 9(h) of the Outbound Order.

A commenter requested that ''any person in the United States'' be removed from the definition of *U.S. person,* or that the Treasury Department provide greater clarity with respect to when a non-U.S. citizen or permanent resident in transit through the United States would be a *U.S. person.* The Treasury Department notes, as it did in the Proposed Rule, that the inclusion of ''any person in the United States'' mirrors the language used in the definition of ''United States person'' in the Outbound Order. The Treasury Department is concerned with persons who are neither citizens nor permanent residents and who are nevertheless able to accrue knowledge, experience, networks, and other intangible assets while they are in the United States that could convey valuable benefits to a *covered foreign person.* The circumstance of a non-U.S. citizen or permanent resident individual in transit through the United States who wishes to enter into a transaction that could trigger coverage under the Final Rule, while possible, is not likely to be a frequent occurrence and can be reasonably managed with advance planning.

One commenter requested that the Treasury Department supplement the definition of *U.S. person* with examples to illustrate when a non-U.S. entity with a subsidiary, employee, unincorporated branch office, or other fixed place of business in the United States would fall within the definition. The Treasury Department anticipates providing illustrative examples via its Outbound Investment Security Program website.

The Final Rule adopts § 850.229 from the Proposed Rule without changes. The Final Rule will apply to the conduct of a *U.S. person* only. Regarding § 850.229 of the Final Rule, the Treasury Department reiterates that an entity organized in the United States will be considered a *U.S. person* even if its *parent* is a non-*U.S. person.* However, a non-*U.S. person* that happens to be a *parent* of a *U.S. person* will not be treated as a *U.S. person* for the purposes of this Final Rule solely because of its relationship to the *U.S. person.* Further, while any person in the United States, including personnel of a non-*U.S. person* entity working in a branch office of that entity or otherwise, will be considered a *U.S. person* under the Final Rule based on their presence in the United States, such person's non-*U.S. person* employer will not to be considered a *U.S. person* solely because of an employee's presence in the United States.

Subpart C—Prohibited Transactions and Other Prohibited Activities

This subpart of the Final Rule describes activities that are prohibited. Such activities include a *U.S. person* engaging in a *prohibited transaction* unless an exemption has been granted and includes a *U.S. person knowingly directing* an otherwise *prohibited transaction,* as described below. A *U.S. person* is also required to take all reasonable steps to prohibit and prevent any transaction by its *controlled foreign entity* that would be a *prohibited transaction* if engaged in by a *U.S. person.*

§ 850.302—Actions of a Controlled Foreign Entity

Under the Proposed Rule, a *U.S. person* would have been required to take all reasonable steps to prohibit and prevent any transaction by its *controlled foreign entity* that would have been a *prohibited transaction* if engaged in by a *U.S. person.* The Proposed Rule set out an illustrative list of factors that Treasury would have considered in determining whether the relevant *U.S. person* took all reasonable steps.

One commenter argued that the term ''all reasonable steps'' is overly broad and would impose an unachievable standard upon *U.S. persons.* In the commenter's view, this would result in second guessing, even when significant efforts were made to comply. The commenter requested removal of the word ''all'' from the regulations, which would, in the commenter's view, be more realistic and achievable as an obligation upon *U.S. persons,* while addressing the Treasury Department's objective of limiting the likelihood that a *controlled foreign entity* would engage in a *prohibited transaction.* One commenter requested that the Treasury Department clarify the shareholder rights that it will consider when determining compliance with this requirement and provide more specific guidance on what constitutes ''all reasonable steps'' for ensuring *controlled foreign entities* follow the requirements in the rule. Another commenter suggested the Treasury Department eliminate entirely the requirement for a *U.S. person* to take all reasonable steps to prohibit and prevent its *controlled foreign entities* from undertaking a transaction that would be a *prohibited transaction* if engaged in by a *U.S. person.* Instead, the commenter suggests that such transactions be permitted but require notification.

The Treasury Department is finalizing § 850.302 as proposed. The Treasury Department declines to eliminate the requirement for *U.S. persons* to take all reasonable steps to prohibit and prevent their *controlled foreign entities* from undertaking a transaction that would be a *prohibited transaction* if engaged in by a *U.S. person.* Doing so would create a loophole whereby a *U.S. person* would effectively be able to engage in *prohibited transaction* through its *controlled foreign entity.* Moreover, the phrasing ''all reasonable steps,'' which is consistent with section 8(d) of the Outbound Order, makes clear that if a particular measure is ''reasonable'' in the context of the specific facts and circumstances of the transaction, then the *U.S. person* should take it. Removing ''all'' could suggest that *U.S. persons* need only take ''some'' reasonable steps and create a risk that a *U.S. person* could permit its *controlled foreign entity* to engage in a transaction that would be a *prohibited transaction* if engaged in by a *U.S. person* and undermine the intent of the Outbound Order. As described in Note 1 to § 850.302, the Treasury Department will assess compliance based on a consideration of the totality of relevant facts and circumstances, and where a *U.S. person* has taken all steps, including those described in § 850.302(b), that were reasonable given the relevant circumstances, the *U.S. person* would be found in compliance with this provision of the Final Rule. The Final Rule adjusts the text of Note 1 to § 850.302 by replacing the phrase ''given the size and sophistication of the U.S. person'' with ''in light of the relevant facts and circumstances'' to clarify that all relevant facts and circumstances may be considered.

The specific measures identified in § 850.302(b) of the Final Rule that a *U.S. person* may take include: (1) the execution of agreements with respect to compliance with the Final Rule between the *U.S. person* and its *controlled foreign entity;* (2) the existence and exercise of governance or shareholder rights by the *U.S. person* with respect to the *controlled foreign entity,* where applicable; (3) the existence and implementation of periodic training and internal reporting requirements by the *U.S. person* and its *controlled foreign entity* with respect to compliance with the Final Rule; (4) the implementation of appropriate and documented internal controls, including internal policies, procedures, or guidelines that are periodically reviewed internally, by the *U.S. person* and its *controlled foreign entity;* and (5) implementation of a documented testing and/or auditing process of internal policies, procedures, or guidelines.

§ 850.303—Knowingly Directing an Otherwise Prohibited Transaction

Section 850.303(a) of the Proposed Rule would have prohibited a *U.S. person* that possessed authority at a non-*U.S. person* entity from *knowingly directing* a transaction by that non-*U.S. person* entity that would have been a *prohibited transaction* if undertaken by a *U.S. person.* A *U.S. person* would have ''knowingly directed'' a transaction when such *U.S. person* had authority to make or substantially participate in decisions on behalf of a non-*U.S. person* entity and exercised that authority to direct, order, decide upon, or approve a transaction that would have been a *prohibited transaction* if engaged in by a *U.S. person.* The Proposed Rule specified that a *U.S. person* would have had such authority if such *U.S. person* was an officer, director, or senior advisor, or otherwise possessed senior-level authority, at such non-*U.S. person* entity.

Section 850.303(b) of the Proposed Rule carved out from this prohibition a *U.S. person* who recused themself from an investment even if that person had the authority to make or substantially participate in decisions on behalf of a non-*U.S. person entity.*

As the Treasury Department noted in the Proposed Rule, this provision was intended to address a potential loophole, such as a *U.S. person* senior manager at a foreign pooled investment fund that invested in a *covered foreign person* or otherwise directed a transaction that would have been prohibited if engaged in by a *U.S. person.* The approach in the Proposed Rule was guided by several goals: (1) establishing a clear standard so a *U.S. person* (or a non-*U.S. person* employing such *U.S. person*) could determine whether its (or its employee's) conduct was covered; (2) limiting the reach of the provision to minimize the potential impact on non-senior *U.S. person* employees, including administrative staff and individuals not playing a substantial role in an investment decision; and (3) capturing concerning *U.S. person* activities in a targeted manner.

Commenters requested the Treasury Department amend § 850.303 to narrow the scope of *U.S. persons* and activity covered, provide additional guidance on how ''knowingly directing'' would be applied to specific situations, and clarify how a *U.S. person* could recuse themself from an investment pursuant to § 850.303(b). Some commenters stated that if interpreted broadly and in conjunction with other terms in the Proposed Rule, this provision could operate as a prohibition on a *U.S. person* holding an executive or other decision-making role at a *covered foreign person* or any non-U.S. company and would be inconsistent with the objectives of other cross-border regulatory requirements.

Several commenters requested that the Treasury Department narrow the scope of ''knowingly directing'' by removing ''or substantially participate in'' and ''or as part of a group'' from the second sentence in § 850.303(a). Two commenters requested that the Treasury Department amend § 850.303(a) to note that certain officers or directors ''may'' have such authority depending on the facts and circumstances, and that not all officers and directors have any authority or power with respect to investment decisions.

Another commenter noted that the inclusion of ''senior advisor'' was unclear, as persons acting solely in an advisory capacity would not typically be able to ''exercise'' authority to direct, order, decide upon, or approve a transaction. Three commenters requested that the Treasury Department clarify that in addition to having the authority to make or substantially

participate in decisions on behalf of a non-*U.S. person,* the *U.S. person* must actually exercise that authority in regard to a transaction that the *U.S. person knows* at the time of the transaction would be a *prohibited transaction* if engaged in by a *U.S. person.*

The Final Rule revises § 850.303(a) in response to the comments. Under the Final Rule, a *U.S. person* that possesses authority at a non-*U.S. person* entity, individually or as part of a group, to make or substantially participate in decisions on behalf of such non-*U.S. person* entity, is prohibited from *knowingly directing* a transaction by that non-*U.S. person* entity that would be a *prohibited transaction* if undertaken by a *U.S. person.* As stated in the Final Rule, a *U.S. person* ''knowingly directs'' a transaction when such *U.S. person* has authority to make or substantially participate in decisions on behalf of a non-*U.S. person* entity and exercises that authority to direct, order, decide upon, or approve a transaction by that non-*U.S. person* entity that would be a *prohibited transaction* if engaged in by a *U.S. person.* The Treasury Department has modified the last sentence of § 850.303(a) to specify that a *U.S. person* possesses such authority for a non-*U.S. person* when they are an ''officer, director, or *otherwise possess executive responsibilities*'' (emphasis added) at a non-*U.S. person.* This modified text removes ''or senior advisor'' and narrows the scope of persons who may knowingly direct a non-*U.S. person* to officers, directors, or their functional executive equivalents, and is consistent with how other national-security regulatory requirements administered by the Treasury Department apply a functional test to those occupying decision-making positions (*see, e.g.,* 31 CFR 800.402(b)(3)).

The Final Rule does not make other changes recommended by commenters to 850.303(a), such as removing ''substantially participates'' or ''as part of a group'' from what it is to ''knowingly direct.'' The Treasury Department is seeking to balance concerns about potential evasion with concerns related to the scope of the provision, including impacts on employment of non-*U.S. persons,* and has determined that scoping the provision to apply to certain persons in key roles is the most effective way to do so. Furthermore, in entities where investment decisions are frequently made by committees or other governing bodies, applying the rule only to actions taken outside of a group context would exclude a significant amount of corporate activity that could be exploited to facilitate a *prohibited transaction.*

The Treasury Department declines to adopt a formal ''facts and circumstances'' test in the Final Rule, because the existing two-step requirement that a *U.S. person* must have authority and then exercise it, combined with the specific language in § 850.303(a) of the Final Rule regarding when such authority exists and the recusal carveout (discussed further below), is clearer than a ''facts and circumstances'' standard. Furthermore, the existing requirement in § 850.303(a) that such authority actually be exercised with regards to a particular investment for the prohibition to apply recognizes the concern raised by commenters that some executives ''may'' have such authority but not exercise it.

The Treasury Department has clarified that consistent with commenter views, to ''knowingly direct'' an otherwise prohibited transaction by a non-*U.S. person,* a *U.S. person* must both (1) have authority to make or substantially participate in decisions on behalf of the non-U.S. person and (2) exercise that authority to direct, order, decide upon, or approve a transaction that would be a *prohibited transaction* if engaged in by a *U.S. person.* In other words, a *U.S. person* with such authority will not be assessed to have ''knowingly directed'' an otherwise *prohibited transaction* unless they actually exercised that authority in decision-making regarding the transaction.

The Treasury Department considered the potential impact of this provision on employment opportunities for *U.S. persons* at non-*U.S. person* entities, but notes that the provision does not broadly restrict *U.S. persons* from holding executive or other decision-making positions at non-*U.S. persons.* The Treasury Department reiterates that § 850.303(a) applies when a *U.S. person* both has and actually exercises decision-making authority. Along with the availability of the recusal provision at 850.303(b) (discussed further below), the provisions together establish a clear standard through which a *U.S. person* could perform executive level functions at non-*U.S. person* entities without unintentionally ''knowingly directing'' a *prohibited transaction.*

Other commenters suggested exclusions for certain activities, including the provision of third-party services, such as banking, due diligence, and routine administrative work by a *U.S. person,* participation in a Limited Partnership Advisory Committee (LPAC), as well as the provision of legal advice and counsel with respect to the applicability of the Final Rule. One commenter requested the Treasury Department amend either § 850.303(a) or the definition of *covered transaction* at § 850.210(a)(4) so that the rule would apply more clearly to investment activity, and not routine business operations, pivots, or expansions. The Final Rule does not make any changes in response to these comments because, as explained in the Proposed Rule, routine business activities conducted by a *U.S. person* (whether that *U.S. person* is an employee of the non-*U.S. person* or a third party) are unlikely to rise to the level of substantial involvement in an investment decision. Furthermore, approval or decision-making by a *U.S. person* in routine business operations of a non-*U.S. person,* which could include approving an annual budget, staffing, or procurement, are unlikely to fall within the scope of this provision. The Treasury Department declines to except a business pivot or expansion by a non-*U.S. person,* which may constitute a *prohibited transaction* (and would fall within the scope of this provision) because such a transaction is more likely to risk a transfer of intangible benefits to a *covered foreign person.*

One commenter requested clarification on how § 850.303 would apply to a *U.S. person* entity voting its interests or providing approvals, even if no *U.S. person* individual is involved, while another requested clarity on what activities of a private fund's Investment Committee would be covered by the provision.

The Final Rule will apply to a *U.S. person* regardless of whether such *U.S. person* is an individual or an entity, as long as it meets the elements of § 850.303(a) such that it possesses the authority described and exercises such authority as described. The Treasury Department notes that a *U.S. person* who participates in an advisory board or an advisory committee of a pooled investment fund would generally not have the authority to ''make or substantially participate in decisions'' about investments if the advisory board or committee itself does not have the ability to approve, disapprove, or otherwise control: (1) investment decisions of the investment fund; or (2) decisions made by the general partner, managing member, or equivalent related to entities in which the investment fund is invested. However, in some circumstances, an advisory board or committee may approve or disapprove certain transactions, such as those where conflicts of interest are present. In those circumstances, the advisory board or committee would have the authority to ''make or substantially

participate in decisions'' of the investment fund.

Another commenter requested the Treasury Department clarify whether penalties apply to the relevant *U.S. person* or the non-*U.S. person* entity that undertakes a transaction that would be a *prohibited transaction* if undertaken by such *U.S. person* directly. Section 850.303 specifically prohibits actions by a *U.S. person.* A violation of this provision would therefore result in penalties for that *U.S. person.*

Knowingly Directing—Recusal Carveout

Several commenters requested additional clarification or guidance regarding the recusal provision at § 850.303(b). A few commenters requested that the Treasury Department clarify at what point a *U.S. person* would be considered to be ''substantially participating'' in an investment decision, and when a *U.S. person* should recuse themself from an investment transaction to benefit from the carveout. Multiple commenters requested guidance on how the prohibition would apply to certain investment activity after the completion of an investment, or noted that the recusal should extend to negotiating and decision-making related to an investment and management and oversight of the investment after the completion date. One commenter stated that the prohibition on ''knowingly directing'' should only apply to the decision to enter into the investment commitment and another stated the recusal carveout should ''apply no earlier than the stage of a 'decision to undertake a transaction' '' and requested additional clarity on what such a decision would entail.

The Final Rule implements § 850.303(b) with modifications in response to comments. In particular, the Final Rule specifies in § 850.303(b) that a *U.S. person* that has the authority specified in § 850.303(a) will not be deemed to have ''knowingly directed'' a transaction by a non-*U.S. person* when the *U.S. person* recuses themself from each of the following activities:

(1) Participation in formal approval and decision-making processes related to the transaction, including making a recommendation;

(2) Reviewing, editing, commenting on, approving, and signing relevant transaction documents; and

(3) Engaging in negotiations with the investment target (or, as applicable, the relevant transaction counterparty, such as a joint venture partner).

Consistent with the requests of most commenters on this issue, the recusal carveout focuses on activities connected to an investment decision and does not reach post-transaction management and oversight of an investment (so long as such post-transaction activity does not fall under the description of activities in § 850.303(b)). Because the definition of *knowingly directing* in § 850.303(a) of the Final Rule does not cover post-transaction activity, a recusal carveout that covers such activity would be inapposite.

Because the above carveout is conjunctive, a *U.S. person* that participates in any single activity specified in § 850.303(b) would not be able to qualify under it. To clarify, while this carveout, if strictly adhered to, removes an individual *U.S. person* from the scope of the prohibition in § 850.303(a), it does not confer any carveouts, protections, exceptions, exemptions, or safe harbors upon the *U.S. person* in connection with any other provision of this Final Rule or any other rule, nor does it affect the application of the Outbound Order, Final Rule, or guidance to a transaction itself or the actions of any other individual or entity.

Subpart D—Notifiable Transactions and Other Notifiable Activities

This subpart of the Final Rule requires a *U.S. person* to notify the Treasury Department in any of the following circumstances:

- If it undertakes a *notifiable transaction* (§ 850.401);
- If its *controlled foreign entity* undertakes a transaction that would be notifiable if undertaken by a *U.S. person* (§ 850.402), or;
- If the *U.S. person* acquires actual knowledge following the completion date of a transaction that the transaction would have been a *covered transaction* if the *U.S. person* had *known* of relevant facts or circumstances as of the completion date (§ 850.403).

In each of the above circumstances, the *U.S. person* is required to follow specified procedures that include requirements to submit detailed information to the Treasury Department according to set timeframes and to certify as to the completeness and accuracy of the information submitted, as well as to maintain relevant records. A *U.S. person* is also required to promptly notify the Treasury Department of any material omission or inaccuracy that the *U.S. person* learns about following any information submission.

§ 850.403—Notification of Post-Transaction Knowledge

The Proposed Rule required a *U.S. person* to notify the Treasury Department if the *U.S. person* acquired actual knowledge following the *completion date* of a transaction that the transaction would have been a *covered transaction* if the *U.S. person* had *known* of relevant facts or circumstances as of the *completion date.* Section 850.403 would have applied to circumstances in which a *U.S. person* acquired actual knowledge after the window in which a § 850.401 notification could have been timely submitted. Under § 850.403 of the Proposed Rule, in such a circumstance a *U.S. person* would have been required to submit a notification pursuant to § 850.404 within 30 days of acquiring such *knowledge.* Specifically, the § 850.403 notification requirement would have applied to situations where a *U.S. person* did not possess *knowledge* at the time of the transaction of a fact that, if *known* at the time of the transaction, would have made the transaction a *covered transaction* (such as, for example, the investment target's engagement in a *covered activity*). The information requirements for a § 850.403 notification included an explanation by the *U.S. person* as to why it did not possess or obtain such *knowledge* at the time of the transaction and to describe any pre-transaction diligence. The requirement would have applied if the transaction would have been either a *notifiable transaction* or a *prohibited transaction.*

The Treasury Department received several comments with respect to this section. Commenters requested revisions to § 850.403 to remove the obligation to submit a notification in the case where a transaction counterparty has pivoted into a *covered activity* until the *U.S. person* is considering a follow-on or other subsequent investment in the target company. It was noted that without this limitation, the Proposed Rule would create an ongoing obligation to monitor and report on activities of the target company and questioned how far into the future an investor must assess a target company's activities and how mature those plans must be before the investment is brought within the scope of the rule. Some commenters requested clarity that there is not a requirement for ongoing monitoring obligations on behalf of a *U.S. person.* However, one commenter noted that because § 850.403 only applies where the *U.S. person* has ''actual knowledge,'' ongoing monitoring or recurring diligence of existing investments would not be

necessary and requests that the rule state as much. Commenters also requested a clear exception from imposed divestment in situations in which a target company pivots into a prohibited *covered activity,* but the *U.S. person* performed reasonable due diligence at the time of its initial investment and satisfied the notification requirement if applicable.

The Final Rule adopts § 850.403 of the Proposed Rule largely as proposed. The only change is a technical edit to Note 1 of § 850.403 to remove the phrase ''For avoidance of doubt'' from the beginning of the note. This edit is for clarity and is not intended to affect the substance of the requirement. Section 850.403 applies where a *U.S. person* acquires actual knowledge after the *completion date* of a transaction of a fact or circumstance such that the transaction would have been a *covered transaction* if the *U.S. person* had *known* of the relevant facts or circumstances as of the *completion date.* As to corporate pivots into *covered activity* that occur after the *completion date* of the relevant transaction, there are two main considerations with respect to the application of the Final Rule: first, whether the *U.S. person* had *knowledge* at the time of the transaction regarding the later corporate pivot into a *covered activity,* including whether the *U.S. person* had or should have had an awareness of a high probability of a fact or circumstance's existence or future occurrence (in which case the transaction would be a *notifiable transaction* or a *prohibited transaction* in the first instance under Subpart C or Subpart D, as applicable); and second, where a *U.S. person* does not satisfy the *knowledge* requirement at the time of the transaction, whether in the future the *U.S. person* 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 transaction* or *prohibited transaction* (for example, that a greenfield entity was, at the time of the transaction, planning to engage in a *covered activity*). Because § 850.403 requires actual knowledge, there is no obligation for a *U.S. person* to conduct recurring diligence or actively monitor the activities of the target of the transaction after the *completion date* for purposes of § 850.403, assuming a ''reasonable and diligent inquiry'' had been conducted as of the time of the transaction.

The purpose of this provision, consistent with the Outbound Order, is to increase the U.S. Government's visibility into *U.S. person* transactions involving the relevant technologies and products.

Accordingly, under the Final Rule, a *U.S. person* who acquires actual knowledge following the completion date of a transaction of a fact or circumstance such that the transaction would have been a *covered transaction* had the fact or circumstance been known by the *U.S. person* at the time of the transaction will be required to submit a notification pursuant to § 850.404 within 30 days of acquiring such *knowledge.* This requirement will apply if the transaction would have been a *notifiable transaction* or a *prohibited transaction.*

§ 850.404—Procedures for Notifications

Section 850.404 of the Proposed Rule detailed the procedures that would have been required for submitting a notification regarding a *covered transaction* pursuant to §§ 850.401, 850.402, and 850.403. This included the method of submission via electronic filing in accordance with the instructions posted by the Treasury Department on its Outbound Investment Security Program website. Section 850.404(b) of the Proposed Rule authorized the Treasury Department to contact a *U.S. person* who files a notification with questions or document requests related to the transaction or compliance with the rule. Under § 850.404(c) of the Proposed Rule, the *U.S. person* would have been required to file a notification no later than 30 calendar days after the *completion date* of a transaction that would have been required to be notified to the Treasury Department under § 850.401 or § 850.402, and, with respect to § 850.403, no later than 30 calendar days after it acquired the *knowledge* referred to in that section. If a *U.S. person* submitted a notification prior to the *completion date* of the transaction, then under § 850.404(d) of the Proposed Rule, the *U.S. person* would have been required to update such notification no later than 30 calendar days following the *completion date* if there were material changes to the information in the original filing. Lastly, under § 850.404(e) of the Proposed Rule, a *U.S. person* would have been required to inform the Treasury Department in writing no later than 30 calendar days following the acquisition of previously unavailable information required under § 850.405.

The Treasury Department received several comments on the notification procedures. One commenter requested that in the case of multiple funding rounds where a *U.S. person* would be required to submit notifications for substantially similar investments, that the Treasury Department either remove the notification requirement for subsequent funding rounds (absent a material change in the relevant activities of the target or relevant transaction counterparty) or allow the *U.S. person* to amend a previously submitted notification by updating it to reflect the subsequent investment. One commenter expressed concern about the Treasury Department's authority to request documents and information about a transaction beyond the information detailed in § 850.405. The commenter requested that such follow-up be limited to instances where a notification is incomplete with respect to the information requirements in § 850.405, that follow-up requests be limited to supporting documentation identified in § 850.405(c), and that the time frame specified by the Treasury Department for responses be a ''reasonable'' time frame. Another commenter expressed the view that the timeline for notifications was too short and requested the timeline be extended to 90 or 180 days following the completion date of a notifiable transaction. One commenter requested clarification on specific recordkeeping and due diligence obligations that companies must undertake. One commenter on this section noted the absence of a mechanism through which a *U.S. person* is required to notify the Treasury Department of an instance where a *person of a country of concern* pivots into a new *covered activity,* but the *U.S. person* does not make a new contribution to this activity. The commenter suggested the rule require notification of such instances, irrespective of whether there is an additional investment made in the relevant entity, or alternatively, where a notification was previously submitted, a requirement to notify if at a future date the *covered foreign person* pivots into a *covered activity* described in the definition of a *prohibited transaction.*

The Final Rule adopts § 850.404 from the Proposed Rule without change. In the case of multiple funding rounds where the information is consistent across investments, the Treasury Department is exploring whether the electronic system for submission of notifications can allow a duplicate notification to be populated, updated as needed, and submitted, with a new certification under § 850.203. A blanket exception for additional investments in the case of multiple funding rounds would be counter to the policy objective of increasing the U.S. Government's visibility into the volume and nature of

investments involving the identified technologies and products. With respect to the scope of follow-up questions or document requests, this is already qualified by the language ''related to the transaction or compliance with [part 850]'' and that provides sufficient focus. Limiting follow-up requests to only information necessary to comply with the requirements in § 850.405 would be unduly restrictive and not allow the Treasury Department to ask for relevant information about the individual transaction that may not have been contemplated in the general information requirements set forth in § 850.405, or as related to compliance. The commenter's request for the timeline to be extended from 30 days post-closing to 90 or 180 days did not justify why a three- or six-fold increase would be necessary. The Treasury Department expects a *U.S. person* to begin collecting the relevant information for the notification submission well before the *completion date* as diligence on the transaction is often conducted early in the transaction lifecycle. On specific recordkeeping and due diligence obligations, these are discussed in various provisions including §§ 850.104, 850.405(c), and 850.904. In response to the comment recommending a mechanism through which a *U.S. person* is required to notify the Treasury Department where an investment target pivots into a new *covered activity* following an investment by a *U.S. person,* the Treasury Department declines to expand the Final Rule to require ongoing notification of post-transaction changes in an investment target or transaction counterparty's activities where the *U.S. person* did not *know* (including having *reason to know*) at the time of the relevant transaction of the investment target or transaction counterparty's planned engagement in a *covered activity.* While one purpose of the Outbound Order is to increase the U.S. Government's visibility into *U.S. person* transactions involving relevant technologies and products, the Treasury Department has balanced such policy considerations with compliance considerations related to a *U.S. person.* Relatedly, and as discussed above, in cases where a *U.S. person* acquires actual knowledge following the *completion date* of a transaction of a fact or circumstance such that the transaction would have been a *covered transaction* had the fact or circumstance been known by the *U.S. person* at the time of the transaction, the *U.S. person* will be required to submit a notification pursuant to § 850.404 within 30 days of acquiring such *knowledge.*

The Final Rule describes at § 850.404 the method of submission, that electronic filing instructions will be made available and that only such electronic filing will constitute the filing of a notification pursuant to the Final Rule. Under § 850.404(b), the Treasury Department may contact a *U.S. person* who has filed a notification with questions or document requests related to the transaction or compliance with the rule. Under § 850.404(c), the *U.S. person* is required to file a notification within 30 calendar days of the completion date of a *notifiable transaction* under § 850.401 or § 850.402, and, with respect to § 850.403, no later than 30 calendar days after it acquires the knowledge referred to in that section. If a *U.S. person* submits a notification prior to the completion of a transaction, then under § 850.404(d), it must update such notification no later than 30 calendar days following the *completion date* if there are material changes to the information in the original filing. Under § 850.404(e), a *U.S. person* is required to inform the Treasury Department in writing no later than 30 calendar days following the acquisition of previously unavailable information required under § 850.405.

§ 850.405—Content of Notifications

Section 850.405 of the Proposed Rule detailed the specific information that a *U.S. person* would have been required to include as part of a notification pursuant to § 850.401, § 850.402, or § 850.403 of the Proposed Rule. This included information about the *U.S. person* and the *covered foreign person,* information about the transaction, and a discussion of the *covered activity* or activities undertaken by the *covered foreign person.* If a notification would have been required pursuant to § 850.403 of the Proposed Rule (relating to *knowledge* relevant to a transaction's status acquired after the transaction has closed), the information to be submitted would also have included identification of the fact or circumstance of which the *U.S. person* acquired *knowledge* post-closing, a statement explaining why the *U.S. person* did not possess such *knowledge* at or prior to closing, and a description of the due diligence that the *U.S. person* undertook prior to the completion of the transaction. Section 850.405(c) of the Proposed Rule would have required a *U.S. person* to maintain records related to a notification and supporting documentation for a period of 10 years from the date of filing. Under § 850.405(d) of the Proposed Rule, if the *U.S. person* did not provide the information required by § 850.405(b), such *U.S. person* would have been required to provide a sufficient explanation for why the information was not available or otherwise could not be obtained and explain what steps it had taken to obtain the information.

The Treasury Department received several comments on this section. One commenter suggested narrowing the information requirements or including a de minimis exception, particularly for smaller firms and minor transactions, to reduce the compliance burden for companies. The Treasury Department sought to address in § 850.405 of the Proposed Rule the basic information necessary to analyze and increase the U.S. Government's visibility into *U.S. person* transactions involving the relevant technologies and products, while at the same time minimizing the compliance burden on U.S. investors. The information provided in the notifications will be helpful in highlighting aggregate sector trends and related capital flows as well as informing future policy development. The Treasury Department expects that many of the information requirements are standard for transactional due diligence and should be available to the *U.S. person.* Narrowing the information or creating a de minimis exception will not serve the objectives of the Outbound Order.

A commenter requested additional guidance regarding a *U.S. person's* ability to provide ''sufficient explanation'' for why particular information is unavailable. The commenter stated that it was unclear whether the submission of a filing with certain information missing would be allowed, and in what circumstances an incomplete filing might be permissible. The obligation on a *U.S. person* is to provide accurate and complete information at the time of the filing. The Treasury Department anticipates there may be limited instances where the *U.S. person* does not have available all of the information required and nevertheless, receipt of the submission by the Treasury Department would be consistent with the objective of the Outbound Order. In such cases, an explanation for why the information is unavailable or cannot be obtained is important.

Another commenter referred to practices in typical venture capital and private equity investments that would make meeting the content requirements of a notification difficult, and therefore requested that requirements be lifted regarding identities and ultimate owner disclosures. The commenter stated that certain parties are contractually prohibited from disclosing the identities

of other parties and that it can be difficult to ascertain the ultimate owner of a public company. The Treasury Department notes that carveouts typically are included in contracts for sharing relevant information with government investigations, and ascertaining the identity of co-investors and ultimate owners of the relevant *U.S. person* and the relevant *covered foreign person* is important to the objectives of the Outbound Order.

A commenter sought clarification on the record retention requirements, specifically as to whether such requirements would apply to non-*covered transactions.* The Proposed Rule at § 850.405(c) provides that the *U.S. person* shall maintain a copy of the notification filed and supporting documentation for a period of 10 years from the date of the filing. This applies to transactions that are required to be notified.

The Treasury Department is adopting § 850.405 as set forth in Proposed Rule, with technical edits to paragraph (a) and paragraphs (b)(3) and (9). The technical edit to paragraph (a) clarifies that a notification submitted to the Treasury Department must be accurate and complete subject to paragraph (d), which discusses how a *U.S. person* should respond where the *U.S. person* cannot provide information required under paragraph (b), or where such information becomes available after the notification is filed with the Treasury Department. The technical edits to paragraphs (b)(3) and (9) add intermediate and ultimate parent entities for inclusion in the post-transaction organizational charts of the *U.S. person* and *covered foreign person,* respectively, as well as information related to such intermediate and ultimate parent entities, to include name, principal place of business, and place of incorporation or legal organization. Section 850.405 of the Final Rule details the specific information that must be submitted by a *U.S. person* as part of a notification, including information about the *U.S. person* and the *covered foreign person,* a brief description of the commercial rationale for the transaction, and a discussion of the *covered activity* or *activities* undertaken by the *covered foreign person.* If the notification is pursuant to § 850.403, the notification must identify the fact or circumstance of which the *U.S. person* acquired actual knowledge post-transaction, a statement explaining why the *U.S. person* did not possess such knowledge at the time of the transaction, and a description of the due diligence that the *U.S. person* undertook prior to the completion of the transaction. Section 850.405 also identifies the records related to the *covered transaction* that the *U.S. person* must maintain for a period of 10 years from the date of filing. If the *U.S. person* does not provide information required by § 850.405, then it must provide a sufficient explanation for why the information is not available or otherwise cannot be obtained and explain what steps it has taken to obtain the information.

Subpart E—Exceptions and Exemptions

§ 850.501—Excepted Transaction

In keeping with the goal of tailoring the Proposed Rule to address the national security threat described in the Outbound Order while minimizing disruptive effects on *U.S. persons,* the Proposed Rule identified certain exceptions. A transaction that otherwise qualified as a *covered transaction* but met one of the enumerated exceptions was referred to as an *excepted transaction.* The Proposed Rule listed categories of *excepted transactions* based on the Treasury Department's determination that such transactions presented a lower likelihood of the transfer of intangible benefits to a *covered foreign person* or were otherwise less likely to raise national security concerns relative to other transactions covered by the Proposed Rule.

The Proposed Rule identified the following categories of *excepted transactions* (subject to conditions in some instances, as summarized below):

- An investment by a *U.S. person* in a publicly traded security;
- An investment by a *U.S. person* in a security issued by a registered investment company, such as an index fund, mutual fund, or exchange traded fund, or issued by any company that has elected to be a business development company;
- An investment below a certain size by a *U.S. person* LP in a pooled investment fund or where the *U.S. person* LP has secured a binding contractual assurance that its capital in the fund will not be used to engage in a transaction that would be a prohibited or notifiable transaction, as applicable, if engaged in by a *U.S. person;*
- A *U.S. person*'s full buyout of all interests of any *person of a country of concern* in an entity, such that the entity does not constitute a *covered foreign person* following the transaction;
- An intracompany transaction between a *U.S. person parent* and its subsidiary to support ongoing operations (or other activities that are not *covered activities* as defined in § 850.208);
- Fulfillment of a *U.S. person's* binding, uncalled capital commitment entered into prior to the date of the Outbound Order;
- The acquisition of a voting interest in a *covered foreign person* upon default or other condition involving a loan, where the loan was made by a lending syndicate and a *U.S. person* participates passively in the syndicate; and
- Certain transactions with or involving a person of a country or territory outside the United States that has been designated by the Secretary in accordance with provisions set forth in the Proposed Rule.

The Treasury Department received comments to § 850.501 of the Proposed Rule, which are discussed below.

Excepted Transaction—General

Commenters were generally supportive of the *excepted transaction* concept. While most commenters focused on one or more of the above categories—which are discussed in turn below—some commenters requested the inclusion of additional exceptions or the exclusion of certain activities from the definition of *covered transaction.* Citing to ambiguities and unintended consequences, such as imposing additional due diligence burdens, several commenters requested that the Treasury Department explicitly include in § 850.501 a range of activities that were identified in the preamble to the Proposed Rule as not intended to fall within the definition of *covered transaction:* university-to-university research collaborations; contractual arrangements or the procurement of material inputs for any of the covered national security technologies or products (such as raw materials); intellectual property licensing arrangements; bank lending; the processing, clearing, or sending of payments by a bank; underwriting services; debt rating services; prime brokerage; global custody; equity research or analysis; or other services secondary to a transaction.

One commenter requested clarification that the exceptions would apply to transactions undertaken by (1) a *controlled foreign entity,* or (2) a non-*U.S. person knowingly directed* by a *U.S. person* that would otherwise fall within the definition of an *excepted transaction* if engaged in by a *U.S. person* directly. Another commenter requested that any ''follow-on'' transactions be excepted from coverage, stating that if an original transaction was not a *covered transaction,* then any subsequent restructuring of that transaction or additional investments in the business should receive the same

treatment to preserve the value of the original, permissible investment. One commenter asked that sale-and-leaseback arrangements be included as an *excepted transaction,* raising the possibility that the transaction could be interpreted as a prohibited greenfield investment if the leasing party were engaged in *covered activities.* One commenter requested that the Treasury Department publish a list of transactions that are not *covered transactions* in guidance materials. Another commenter requested that the Treasury Department consider exemptions or special provisions for transactions made by U.S. semiconductor companies.

Upon consideration of the requests to list activities or transactions that are not covered within the text of the Final Rule, either within the definition of a *covered transaction* or within the definition of an *excepted transaction,* the Treasury Department has determined that doing so is not necessary. The definition of *covered transaction* has been crafted to refer to a specific set of transaction types, and for any transaction to be a *covered transaction,* all of the elements in the relevant prong of the definition must be met. As such, it would be unnecessary and may be misleading to categorically identify a set of general activities as excepted from the provisions of the rule when some activities may not in the first place satisfy the elements needed to find coverage (and thus technically could not be excepted from coverage if they were never covered to begin with) or, depending on how the activity is undertaken, may meet the definitional elements and objective of the Outbound Order and thus should be evaluated as a *covered transaction.* Therefore, the Final Rule contains no such list of non-*covered activities* apart from the definition of *excepted transaction.* While *U.S. persons* subject to the rule may need to undertake due diligence to ensure compliance—*i.e.,* to identify whether a contemplated transaction is a *covered transaction*—the Treasury Department has sought to tailor the Final Rule to address the national security threat identified in the Outbound Order.

With respect to the application of the exceptions to a *controlled foreign entity* or to a non-*U.S. person knowingly directed* by a *U.S. person,* the Treasury Department notes the Final Rule, as with the Proposed Rule, places obligations on a *U.S. person* to take all reasonable steps to prohibit and prevent its *controlled foreign entity* from undertaking a transaction that would be a *prohibited transaction* if undertaken by a *U.S. person,* and to notify the Treasury Department if the *controlled foreign entity* undertakes a transaction that would be a *notifiable transaction* if undertaken by a *U.S. person.* If a transaction would not be prohibited or notifiable if undertaken by a *U.S. person*—as is the case with an *excepted transaction*—then there is no obligation on the *U.S. person* with respect to such transaction.

Including an exception for restructurings or follow-on investments would substantially undermine the goals of the Final Rule. The national security objectives of the Outbound Order and Final Rule are implicated regardless of whether earlier investments may have been permitted. Creating a categorical exception for corporate restructuring would potentially open a loophole, and where a transaction meets the criteria of a *covered transaction* and a restructuring introduces an entity in a *country of concern* into the corporate chain, this may be a transaction relevant for purposes of the Final Rule.

The Treasury Department assesses that an exception for sale-and-leaseback arrangements would not be consistent with the national security goals of the Final Rule. To the extent that the *U.S. person knows* or plans that the lease will result in the establishment of a *covered foreign person* or the engagement of a *person of a country of concern* in a *covered activity,* then that transaction should be a *covered transaction.* If the *U.S. person,* after ''reasonable and diligent inquiry,'' does not have the requisite *knowledge* or plan, then the leaseback would not be a *covered transaction.*

Several commenters requested a general de minimis exception be created in § 850.501 based on the dollar value of the transaction or the percentage of outstanding equity acquired by the *U.S. person.* One commenter suggested excepting acquisitions of less than five percent of the equity interest of a *covered foreign person.* A second commenter suggested excepting transactions where a *U.S. person* invests no more than $10 million in a *covered foreign person* and receives no more than five percent of its equity. A third commenter requested that a presumption of an exception attach to any investment in publicly traded securities if such acquisition constitutes 10 percent or less of voting interest in the target. Several commenters stated that de minimis investments were, or were likely to be, passive, and therefore were unlikely to lead to a *U.S. person* transferring intangible benefits to the investment target.

The Treasury Department declines to institute an exception across transactions based purely on their dollar value or the percentage of equity. One reason is that the various types of transactions already included in the definition of an *excepted transaction* in the Final Rule include investments with a lower likelihood of a *U.S. person* having the opportunity and incentive to transfer intangible benefits. Such transactions include publicly traded securities and LP investments below a certain threshold (as discussed further below). In addition, and independently, a de minimis threshold based on the financial significance of a *covered activity* in relation to any particular entity does not necessarily correspond to the national security significance of such activity. The Treasury Department continues to assess that investments of the kinds identified in the definition of *covered transaction,* which has been intentionally scoped to capture those investments more likely to raise national security concerns, may contribute to national security risks regardless of their size, as even relatively low-dollar investments can lead to the transfer of intangible benefits, particularly for early-stage companies seeking investor validation or access to professional networks as much as capital. In addition, investments that fall beneath the various thresholds proposed by commenters—such as those that comprise four percent of voting interest or equity in a *covered foreign person*—may nonetheless afford significant opportunity and incentive for a *U.S. person* to transfer intangible benefits to the investment target, illustrating the challenges of a blanket de minimis threshold.

The Treasury Department additionally declines to create an exception specifically for the semiconductor industry. Given the likelihood that *U.S. person* participants in the semiconductor industry are often well-positioned to transfer intangible benefits to *covered foreign persons,* such an exception would create a significant gap in coverage under the Final Rule and thereby undermine the national security objectives of the Outbound Order.

The Treasury Department has made one technical edit to the chapeau of § 850.501. The phrase ''The following transactions are excepted transactions'' had been at (a) in the Proposed Rule, but this phrase is being moved into the chapeau in the Final Rule, and the phrase ''An investment by a U.S. person,'' which had been at (1) in the Proposed Rule, is now at (a)(1) in the Final Rule. This edit is for clarity and

is not intended to affect the substance of the provision.

Publicly Traded Security; Derivative; Equity Compensation

Section 850.501(a)(1)(i) of the Proposed Rule defined as an *excepted transaction* an investment into a ''publicly traded security,'' with ''security'' as defined in section 3(a)(10) of the Securities Exchange Act of 1934, as amended. As noted in the Proposed Rule, this included a security traded on a non-U.S. exchange, or a security traded ''over-the-counter,'' in addition to a security traded on a U.S. exchange. The Treasury Department assessed that a *U.S. person's* purchase of securities traded on a public exchange or over the counter, whether inside or outside the United States, would present a lower likelihood of transferring intangible benefits to a *covered foreign person.*

A few commenters supported the Proposed Rule's incorporation of elements from the definition of ''publicly traded security'' as it is used by the Office of Foreign Assets Control (OFAC) in connection with the Non-Specially Designated Nationals (SDN) Chinese Military-Industrial Complex Companies List. One commenter supported the additional clarity offered in the Proposed Rule on the exception for investments into publicly traded securities.

Several commenters discussed the definition of publicly traded security in the context of an *excepted transaction.* Multiple commenters requested that the definition of publicly traded security include derivatives, or that the definition of *excepted transaction* be expanded to include derivatives. One commenter recommended excluding derivatives unless the derivates trade involves the right to acquire equity or certain rights associated with equity in a *covered foreign person.*

One commenter suggested exceptions for investments in securities be expanded to cover a variety of additional instruments, including index funds, mutual funds, and exchange-traded funds ''involving'' publicly traded securities of a *covered foreign person,* instruments that reference such securities (*e.g.,* swaps, futures, or options), or instruments that are convertible into or exchangeable for such publicly traded securities or index funds, mutual funds, and exchange-traded funds. Another commenter requested that Treasury clarify that the exception includes rights, warrants, and derivative contracts with ''publicly traded security'' reference assets, as well as futures on broad-based indexes. Another commenter called on the U.S. Government to close what it referred to as the ''passive-index loophole,'' requesting that the Treasury Department work with the U.S. Securities and Exchange Commission (SEC) to do so and referenced support for certain legislative efforts on this matter. One commenter questioned whether a *U.S. person's* receipt of equity or an equity-related instrument from a *covered foreign person* that is a public company would qualify as an exception.

One commenter requested that the Final Rule consider subscriptions to IPOs as a ''publicly traded security'' or otherwise exempt subscriptions to IPOs, while others sought clarification whether initial purchasers would qualify for the exception. Other commenters requested clarity regarding whether transactions by underwriters, advisers, and other providers of ''ancillary services'' participating in or assisting with an IPO of *covered foreign persons* would qualify as an *excepted transaction.*

The Final Rule implements § 850.501(a)(1)(i) from the Proposed Rule without change. Under the Final Rule, an *excepted transaction* includes an investment into a ''publicly traded security,'' with ''security'' defined as set forth in section 3(a)(10) of the Securities Exchange Act of 1934, as amended. This includes a security traded on a non-U.S. exchange, or a security traded ''over-the-counter,'' in addition to a security traded on a U.S. exchange. In response to comments, the Treasury Department is adding an additional exception at § 850.501(a)(1)(iv) in the Final Rule that excepts an investment in a derivative so long as the derivative does not confer the right to acquire equity, rights associated with equity, or any assets in or of a *covered foreign person.*

In response to the comment regarding a ''passive-index loophole,'' the exception for publicly traded securities as well as that for securities issued by an investment company (further discussed below), are not loopholes but rather represent a considered decision to carve out investments that are unlikely to contribute to the national security risks connected to the transfer of intangible benefits identified in the Outbound Order. In response to one commenter's request to except the receipt of equity or an equity-related instrument from a public company, the Treasury Department has created an exception for receipt of employment compensation in the form of stock or stock options in the Final Rule discussed more above (see *covered transaction*). This exception is reflected in the text at § 850.501(f).

The Treasury Department considers the acquisition of an equity interest in a *covered foreign person* that is not yet publicly traded for the purpose of facilitating an IPO, such as a purchase with the intent to create a market or to resell the security on a secondary market (*e.g.,* as part of an underwriting arrangement), to be a *covered transaction* and declines to create an exception for such a transaction. Such transactions provide both capital to the *covered foreign person* and the opportunity to transfer intangible benefits, such as increased market access. (See the discussion regarding *covered transaction* above for more.) Furthermore, services ancillary to IPOs that do not include the acquisition of an equity interest (or other interests set forth in the definition of § 850.210), including underwriting services that do not entail acquiring such an interest, are not a *covered transaction* and thus do not require an exception.

Security Issued by an Investment Company

Section 850.501(a)(1)(ii) of the Proposed Rule defined as an *excepted transaction* an investment by a *U.S. person* in a security issued by an investment company as defined in section 3(a)(1) of the Investment Company Act of 1940, as amended (ICA), that is registered with the SEC, such as an index fund, mutual fund, or exchange traded fund, as well as a company that has elected to be a business development company pursuant to the ICA. The Treasury Department considered such investments to carry with them a lower likelihood of exacerbating the threat to national security identified in the Outbound Order.

The Treasury Department received a few comments on this section of the Proposed Rule. One commenter requested that the Treasury Department consider requiring index providers to engage in public consultation prior to undertaking methodological changes to indexes. Another commenter indicated their support for the proposed exception and requested that it be expanded to include common and collective investment funds that are exempt from the definition of ''investment company'' under the ICA, pursuant to section 3(c)(3) or section 3(c)(11) thereof, but are subject to regulation by Federal or state banking authorities (also known as collective investment trusts or CITs), arguing that they, like index funds, are unlikely to present the kind of risks contemplated by the Outbound Order. One commenter requested that the exceptions for investments in securities

issued by registered investment companies be expanded to cover securities issued by companies with equivalent status under the securities laws of non-U.S. countries.

The Treasury Department is implementing § 850.501(a)(1)(ii) with three changes from the Proposed Rule. The first is the insertion of ''elected to be regulated as or is regulated as a business development company'' in place of ''elected to be a business development company.'' This is a technical edit and is not intended to alter the substance of the rule. The second change is an updated statutory reference to 15 U.S.C. 80a–53 in place of 15 U.S.C. 8a–54 and a reference to the Investment Company Act of 1940 ''as amended.'' This is also a technical edit and is not intended to alter the substance of the rule. The third is the removal of the reference to ''or any derivative thereon,'' given the exception for derivatives discussed above and located at § 850.501(a)(1)(iv) of the Final Rule. Under this provision of the Final Rule, an investment by a *U.S. person* in a security issued by a registered investment company, such as an index fund, mutual fund, or exchange traded fund, as well as a business development company under the ICA, are excepted from the definition of *covered transaction.*

The Treasury Department recognizes the policy goal underpinning the request to impose a requirement on index funds to engage in public consultation prior to making methodological changes. However, the request exceeds the scope of authority delegated to the Treasury Department by the Outbound Order, and thus cannot be addressed in this rulemaking. With respect to CITs, while CITs serve a similar purpose to registered investment companies, they are not themselves separate legal entities, but a type of fiduciary account maintained by a Federal or state bank or trust company. CITs are investment funds available mainly in employer-sponsored retirement plans and unregulated by the SEC, so adding an exception for CITs would undermine this separate treatment for pooled investment funds under § 850.501(a)(1)(iii). The Treasury Department declines to expand the exceptions for investments in securities issued by registered investment companies to cover securities issued by companies with equivalent status under the securities laws of non-U.S. countries given a desire to keep the exception limited and the complexities in assessing the equivalence of non-U.S. securities laws, which can vary considerably across jurisdictions.

Investment Made as an LP

The Proposed Rule presented two alternates for § 850.501(a)(1)(iii) for commenters to consider. Under proposed Alternate 1, a *U.S. person's* investment made as an LP in a pooled investment fund would have constituted an *excepted transaction* if (1) the LP's rights are consistent with a passive investment, and (2) the LP's committed capital is not more than 50 percent of the total assets under management (AUM) of the pooled investment fund. If the *U.S. person* LP's committed capital were to constitute more than 50 percent of the total AUM of the pooled investment fund, its investment would have qualified as an *excepted transaction* only if the *U.S. person* secured a binding agreement that the pooled investment fund would not use its capital for a *prohibited transaction.* Under proposed Alternate 2, a *U.S. person's* investment made as an LP in a pooled investment fund would have constituted an *excepted transaction* if the LP's committed capital is not more than $1 million.

A number of commenters expressed a preference for Alternate 1. No commenters expressed a preference for Alternate 2. Several commenters noted that Alternate 2 would make the exception for an LP investment effectively unavailable to most *U.S. persons* (including U.S. institutional investors) investing in a pooled investment fund as an LP. One commenter noted that the size of an LP's capital commitment in a particular fund may not align to the size of the LP's investment allocated specifically to a *covered foreign person.* Several commenters stated that Alternate 1 was better aligned with the policy goals of the rule because by focusing on an LP's relative share of a given pooled investment fund as a percentage of AUM, which relates to the LP's influence within the pooled investment fund, it focused more on the potential transfer of intangible benefits from a non-passive *U.S. person* investor via such fund than the absolute dollar threshold in Alternate 2. Two commenters stated that Alternate 1 aligned with the goals of the Outbound Order because the AUM threshold of 50 percent was aligned with the threshold for control of a pooled investment fund. One commenter stated that Alternate 2 would disadvantage *U.S. person* LPs and facilitate the entrance of non-*U.S. person* LPs into pooled investment funds in their place.

Two commenters requested that if the Treasury Department adopts Alternate 2, it should raise the dollar threshold to be significantly higher, such as $20 million. One commenter stated that there should be no de minimis threshold for the exception for LP investments at all because LPs only have limited liability as long as they remain passive investors. One commenter suggested that an exception for all passive investment, similar to the approach taken for LPs in Alternate 1, be included in the rule. One commenter requested that the Treasury Department remove the exception for LP investments altogether.

In discussing the effects of Alternate 2, one commenter stated that some fund managers do not accept investments under $1 million to comply with SEC laws and regulations related to ''sophisticated investors.'' The commenter also stated that a range of investors rely on investment in private funds as a source of diversification and strong returns for investing the retirement savings of tens of millions of American workers and that if Alternate 2 were selected, these investors may forgo such investments, disrupting cross-border investment and causing them to lose an essential source of diversification for the retirement savings of tens of millions of American workers. One commenter stated that based on a review of a random sample of 400 LP investments across all its funds, 255 contributed in excess of $1,000,000 per fund.

A number of commenters requested that, regardless of which alternate the Treasury Department selects for the final rule, an *excepted transaction* include a transaction in which a *U.S. person* LP has secured a binding contractual assurance that its capital will not be used to engage in a transaction that would cause the LP to have made an indirect *prohibited transaction.* However, one commenter stated that this language would create a loophole unless it required the fund to make an assurance that none of the fund's capital would be used for such a purpose.

Several commenters discussed challenges to compliance with either or both alternates. Multiple commenters requested further details regarding how the percentage of AUM would be calculated for the purposes of Alternate 1 given, for example, multiple co-investments in a single target by the same LP via multiple funds as well as the fact that fundraising from multiple LPs occurs over a period of time, causing a given LP's percentage of total contributed capital to fluctuate during the fundraising period. Several comments related to whether the factors enumerated in § 850.501(a)(1)(iii)(A)(*1*)

through (*5*) via Alternate 1 (which would have excluded an investment from the definition of *excepted transaction* related to certain LP investments) or in § 850.501(a)(2) (which would have excluded an investment from the definition of *excepted transaction* related to a publicly traded security, a security issued by an investment fund, or an LP investment) apply to a given LP investment. Other commenters requested that certain types of LP engagement in a fund be conferred a safe harbor. One commenter discussed compliance costs for a non-*U.S. person* fund that has a mix of LPs that fall above and below the *excepted transaction* threshold. Another commenter stated that compliance with Alternate 2 would not be possible for a *U.S. person* investor contributing a smaller amount as they would lack leverage to gain access to the information necessary to determine whether a pooled investment fund had made an investment that would result in an indirect *covered transaction* by the LP.

The Treasury Department notes commenter preferences for Alternate 1, as well as the comments and data stating that a $1 million dollar threshold could make the exception practically unavailable to many larger or institutional investors. However, the fact that an institutional investor generally makes investments as an LP investor that exceed a given dollar threshold is not dispositive to the analysis of that threshold. As discussed in the Proposed Rule, the rationale for excepting an LP investment by a *U.S. person* under a specified threshold into a pooled investment fund that then invests in a *covered foreign person* is that LP transactions above a certain threshold are more likely to involve the transfer of intangible benefits such as those often associated with larger institutional investors, including standing and prominence, managerial assistance, and enhanced access to additional financing. The Treasury Department has determined that an exception threshold based purely on an investment's proportion of a fund's overall AUM could be overinclusive by permitting large *U.S. person* investments that could be significantly allocated to underlying investments in one or more *covered foreign persons.* Even if an institutional *U.S. person* LP remained passive and did not provide managerial assistance to investment targets, a *covered foreign person* benefiting from the indirect investment could exploit the affiliation with an established *U.S. person* LP for legitimacy and access to additional financing, among other benefits. In addition, given the size of certain investments that would be permitted under a pure AUM-based exception threshold, a *U.S. person* LP may have greater incentive and potentially greater ability to impact the success of a *covered foreign person* in which the relevant pooled investment fund invests.

To address this risk of intangible benefits, the Treasury Department declines to adopt the element of Alternate 1 linked to a pooled investment fund's AUM. Instead, in response to requests to raise the dollar threshold in Alternate 2, the Treasury Department has determined to apply an exception at $2,000,000, or double that discussed in the Proposed Rule. This higher threshold is intended to facilitate compliance by *U.S. person* investors that are generally smaller in size and less likely to confer standing and prominence on an underlying *covered foreign person* by virtue of their association as an LP investor. The Treasury Department declines to eliminate the LP exception in the Final Rule, as suggested by one commenter, because the Final Rule is scoped to prevent the transfer of capital that is accompanied by intangible benefits, and certain de minimis *U.S. person* investments into pooled investment funds likely do not provide sufficient incentive or opportunity for the *U.S. person* to transfer such intangibles to a *covered foreign person.*

The Treasury Department has also considered the continued interest of institutional investors to have exposure to a wide variety of pooled investment funds in search of returns on capital. In response to commenter requests to maintain an exception for a *U.S. person* LP investor that has received a binding contractual assurance that its capital invested in the fund will not be used to engage in an indirect *prohibited transaction,* the Treasury Department has determined to modify the Final Rule to except *U.S. person* investments into a pooled investment fund if the *U.S. person* has obtained a binding contractual assurance that its capital in the fund will not be used to engage in a transaction that would be a *prohibited transaction* or *notifiable transaction,* as applicable, if engaged in by a *U.S. person.* For example, if a *U.S. person* LP investor invests in a fund that is not a *U.S. person* and that it *knows* is likely to invest in a *person of a country of concern* engaged in one or more of the three specified sectors, and the investor obtains a binding contractual assurance that its capital in the fund will not be used to engage in a transaction that would be a *prohibited transaction* if engaged in by a *U.S. person,* the *U.S. person* LP investor's investment into the fund is not prohibited under the Final Rule. However, unless the *U.S. person* LP investor has also obtained a binding contractual assurance that its capital in the fund will not be used to engage in a transaction that would be a *notifiable transaction* if engaged in by a *U.S. person,* then the *U.S. person* LP investment is not excepted from the applicable notification requirements, and would be required to submit a notification when the fund undertakes a transaction that would be a *notifiable transaction* if undertaken by a *U.S. person.* Any assurance would need to be obtained prior to the *U.S. person* investment into the pooled investment fund for the exception to apply. If timely obtained, the exception would apply regardless of the overall dollar amount of the *U.S. person's* investment—that is, the test for an *excepted transaction* is disjunctive such that *either* an investment of $2,000,000 or less, *or* an investment with the foregoing contractual assurance, is sufficient to trigger the exception.

This approach aligns with the goals of the Outbound Order because the *covered foreign person* would not benefit from a *U.S. person's* capital, and a *U.S. person* whose capital is not invested in a *covered foreign person* likely lacks the opportunity or incentive to provide intangible benefits to such *covered foreign person* that it might have provided had its capital been invested. The Treasury Department expects that such a binding contractual assurance would result in the *U.S. person* LP not receiving investment returns from those investments in a *covered foreign person* for which the *U.S. person's* capital was not used pursuant to such assurance.

The overall hybrid approach adopted in the Final Rule—that is, defining *excepted transaction* as any LP investment of $2,000,000 or less, or any LP investment accompanied by a binding contractual assurance that the LP's capital invested in the pooled investment fund would not be made to effect an indirect *prohibited transaction* or *notifiable transaction,* as applicable—provides two distinct avenues to meet the criteria of an exception, addressing several issues raised by commenters.

Finally, the hybrid approach adopted in the Final Rule makes the exception accessible to a wide variety of investor sizes and types but retains the bright-line simplicity of Alternate 1. It eliminates the need to interpret and

apply the exclusionary factors enumerated in § 850.501(a)(1)(iii)(A)(*1*) through (*5*) of the Proposed Rule to particular LP agreements or participation in an LPAC or committee of an investment fund, and likewise obviates the complexities discussed by commenters of calculating a specific LP's percentage of AUM. As such, the Treasury Department removes from the Final Rule Note 1 to § 850.501 of the Proposed Rule, which described the application of those exclusionary factors no longer included in the Final Rule. The Treasury Department notes that an LP's participation on an advisory board or a committee of an investment fund does not, as a general matter, exclude such LP from the exception described in § 850.501(a)(1)(iii).

Rights Beyond Standard Minority Shareholder Protections

Under § 850.501(a)(2) of the Proposed Rule, certain transactions that otherwise qualified as *excepted transactions* would not qualify if a *U.S. person* obtained certain rights beyond standard minority shareholder protections as part of its investment. The Proposed Rule listed six minority shareholder protection rights:

- The power to prevent the sale or pledge of all or substantially all of the assets of an entity or a voluntary filing for bankruptcy or liquidation;
- The power to prevent an entity from entering into contracts with majority investors or their affiliates;
- The power to prevent an entity from guaranteeing the obligations of majority investors or their affiliates;
- The right to purchase an additional interest in an entity to prevent the dilution of an investor's pro rata interest in that entity in the event that the entity issued additional instruments conveying interests in the entity;
- The power to prevent the change of existing legal rights or preferences of the particular class of stock held by minority investors, as provided in the relevant corporate documents governing such stock; and
- The power to prevent the amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of an entity with respect to the matters described in § 850.501(a)(2)(i) through (v) of the Proposed Rule.

A few commenters provided responses to this section of the Proposed Rule. One commenter noted that in certain jurisdictions, including the PRC, rules for listed companies give shareholders owning no more than 3 percent of shares the right to put forward for a shareholder vote a proposal to nominate directors. The commenter asked that the Treasury Department either make explicit that such a right is a standard minority shareholder protection or that an otherwise *excepted transaction* does not lose that status unless and until the *U.S. person* investor exercises their right to nominate. One commenter asked that the Treasury Department explicitly affirm that a transaction that provides only minority shareholder provisions is excepted. Another commenter suggested removing the restriction that any investment that affords a *U.S. person* rights outside standard minority shareholder rights will not constitute an *excepted transaction.*

The Treasury Department acknowledges that certain jurisdictions, including the PRC, may provide proposal rights to relatively low percentage shareholders in companies listed in those jurisdictions. The Treasury Department, however, does not consider these rights to be standard minority protection rights and declines to modify the Final Rule to accommodate this scenario. Standard minority protection rights are typically defensive in nature and are aimed at protecting minority shareholders' investments from actions taken by majority investors. A right to propose a slate of directors is a positive, not negative right, and goes beyond just protecting the investment of the minority shareholders. Being afforded such a right with respect to an investment in a *covered foreign person* would go beyond standard minority shareholder protections; as such, if provided as part of an investment that would otherwise be an *excepted transaction,* the investment will not have that excepted status.

The Treasury Department does not support the inclusion of an explicit affirmation that transactions providing only minority shareholder protections are excepted. The text of the Final Rule is clear that if an investment falls within the definition of 850.501(a)(1), it is an *excepted transaction,* unless it affords rights beyond standard minority shareholder protections.

Section 850.501(a)(2) of the Final Rule, therefore, remains largely unchanged from the Proposed Rule, with the exception of a technical edit discussed below. An investment in a *covered foreign person* that would otherwise be an *excepted transaction* under § 850.501(a) that affords a *U.S. person* rights beyond standard minority shareholder protections with respect to the *covered foreign person* (such as the rights listed above) is not an *excepted transaction.* The Final Rule adds the phrase ''standard minority shareholder'' to the last sentence of § 850.501(a)(2) to clarify the reference to the ''protections'' described in paragraphs (a)(2)(i) through (vi). This edit is not intended to affect the substance of the requirement.

Buyout of Person of a Country of Concern Interest(s)

Section 850.501(b) of the Proposed Rule defined as an *excepted transaction* those transactions in which a *U.S. person* acquired all of the equity or other interests in an entity held by one or more *persons of a country of concern,* provided that following the acquisition, the entity no longer constituted a *covered foreign person.* The objective of the exception was to carve out from coverage a transaction that eliminated the likelihood that intangible benefits of a *U.S. person* could transfer to a *covered foreign person* because following the transaction, a *person of a country of concern* no longer would have any interest in the buyout target.

The Treasury Department received two comments on this section of the Proposed Rule. Both commenters recommended that the exception be expanded to include any acquisition of equity or other interest by a *U.S. person* in an entity if, following the acquisition, the entity no longer meets the definition of a *person of a country of concern.* According to the commenters, modifying the exception would be consistent with the Proposed Rule, which would permit *U.S. persons* to invest in entities that are minority-owned by *persons of a country of concern.*

The Treasury Department declines to expand the exception and adopts the text of the Proposed Rule without changes. Expanding the exception in the manner recommended by commenters would open a potential loophole with respect to joint ventures—if, for example, a *U.S. person* purchases a 51 percent interest in a *covered foreign person,* and a *person of a country of concern* retains 49 percent ownership, that transaction closely resembles the establishment of a joint venture. The exception, if expanded in the manner requested by commenters, would threaten to undermine § 850.210(a)(5), because *U.S. person* investors could effectively create joint ventures with *persons of a country of concern* in contravention of the Final Rule.

Intracompany Transfer

Section 850.501(c) of the Proposed Rule excepted from the definition of *covered transaction* certain intracompany transactions—that is, a transaction between a *U.S. person* and

its *controlled foreign entity* to support ongoing operations or other activities that are not *covered activities.* The goal of this exception was to avoid unintended interference with the ongoing operations of a *U.S. person's controlled foreign entity* even when that *controlled foreign entity* also met the definition of *covered foreign person.* The Treasury Department expected that the initial acquisition or establishment of the subsidiary would already have constituted a *covered transaction,* and where it did not, the potential impacts on the *U.S. person* from covering such intracompany transactions under the Proposed Rule likely would have outweighed the benefit in terms of the objectives of the Outbound Order. Although the definition of *covered transaction* in the Proposed Rule would not have usually applied to most routine intracompany activities such as the sale or purchase of inventory or fixed assets, the provision of paid services, or the licensing of technology, the intracompany transaction exception in the Proposed Rule nonetheless would have excepted intracompany transactions that would have been *covered transactions* but supported activities that were not *covered activities.* However, the exception would not have applied to greenfield investments or joint ventures, in order to prevent the exception from being exploited, *e.g.,* via the use of an existing *controlled foreign entity* to shift operations into new *covered activities* or the acquisition of a *person of a country of concern entity* not engaged in a *covered activities* that then shifted operations into a *covered activity* for the first time.

Several commenters sought clarification regarding the application of the exception, stating that the Proposed Rule was ambiguous with respect to the line between transactions that would support ongoing operations and those that would fund *covered activities.* To rectify the ambiguity, one commenter stated that the rule should be revised to allow companies (1) to provide ongoing support for existing operations (*i.e.,* predating the Outbound Order) in the prohibited category, so long as they provide notice; and (2) to be excepted from the notification requirement for ongoing operations (*i.e.,* predating the Outbound Order) if they would not be prohibited under the Outbound Order.

One commenter interpreted the Proposed Rule to limit the exception to only transactions between a *U.S. person parent* and a direct *controlled foreign entity* subsidiary. Another suggested that the rule should apply to any intracompany transaction between a *U.S. person parent* and *controlled foreign entity* subsidiary, except transactions that would be covered under § 850.210(a)(4).

Multiple commenters sought to expand the reach of the exception beyond the parent-subsidiary relationship between a *U.S. person* and its *controlled foreign entity.* A few commenters asked for expansion of the exception to include transactions between a *U.S. person* and its subsidiaries, both wholly-owned and less-than-wholly-owned. One commenter requested that the exception apply to all transactions between a *U.S. person parent* and any wholly owned subsidiary. Others suggested expanding the exception to include any transaction between a *U.S. person* and a corporate affiliate, or a transaction involving affiliates that are *knowingly directed* by a *U.S. person,* or a transaction undertaken by a *controlled foreign entity* of a *U.S. person.* One commenter suggested extending the exception to where a *U.S. person knowingly directs* a transaction by a foreign *parent* that is a publicly traded company. One commenter suggested establishing a threshold based on the financial significance of the transaction. Another commenter stated that the exception should apply to categories of *covered activities,* which would allow a *controlled foreign entity* to continue its activities within a particular category.

Some commenters suggested that the exception should extend to *U.S. person* investment in any *controlled foreign entity,* even if the *U.S. person* were not the *parent.* Others asked that the exception apply to transactions between entities operating in a verein network or other non-corporate forms that have the same purpose of facilitating routine operational activities.

One commenter asked for an illustrative list of intracompany transactions that would fall within the exception, and those that would not—*i.e.,* when the *controlled foreign entity* begins engaging in a new *covered activity.*

The Treasury Department notes the requests for clarification with respect to the Proposed Rule regarding the intended scope of the exception for intracompany transfers under § 850.501(c). The purpose of the exception in the Final Rule is to carve out from the definition of *covered transaction* a transaction between a *U.S. person parent* and a *controlled foreign entity* subsidiary that supports new operations that are not covered activities or that maintains ongoing operations (including ongoing covered activities) in which the *controlled foreign entity* is engaged at the time of the effective date of the Final Rule. The Final Rule amends this provision to make this explicit.

As written, the intracompany transfer exception in the Final Rule does not include an exception for intracompany transfers that support new operations that are *covered activities.* Because such transfers are not excepted, the exclusions for greenfield, brownfield, and joint venture investments in the exception in the Proposed Rule that cross reference to § 850.210(a)(4) and (5) have been removed.

In other words, the intracompany transfer exception in the Final Rule allows a *U.S. person parent* to continue to support its *controlled foreign entity* in maintaining any *covered activities* in which it has been engaging prior to the effective date of the Final Rule as well as any new non-*covered activities.* The intracompany transfer exception in the Final Rule also allows a *U.S. person parent* to support its *controlled foreign entity* that was established after the effective date of the Final Rule in its new or ongoing operations that are not *covered activiti*es. It does not permit a *U.S. person parent* to use its *covered foreign person* subsidiary to engage in new *covered activities,* nor does it allow a *U.S. person parent* to acquire control of a *person of a country of concern* and shift such entity's operations such that it engages in a new *covered activity.* Neither such activity is excepted by § 850.501(c) of the Final Rule, and both such activities are covered by the language of § 850.210(a)(4) (see the discussion of *covered transaction* above, specifically as regards ''greenfield'' and ''brownfield'' investments).

The Treasury Department does not support extending the intracompany transfer exception beyond the *U.S. person parent-controlled foreign entity* relationship—*i.e.,* to other subsidiaries or affiliates, where a *U.S. person knowingly directs* a transaction involving an affiliate or a foreign *parent* to support ongoing operations of a subsidiary, or between a *U.S. person* and any *controlled foreign entity,* including those for which the *U.S. person* is not a *parent.* This exception is intended to be limited in scope and to avoid unintended consequences for the existing operations of a *U.S. person* that is already the *parent* of a *covered foreign person* in a *country of concern* and, importantly, can control such entity. Extending the exception beyond a *controlled foreign entity* could open significant loopholes and could result in transfers of intangible benefits to an entity in a *country of concern* that the relevant *U.S. person* does not control,

heightening concerns that such enhanced standing and prominence, managerial assistance, access to investment and talent networks, market access, and enhanced access to additional financing, could be shared onward with government authorities. Similarly, the Treasury Department declines to expand the exception to allow any intracompany transfer to a wholly-owned subsidiary, as one commenter requested, as this could open a loophole in the rule by extending the exception to the use of existing wholly-owned subsidiaries to fund operations in new line of *covered activities,* for example.

The Treasury Department also does not support the establishment of a threshold for the exception based on financial significance; the exception applies to any transaction of any value between a *U.S. person parent* and *controlled foreign entity* subsidiary to support new non-*covered activities* or maintain ongoing operations, including ongoing *covered activities.* The purpose of the Final Rule, consistent with the Outbound Order, is to require notification of, and prohibit, certain transactions that can be exploited by *countries of concern* to develop sensitive technologies and products. Therefore, the Treasury Department assesses that it is important to keep this exception, which would permit investments in an entity that constitutes a *covered foreign person,* narrow, with the intention of avoiding unnecessary disruption to operations of entities of which the *U.S. person* is a *parent.* Given the myriad varieties of intracompany transactions that could be excepted under this provision, the Treasury Department declines to provide an illustrative list in this Final Rule. To be clear, the exception under the Final Rule is not limited to direct *U.S. person parent-controlled foreign entity* relationships, as § 850.206(b) contemplates and captures a tiered ownership structure scenario where a *U.S. person* is an ultimate (but not immediate) *parent.* For the avoidance of doubt, to the extent that a *U.S. person* entity's subsidiaries or affiliates are also *U.S. persons,* then they have an independent obligation to comply with the Final Rule.

Binding, Uncalled Capital Commitment

The Proposed Rule included an exception for transactions made in fulfillment of a *U.S. person*'s binding, uncalled capital commitment entered into prior to August 9, 2023, the effective date of the Outbound Order. The Treasury Department included this exception because a *U.S. person* could not have been aware of the scope of the Outbound Order or the President's directive to the Treasury Department to implement the prohibition and notification requirements before the Outbound Order was issued. Indeed, the ANPRM, issued on the same day as the Outbound Order, included a discussion of the possible exception for transactions made pursuant to such commitments made prior to the issuance of the Outbound Order. The Proposed Rule, therefore, aimed to avoid a significant disruption to a *U.S. person* who entered into a binding capital commitment prior to August 9, 2023, and would have applied to any transaction made in fulfillment of a binding, uncalled capital commitment entered into prior to such date.

Multiple commenters provided responses to this section of the Proposed Rule. A few commenters expressed support for the Treasury Department's decision to provide for only prospective application of the rule, while several requested that the Treasury Department revise the exception for commitments entered into before August 9, 2023, to instead except commitments entered into before the effective date of the Final Rule. One commenter asked to revise the exception for transactions made pursuant to a binding, uncalled capital commitment entered into before August 9, 2023, to instead except commitments that the investor did not know were prohibited at the time the commitments were entered into.

A few commenters stated that limiting the exception to binding, uncalled capital commitments made prior to August 9, 2023, could lead to retroactive application if terms defined elsewhere, like *covered activities* and ''covered national security technologies and products,'' were later broadened to cover more transactions without changing the applicable lookback date.

In response to the comments, and given certain fairness considerations raised by the commenters, the Treasury Department has revised § 850.501(d) of the Final Rule to provide an exception for transactions made after the effective date of the Final Rule (January 2, 2025) pursuant to a binding, uncalled capital commitment entered into before the effective date of the Final Rule.

If the Treasury Department broadens the scope of what is covered in subsequent rulemaking, the Treasury Department expects to consider whether it is appropriate to amend this provision to take into account binding commitments made after the specified date. The Treasury Department notes that the exception in § 850.501(d) is limited to transactions pursuant to binding capital commitments made before the effective date (*i.e.,* where the *U.S. person* has made a binding capital commitment to a fund or similar investment entity prior to January 2, 2025 and the capital is then called after the effective date), recognizing that often a fund's investment targets have yet to be determined at the time of the capital commitment. This is in contrast to the situation where a *U.S. person* signs a binding agreement with or with respect to the investment target. In the later scenario, the exception in 850.501(d) will not apply and, if the transaction's *completion date* is after January 2, 2025, the notification and prohibition requirements are applicable, even if the binding agreement was executed prior to January 2, 2025. The Treasury Department notes that following the Outbound Order and the ANPRM, the Proposed Rule additionally put the public on notice that the Treasury Department intended to require notifications for certain transactions and prohibit other transactions, and the Final Rule includes a delayed effectiveness, allowing transaction parties time to ensure compliance with the Final Rule.

Loan Syndication Upon Default

Section 850.501(e) of the Proposed Rule included in the definition of *excepted transaction* the acquisition of a voting interest in a *covered foreign person* by a *U.S. person* upon default or other condition involving a loan or similar financing arrangement where the *U.S. person* lender was part of a syndicate of banks and could not initiate action vis-à-vis the debtor on its own and did not have a lead role in the syndicate. Consistent with the objectives of the Outbound Order, it excepted a narrow set of circumstances in which a *U.S. person* lender would have passively received an interest in a *covered foreign person* and, even after receiving such interest, lacked a role in the lending syndicate that would have been likely to create the opportunity for a *U.S. person* lender to convey intangible benefits to the *covered foreign person* debtor.

The Treasury Department received multiple comments on this provision of the Proposed Rule, including one expressing general support of the exception. Several comments requested revisions to the Proposed Rule, while one sought to remove the exception entirely. With respect to requested revisions, one commenter stated that, if foreclosures on collateral remain within the scope of the rule, then the Treasury Department should revise § 850.501(e)(2) to state that the

exception applies to any *U.S. person* bank that ''is not the syndication agent,'' because ''lead role'' is not common industry terminology. The Treasury Department intends to maintain this exception in the Final Rule, as the Treasury Department assesses that a *U.S. person* bank passively receiving an equity interest by virtue of a role in a lending syndicate is unlikely to result in the national security concerns identified in the Outbound Order. The Treasury Department agrees with the proposed revision to § 850.501(e)(2) to replace ''lead role'' with ''syndication agent'' and has made such change in the Final Rule. To the extent that a *U.S. person* lender in the syndicate is not the syndication agent yet can still initiate action on its own with respect to the debtor, then the exception would not apply.

A few commenters sought to expand the scope of the exception. One commenter requested the exception be broadened to include instances where the *U.S. person* lender has a larger role in the lending syndicate. Another commenter requested that the Treasury Department revise the rule to recognize that exercising control to protect an investment does not always create the intangible benefits the rule seeks to eliminate.

The Treasury Department declines to expand the exception to include U.S. bank lenders that play a larger role in the syndicate. With such a role comes a greater opportunity to cause the transfer of the equity and potentially to transfer intangible benefits to the *covered foreign person* debtor, which would undermine the goals of the Outbound Order and Final Rule. Although exercising control over an investment may not always result in the conveyance of intangible benefits, the Treasury Department assesses that greater control leads to a higher likelihood of such conveyance the rule seeks to address.

A few commenters requested that the Treasury Department revise the exception to apply to syndicates led by either a bank or a nonbank. The Treasury Department declines to expand the exception in the Final Rule to include nonbank lenders. The Treasury Department seeks to keep this exception limited, given that it involves a *U.S. person* lender taking possession of a voting interest in an entity to which it has provided capital, and notes that there are other exclusions under the Final Rule that may be applicable to *U.S. persons* who have foreclosed on an equity interest as a result of a loan default, for example, where the *U.S. person* did not *know* at the time of making the loan that the pledged collateral was in a *covered foreign person.* (See the discussion of a *covered transaction* above.) *U.S. person* bank lenders are generally not in the business of managing and operating going concerns. To the extent that they take possession of a voting interest, it is primarily for the purpose of selling the interest to recoup the value of their loans, and hence the Treasury Department assesses there is a relatively lower likelihood of such banks conveying intangible benefits to the *covered foreign person.*

The Final Rule, therefore, remains largely unchanged from the Proposed Rule, except for the change in § 850.501(e)(2) discussed above. The exception, therefore, applies to the acquisition of a voting interest in a *covered foreign person* by a *U.S. person* upon default or other condition involving a loan or similar financing arrangement, where the loan was made by a syndicate of banks where the *U.S. person* lender in the syndicate cannot act on its own with respect to the debtor and is not the syndication agent.

Exception Regarding Designated Territories or Countries Outside of the United States

Recognizing shared objectives and in furtherance of the U.S. Government's efforts to encourage partners and allies to address risks related to outbound investment, § 850.501(f) of the Proposed Rule excepted certain transactions with or involving a person of a country or territory outside of the United States designated by the Secretary in accordance with certain criteria (to be developed) that related to that country or territory's own measures to address the national security risk related to certain outbound investment. The Treasury Department expected that any such country or territory would be designated after accounting for factors such as whether the country or territory was regulating outbound investment transactions involving technologies critical to a *country of concern's* military, intelligence, surveillance, or cyber-enabled capabilities, which technologies were covered by such regulation, and whether such regulation addressed national security concerns related to outbound investment similar to those addressed by the Outbound Order. The Proposed Rule noted that the Treasury Department was considering taking into account other factors for purposes of designating a country or territory, including the extent to which a country or territory cooperated with the United States on issues of national security and whether it had in place and is using related authorities and tools, such as export controls, to protect sensitive technologies and products.

The Proposed Rule would have provided for the application of this exception only to certain types of transactions with or involving a person of a designated country or territory. The Proposed Rule stated that the Secretary would determine the types of transactions for which the related national security concerns were likely to be adequately addressed by measures taken or that may be taken by the government of a country or territory outside the United States. Once developed, the Treasury Department stated that it would make the factors for the designation of a country or territory as well as types of transactions and/or activities that would be subject to the exception publicly available on the Treasury Department's Outbound Investment Security Program website.

Several commenters addressed—and were generally supportive of—the proposed exception under § 850.501(f).

A few commenters offered a framework for how the Treasury Department should consider scoping which transactions should be subject to the exception, or general principles for applying the exception in the future. Others noted that the proposed exception could convey an unfair advantage to a foreign competitor unless the foreign program is equally stringent. Another commenter noted that the proposed exception would not provide an incentive for a country or territory to develop an equivalent program because it would affect only a small number of businesses in any given country, and that if the Treasury Department were to consider other national security measures (such as export controls) in evaluating a country or territory for designation, then the country may gain the benefit of the incentive without needing to establish its own outbound security program. One commenter asked that the Treasury Department revise the Proposed Rule to clarify that the Secretary will make public the bases for the decision to designate a country or territory. Another commenter requested that the criteria for the exception be ''fully developed and specific'' prior to the issuance of the Final Rule.

The Treasury Department appreciates commenters' efforts to help develop a framework and to conceptualize the proposed exception and identify principles to guide its operation, as well as their interest in having the relevant consideration criteria be developed prior to the issuance of the Final Rule. Accordingly, the Treasury Department anticipates making available on its

Outbound Investment Security Program website more information on the factors the Secretary will consider when making a designation or determination. With respect to factors related to a designation, the Treasury Department intends to consider, for example:

- A country or territory's legal authority to regulate outbound investment;
- The extent to which the country or territory has in place and effectively utilizes a mechanism to regulate outbound investment involving sensitive technologies and products in the semiconductors and microelectronics, quantum information technologies, and AI sectors;
- The extent to which the country or territory possesses the legal authority to prohibit or require notification for outbound investment transactions involving sensitive technologies and products in the semiconductors and microelectronics, quantum information technologies, and AI sectors; and
- The extent to which the country or territory possesses legal authority to control the export of sensitive technologies and products in the semiconductors and microelectronics, quantum information technologies, and AI sectors to any foreign persons anywhere they may be located.

With respect to determinations, the Treasury Department is currently considering adopting an approach similar to that described by commenters, where the ''types of transactions'' for which this exception is available may differ based on whether the country or territory is the ''source of investment'' or the ''destination of investment.''

In response to comments, the Treasury Department notes that any exceptions created under this section would ultimately apply to *U.S. persons.* These exceptions would lift the notification requirement or prohibition, as applicable, on a *U.S. person* with respect to certain transactions that would otherwise be *notifiable transactions* or *prohibited transactions.*

The Treasury Department does not expect a foreign country or territory's regime related to outbound investment to necessarily be identical to the Final Rule. The relevant focus remains on the national security risks related to and, as stated in the Outbound Order, potentially exacerbated by, outbound investment. As such, the Secretary, following relevant consultations, may determine that certain types of transactions involving those countries or territories should be excepted.

Accordingly, the Final Rule adopts at § 850.501(g) the exception found at § 850.501(f) of the Proposed Rule with minor modifications. The Final Rule clarifies that the national security risks related to outbound investment to be addressed by a country or territory outside of the United States must be similar to those described by the Outbound Order. Additionally, consistent with the national emergency declared in the Outbound Order, the risks must be related to, rather than be posed by outbound investment. The Treasury Department assesses that these changes will provide the Secretary with greater flexibility to consider the full range of a country's or territory's legal authorities and programs when making designations or determinations under the rule. In addition, to afford flexibility to respond to changes in the international threat environment, the Treasury Department has added § 850.501(g)(4) to provide the Secretary with the authority to rescind a designation or determination if determined to be appropriate. The Secretary's recission of a designation or determination would apply prospectively and would be announced publicly.

Excepted Transaction—Final Rule Summary

The Final Rule implements ten categories of *excepted transaction,* including (subject to conditions, in some instances):

- An investment by a *U.S. person* in a publicly traded security;
- An investment by a *U.S. person* in a security issued by a registered investment company, such as an index fund, mutual fund, or exchange traded fund, or issued by any company that has elected to be a business development company;
- An investment of a certain size by a *U.S. person* LP in a pooled investment fund;
- An investment by a *U.S. person* in a derivative;
- A *U.S. person's* full buyout of all interests of any *person of a country of concern* in an entity, such that the entity is not a *covered foreign person* following the transaction;
- An intracompany transaction between a *U.S. person parent* and its *controlled foreign entity* that supports new operations that are not covered activities or that maintains ongoing operations, including ongoing covered activities;
- Fulfillment of a *U.S. person's* binding, uncalled capital commitment entered into prior to the effective date of the Final Rule;
- The acquisition of a voting interest in a *covered foreign person* upon default or other condition involving a loan, where the loan was made by a lending syndicate and a *U.S. person* participated passively in the syndicate;
- The receipt of employment compensation by an individual in the form of stock or stock options, or the exercise of such options; and
- Certain transactions with or involving a person of a country or territory outside the United States that has been designated by the Secretary in accordance with provisions set forth in § 850.501(g) of the Final Rule.

§ 850.502—National Interest Exemption

The Outbound Order authorizes the Secretary to ''exempt from applicable prohibitions or notification requirements any transaction or transactions determined by the Secretary, in consultation with the heads of relevant agencies, as appropriate, to be in the national interest of the United States.'' As described in the Proposed Rule, the Secretary, in consultation with the Secretary of Commerce, the Secretary of State, and the heads of relevant agencies, as appropriate, may have determined that a *covered transaction* is in the national interest of the United States and therefore, exempted it from certain provisions of the Proposed Rule. The Treasury Department anticipated that this exemption of a *covered transaction* would have been granted by the Secretary only in exceptional circumstances.

Section 850.502 of the Proposed Rule described the process and considerations for the Secretary's authority to exempt a *covered transaction* determined to be, in consultation with the heads of relevant agencies, as appropriate, in the national interest of the United States. Any determination that a *covered transaction* was in the national interest of the United States and therefore exempt from certain provisions of the Proposed Rule would have been based on a consideration of the totality of the facts and circumstances. The Proposed Rule stated that the Treasury Department anticipated such determination may have been informed by, among other considerations, the transaction's effect on critical U.S. supply chain needs, domestic production needed for projected national defense requirements, the United States' technological leadership globally in areas affecting U.S. national security, and the impact on national security from prohibiting a given transaction. The Proposed Rule stated that the Treasury Department would not consider granting retroactive waivers or

exemptions (*i.e.,* waivers or exemptions after a prohibited transaction has been completed).

To request a national interest exemption under the Proposed Rule, a *U.S. person* would have needed to submit certain information to the Treasury Department, including a description of the scope of the relevant transaction, the basis for the request, and an analysis of the transaction's potential impact on the national interest of the United States. The Proposed Rule noted that the Treasury Department may have requested that a *U.S. person* submit information, including some or all of the information required under § 850.405, as well as additional details based on the facts and circumstances.

The Treasury Department received comments on § 850.502 of the Proposed Rule. Commenters generally expressed support for this section. Several commenters requested that the Treasury Department develop clearer and more specific considerations that will be evaluated in determining whether a *covered transaction* is in the national interest of the United States, and therefore exempt from applicable provisions of the rule. Commenters requested that the Treasury Department expand the considerations that will be evaluated in a national interest determination, to include concerns related to the impact on human life, the environment, and finances of *U.S. persons.*

While understanding the interest of commenters in expanding the enumerated considerations that may inform a national interest determination, the Treasury Department declines to include additional enumerated considerations or clarifications in the Final Rule. As discussed in the Proposed Rule, any determination will take into account the totality of the relevant facts and circumstances and may be informed by, among other considerations, the transaction's effect on critical U.S. supply chain needs, domestic production needed for projected national defense requirements, the United States' technological leadership globally in areas affecting U.S. national security, and the impact on national security from prohibiting a given transaction. For the avoidance of doubt, the considerations in the Final Rule are not exclusive, and additional considerations may inform any determination by the Secretary. The Treasury Department anticipates providing information on the process and requirements for any national interest exemption request on its Outbound Investment Security Program website.

One commenter requested clarity as to whether individuals with delegated authority can seek an exemption on behalf of a *U.S. person.* Similar to the submission of a notification which requires a certification signed by the chief executive officer or other duly authorized designee of the person filing pursuant to § 850.203, the Treasury Department has added in the Final Rule a provision at 850.502(d) to require a certification that can be signed by a duly authorized designee according to § 850.203 in order to help ensure the provision of accurate and complete information to the Treasury Department. The Treasury Department notes that a certification based on misrepresentation, concealment, or omission of material fact may impact the validity of a national interest determination.

One commenter suggested that the rule include clear timelines for both the requesting person and the Treasury Department in reaching a determination and seeking additional information about the *U.S. person's* interactions with the *covered foreign person* and any mitigation of potential threats from the *covered foreign person.* Additionally, the commenter requested that the Treasury Department publicize the granting of a national interest exemption so that others can benefit from understanding the criteria that meet the requirements. Another commenter requested that the Treasury Department issue additional guidance on the process for submitting information related to the transaction for which this exemption is sought, and that any such process be developed with business practicalities in mind. As noted above, the Treasury Department intends to provide information, in accordance with § 850.502(c), to be submitted in connection with any national interest exemption request on its Outbound Investment Security Program website by the effective date of the Final Rule. As stated in the Proposed Rule, a *U.S. person* requesting a national interest exemption will need to submit certain information to the Treasury Department, including a description of the scope of the relevant transaction, the basis for the request, and an analysis of the transaction's potential impact on the national interest of the United States. The Treasury Department may request that a *U.S. person* submit information that may include some or all of the information required by § 850.405, as well as additional details based on the facts and circumstances. In addition to the required information, as a general matter, the Treasury Department welcomes additional information that the *U.S. person* deems relevant, including with respect to the *U.S. person's* interaction with the *covered foreign person* and views on mitigation of any national security risk, among others.

At this time, the Treasury Department is not instituting a timeline for its internal review and determination. After the Outbound Order and Final Rule are implemented, the Treasury Department may consider instituting such a timeline or providing additional information.

One commenter requested that the Treasury Department establish an appeals process and timeline in the event a request for an exemption is denied. The Treasury Department declines to establish such a process at this time and will be informed by experience.

One commenter suggested that the Treasury Department establish, prior to the issuance of the rule, the binding conditions to which an exempt *covered transaction* may be subject. The Treasury Department declines to establish in the Final Rule the binding conditions that a *covered transaction* may be subject to in connection with a granted national interest exemption. Because any determination will be based on a consideration of the totality of relevant facts and circumstances, the Treasury Department is unable to speculate as to what binding conditions may be necessary in a determination by the Secretary that a *covered transaction* is exempt under § 850.502.

The Final Rule adopts § 850.502 as set forth in the Proposed Rule with a modification to require that any information and documents submitted in relation to a national interest determination request be subject to the certification described in § 850.203. As noted above, a certification based on misrepresentation, concealment, or omission of material fact may impact the validity of a national interest determination.

Under § 850.502 of the Final Rule, the Secretary, in consultation with the Secretary of Commerce, the Secretary of State, and the heads of relevant agencies, as appropriate, may determine that a *covered transaction* is in the national interest of the United States and therefore is exempt from applicable provisions in Subparts C and D of this part (excluding §§ 850.406, 850.603, and 850.604). Such a determination may be made following a request by a *U.S. person* on its own behalf or on behalf of its *controlled foreign entity.* Any such determination will be based on consideration of the totality of the

relevant facts and circumstances and may be informed by the criteria discussed, although the Treasury Department reiterates this is not an exclusive list of criteria. A *U.S. person* seeking a *national interest exemption* shall submit relevant information to the Treasury Department regarding the transaction and shall articulate the basis for the request, including the *U.S. person's* analysis of the transaction's potential impact on the national interest of the United States. The Treasury Department may request additional information that may include some or all of the information required under § 850.405. A certification must be submitted pursuant to § 850.203. Electronic filing instructions will be available via the Treasury Department's Outbound Investment Security Program website. A determination that a *covered transaction* is exempt under this section may be subject to binding conditions, and to be valid must be provided to the subject *U.S. person* in writing and signed by the Assistant Secretary or Deputy Assistant Secretary of the Treasury for Investment Security.

The Treasury Department reiterates that it will not grant retroactive waivers or exemptions (*i.e.,* waivers or exemptions after a *prohibited transaction* has been completed).

Subpart F—Violations

Subpart F of the Proposed Rule (§§ 850.601 through 850.604) described conduct that would be treated as a violation of the Proposed Rule. Such conduct would have included taking any action prohibited by the Proposed Rule, failing to take any action required by the Proposed Rule within the timeframe and in the manner specified, and making materially false or misleading representations to the Treasury Department when submitting any information under the Proposed Rule. The Proposed Rule would also have prohibited any action that evades or avoids or has the purpose of evading or avoiding any of the prohibitions of the Proposed Rule. The Treasury Department did not receive any comments on Subpart F of the Proposed Rule.

The Final Rule implements Subpart F as proposed, with the exception of a clarification to § 850.603 to include ''omission.'' The Treasury Department is making this change to clarify that in addition to any materially false or misleading information submitted pursuant to the Final Rule, the omission of any such material information would also constitute a violation of the Final Rule.

Subpart G—Penalties and Disclosures

Subpart G of the Proposed Rule (§§ 850.701 through 850.704) described the civil and criminal penalties that may be imposed for violations of its requirements up to the maximum amount set forth in section 206 of IEEPA. Furthermore, the Proposed Rule would have permitted the Secretary, in consultation with the heads of relevant agencies, to take action to nullify, void, or otherwise compel divestment of any *prohibited transaction* entered into after the effective date of the Final Rule. The Proposed Rule also described the process for a *person* that may have violated applicable provisions to submit a voluntary self-disclosure.

The Treasury Department received comments to this subpart. One commenter suggested the rule include a process for appealing a penalty that is imposed or provide some other administrative or legal remedy. Other commenters requested that the Treasury Department clarify whether a non-*U.S. person* would face penalties for violations of the rule, and if so, under what circumstances, and requested specific guidance for non-U.S. persons.

The Treasury Department declines to establish an appeals process at this time. Any penalty will be imposed based on a totality of the facts and circumstances. The Treasury Department anticipates providing additional information regarding compliance with the program at a later date. The Treasury Department also notes that the Final Rule places certain obligations solely upon *U.S. persons.*

The Final Rule makes technical edits to the text of the provisions of Subpart G. Under the Final Rule, the Treasury Department may impose a civil penalty on any person that violates the Final Rule. In § 850.701(a)(1), the Final Rule clarifies that the maximum civil penalty that may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any order, regulation, or prohibition issued under IEEPA, including any provision of the Final Rule, is the greater of twice the value of the transaction that is the basis of the violation with respect to which the penalty is imposed or $250,000, which amount is subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. The Final Rule at § 850.701(c) notes that, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, notice of the maximum penalty which may be assessed under this section will be published in the **Federal Register** and on Treasury's Outbound Investment Security Program website on an annual basis on or before January 15 of each calendar year. As of the date of issuance of this Final Rule, the current maximum civil penalty under IEEPA is an amount not to exceed the greater of an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed or $368,136. 89 FR 2139 (published January 12, 2024). The Secretary may also refer potential criminal violations under the Final Rule to the Attorney General. Regarding a voluntary self-disclosure made for actual or apparent violations of the Final Rule, the Treasury Department will take such disclosure into account as a mitigating factor in determining the appropriate response, including the potential imposition of penalties, if the Treasury Department determines that there was, in fact, a violation.

Subpart H—Provision and Handling of Information

§ 850.801—Confidentiality

Section 850.801 of the Proposed Rule described the Treasury Department's proposal to treat as confidential, subject to limited exceptions, information and documentary materials that would have been submitted pursuant to its provisions and were not otherwise publicly available.

The Proposed Rule would have permitted the Treasury Department to disclose information or documentary materials, subject to appropriate confidentiality and classification requirements, where such materials were relevant to any judicial or administrative action or proceeding; provided to Congress; or provided to any domestic governmental entity or to a foreign governmental entity of a U.S. partner or ally, where the information or materials was important to the national security analysis or actions of such governmental entity or the Treasury Department. Additionally, the Proposed Rule would have permitted the Treasury Department to disclose information to third parties with the submitter's consent, and it also permitted the Treasury Department to use the information gathered to fulfill its obligations under the Outbound Order, potentially including publication of anonymized data.

As explained in the Proposed Rule, the Treasury Department was considering whether there were additional circumstances where disclosure of otherwise confidential information should be permitted. One

proposal considered would have allowed the Treasury Department to disclose such information to the public as and when the Secretary determined that such disclosure was in the national interest. The Treasury Department expected that such an exception would be rarely invoked and limited to circumstances in which the Secretary identified a pressing national interest that disclosure could help to address. This exception would not have superseded any applicable statutory restrictions that may constrain the sharing of certain categories of information, such as information that a party has identified as protected trade secrets information. The Treasury Department invited comments on the considerations that it should take into account in identifying the scope of this potential additional exception to confidential treatment, the standard that should apply to the Secretary's determination, and what safeguards may be applicable to disclosure when such an exception applies.

Multiple commenters provided perspectives on § 850.801 of the Proposed Rule. One commenter requested that the Treasury Department limit the sharing of information among U.S. Government agencies to only what is necessary to develop the analysis and recommendations required by the Outbound Order. The commenter also suggested retaining the other information sharing exceptions, particularly the exception for supporting judicial or administrative procedures. Another commenter expressed concerns about the Treasury Department's ability to share confidential business information submitted by parties with foreign government entities, potentially placing U.S. companies at a competitive disadvantage, and urged clarification that such information may be shared only to the extent ''necessary'' for the purpose of national security. One commenter requested the Treasury Department compile a monthly report on the distribution of notified investments across geography and industry, among other categories, to be ''shared with the relevant security or intelligence agency.''

While the Treasury Department recognizes the importance of safeguarding sensitive information, limiting the ability of the Treasury Department to share information among U.S. Government agencies to only what is necessary to develop the required information and recommendations to the President would undermine certain directives in the Outbound Order. For example, the Outbound Order directs the Treasury Department to consult with relevant departments and agencies in assessing the effectiveness of the Final Rule. Additionally, the Treasury Department, as stated in the Proposed Rule, intends to analyze *notifiable transactions,* in consultation with the Department of Commerce and, as appropriate, other relevant agencies. The Treasury Department emphasizes the importance of consulting with relevant agencies in furtherance of effective administration of the Final Rule.

With respect to the sharing of information with foreign governments of a United States partner or ally, the Treasury Department declines to change the standard under the exception to the confidentiality provision in § 850.801(b)(3) from ''important'' to ''necessary'' and instead retains the language ''important to the national security analysis or actions of such governmental entity or the Department of the Treasury.'' The Treasury Department views this as a high bar and intends that any sharing of information would be subject to appropriate safeguards, including appropriate confidentiality and classification requirements, which the Treasury Department takes seriously.

In response to the commenter suggestion regarding monthly data being shared with the relevant security or intelligence agencies, the Outbound Order directs the Treasury Department to provide to the President, through the Assistant to the President for National Security Affairs, an assessment of the effectiveness of the Outbound Investment Security Program in addressing national security threats identified in the Outbound Order as well as appropriate recommendations. Such assessment and/or recommendations may include anonymized data pertaining to *notifiable transactions.* The Treasury Department is finalizing § 850.801 as set forth in the Proposed Rule with the addition of the proposal discussed in the Proposed Rule (but not added to proposed regulatory text at that time) to permit the disclosure of information where the Secretary determines such disclosure to be in the national interest, as discussed further below. Section 850.801(a) of the Final Rule provides that information or documentary materials not otherwise publicly available that are submitted to the Treasury Department in accordance with its provisions will not be disclosed to the public, except as required by law or as set forth in the exceptions. As with the Proposed Rule, the Final Rule sets out limited circumstances under which the Treasury Department is permitted to disclose information or documentary materials, subject to appropriate confidentiality and classification requirements. Such circumstances include where information and documentary materials are (1) relevant to any judicial or administrative action or proceeding, (2) provided to Congress, or (3) provided to any domestic governmental entity or to a foreign governmental entity of a U.S. partner or ally, where the information or materials are important to the national security analysis or actions of such governmental entity or the Treasury Department. The Final Rule, like the Proposed Rule, also permits the Treasury Department to disclose to third parties information or documentary materials when the person who submitted or filed the information or documentary materials has consented to its disclosure to such third parties. The Final Rule also specifies that the Treasury Department may use the information gathered pursuant to the rule to fulfill obligations under the Outbound Order, which may include publication of anonymized data. An additional circumstance in which information may be disclosed is included in the Final Rule at § 850.801(d).

The Treasury Department is implementing in the Final Rule the proposal discussed in the preamble to the Proposed Rule that will allow the disclosure of information when the Secretary determines such disclosure is in the national interest. Factors that the Secretary may consider when determining if disclosure is in the national interest may include whether such disclosure will further national security interests, address law enforcement needs, or promote compliance with the rule. Circumstances in which the Secretary may determine the disclosure of information to be in the national interest can include, for example, identifying *persons of a country of concern* that are engaged in *covered activities* so that *U.S. persons* are on notice that the Treasury Department has determined such persons to be *covered foreign entities.* The Treasury Department anticipates this exception to be invoked rarely and limited to circumstances in which the Secretary identifies a national interest that disclosure could help to address. The Treasury Department recognizes that a determination as to when the disclosure of information is in the national interest is a significant decision that requires taking into account a range of considerations and accordingly should be made only by a

senior official. Consistent with this, the Final Rule provides that any such determination may not be delegated below the level of the Assistant Secretary of the Treasury.

Subpart I—Other Provisions

§ 850.903—Severability

Section 850.903 of the Proposed Rule provided that if any provision of the Final Rule, or the application thereof to any person or circumstance, is held to be invalid, such invalidity would not affect other provisions, or application of such provisions to other persons or circumstances, that can be given effect without the invalid provision or application. The Treasury Department did not receive any comments on § 850.903 and adopts it without change in the Final Rule.

If any provisions of this Final Rule, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions, or application of such provisions to other persons or circumstances, that can be given effect without the invalid provision or application. Each provision of the Final Rule and application thereof serves an important, related, but distinct purpose; provides a distinct benefit separate from, and in addition to, the benefit provided by other provisions and applications; is supported by evidence and findings that stand independent of each other; and is capable of operating independently such that the invalidity of any particular provision or application would not undermine the operability or usefulness of other aspects of the Final Rule. Based on its analysis, the Treasury Department believes that although more limited application would change the magnitude of the overall benefit of the Final Rule, it would not undermine the important benefit of, and justification for, the Final Rule's application to other persons or circumstances. The qualitative and quantitative benefits of the Final Rule outweigh the costs for all persons and circumstances covered by the Final Rule.

For example, but without limitation, if application of the Final Rule to a *U.S. person* with respect to the actions of its *controlled foreign entity,* is held to be invalid, it is the Treasury Department's intent that the Final Rule remain in effect as to all other persons covered by the Final Rule. Similarly, if the prohibition on a *U.S. person knowingly directing* a transaction by a non-*U.S. person* is held to be invalid, it is the Treasury Department's intent that the Final Rule remain in effect as to the prohibition on *U.S. persons* from engaging in *prohibited transactions.* The purpose of the Final Rule is to restrict those investments by *U.S. persons* that present a likelihood of conveying both capital and intangible benefits that can be exploited to accelerate the development of sensitive technologies or products critical for military, intelligence, surveillance, or cyber-enabled capabilities of *countries of concern* in ways that negatively impact the national security of the United States. It is consistent with this purpose to cover activity of *U.S. persons* as defined in the Final Rule if the application of the rule to a subcategory of persons or to a subcategory of activity is held to be invalid.

The key requirements of the Final Rule—the prohibition or notification of certain *covered transactions*—are likewise severable. The *covered transactions* that are subject to notification are distinct from those that are prohibited, and the two provisions operate independently of each other. The Treasury Department therefore intends for each of these requirements in the Final Rule to be severable from each other and to be applied to the extent possible, even if its application is limited.

§ 850.904—Reports To Be Furnished on Demand

The Proposed Rule set forth at § 850.904 that any person may be required to furnish information under oath regarding any act or transaction subject to part 850. Pursuant to § 850.904, the Treasury Department could have requested this information at any time and conduct investigations, hold hearings, take depositions, and compel witnesses to testify through subpoenas, among other things.

A commenter requested clarification in the rule that any inquiry made of legal counsel under this section should be conducted subject to the attorney-client privilege applicable in the relevant jurisdiction. The Treasury Department declines to specifically mention any particular defense, such as the attorney-client privilege, to a demand for information under this provision. Individuals required to provide such information may raise such defenses as applicable and appropriate, although the availability of such defenses does not excuse a party from the requirements of this rule.

Another commenter suggested the requirement to furnish information was overly broad, and recommended narrowing its scope to only functions necessary, in the commenter's view, for enforcement of the rule. Additionally, the commenter requested the Treasury Department make revisions including by removing the language requiring the information to be submitted under oath, in the form of reports or otherwise, as well as the language permitting the inquiry to be at any time. The commenter also requested narrowing the Treasury Department's authority to request information from ''any person'' about any ''act or transaction'' subject to the Proposed Rule to instead requesting information only from a *person* involved in a transaction subject to the Proposed Rule and about such transaction. Lastly, the commenter requested limiting the Treasury Department's investigative authority under § 850.904 to conducting investigations and requesting information aided by civil administrative subpoenas.

Limiting the Treasury Department's ability to seek information in connection with transactions subject to part 850 as suggested by the commenter would undermine the Treasury Department's ability to investigate and enforce violations of the Final Rule. Given the focus of the Final Rule on obligations on *U.S. persons* and the range of transactions within the definitions of *covered transaction* and *excepted transaction,* greater rather than less flexibility in the Treasury Department's avenues for obtaining information is important. Under IEEPA, the President has broad authority to investigate transactions in which any foreign person has an interest. Section 10(ii) of the Outbound Order grants the full scope of these investigative powers to the Secretary to carry out the purposes of the Outbound Order, including to investigate and make requests for information relative to notifiable or prohibited transaction not only from parties to such transactions but also from other relevant persons. Section 850.904 implements this authority and is consistent with longstanding OFAC practice under IEEPA (*e.g.,* 31 CFR 501.602). Notably, the text of the provision limits the Treasury Department's information gathering power to acts or transactions subject to part 850.

The Final Rule makes no change to the text of proposed § 850.904. Under the Final Rule, any person may be required to furnish information under oath regarding any act or transaction subject to its provisions. The Treasury Department can request this information at any time and the Treasury Department has the authority to conduct investigations, hold hearings, take depositions, and compel witnesses to

testify through subpoenas, among other things.

D. Other Comments

Compliance Burden

Several commenters noted that the Proposed Rule would impose what the commenters believed were significant compliance costs on U.S. companies, particularly small businesses, U.S. investors, and also foreign persons. One such commenter stated that the compliance costs for U.S. investors would be passed along to businesses, limiting resources to advance innovation. Another commenter noted that for venture capital investments in particular, it would be difficult and costly to determine who is *a person of a country of concern,* and that regulatory changes in the PRC were making it more challenging to obtain information on PRC entities, which will make it difficult for *U.S. persons* to comply with this requirement.

As described below in Section IV, the Treasury Department assessed the costs and benefits of the Final Rule. As noted in that analysis, while the Final Rule will impose some compliance costs on U.S. companies, investors, and foreign persons, the Treasury Department estimates that the Final Rule will apply to a relatively modest volume of potential *covered transactions,* and that these costs, in turn, will be relatively modest compared to the size of potential investment opportunities. The Treasury Department also notes that for at least some transactions and investors, the level of information collection, retention, and diligence necessary to comply with the Final Rule, to include determining whether a transaction party is a *person of a country of concern,* may not give rise to any costs beyond what would be incurred during the course of routine due diligence in the absence of the Final Rule.

Compliance Assistance

Several commenters requested the Treasury Department develop tools to assist compliance with the rule, such as public guidance or advisories, frequently asked questions (FAQs), sample due diligence questionnaires, red flags and case examples, or recommended contractual language, as well as enforcement guidelines.

Some commenters requested that the Treasury Department include specific fact patterns in the regulatory text, not just in the preamble to the rule, to illustrate transactions that might be covered, prohibited, or excepted, or that the Treasury Department publish these examples as FAQs.

Commenters also requested that the Treasury Department develop a formal or informal process, such as a hotline, for providing interpretive guidance or advisory opinions on specific transactions. Some commenters requested this process be established before the rule is effective. One commenter pointed to similar practices by other components of the Treasury Department as well as other departments and agencies that administer national security-related regulatory programs, such as the Departments of Commerce, Justice, and State, as well as the SEC.

Two commenters requested the Treasury Department periodically publish non-confidential or anonymized information in its possession about specific transactions to minimize program compliance costs, as well as unintentional violations.

One commenter requested that the Treasury Department publish guidance on *prohibited transactions* and *notifiable transactions* that were undertaken between August 9, 2023 (*i.e.,* the date of the Outbound Order), and the effective date of the rule. The commenter recommended that, in the alternate, the Treasury Department could clarify that *prohibited transactions* undertaken during this time period will not be subject to enforcement/penalties if parties submit a notification after the issuance of the rule, while *notifiable transactions* undertaken during an interim period could be notified within a certain period (*e.g.,* 100 days) after the effective date of the rule. In response, the Treasury Department notes that the obligations under the Final Rule take effect upon the effective date; only transactions with a *completion date* on or after the effective date are subject to the notification requirements or prohibition, as applicable.

The Treasury Department recognizes that the Final Rule imposes new requirements about which further information may be helpful. To assist *U.S. persons* in compliance with the Final Rule, the Treasury Department anticipates providing additional information following publication of the Final Rule, including through its Outbound Investment Security Program website. The Treasury Department also anticipates engaging in stakeholder outreach and education on the requirements in the Final Rule. In providing any additional information or materials, the Treasury Department will consider commenter requests to publish more specific and detailed materials to assist in due diligence. Regarding the request to include specific examples of fact patterns in the regulatory text, the Treasury Department assesses it is more efficient to publish examples through its Outbound Investment Security Program website rather than through a rulemaking. Doing so will allow the Treasury Department to provide and update such examples in a timely manner to support industry compliance.

At this time, the Treasury Department does not expect to establish an advisory opinion process to allow parties to request determinations of whether a particular transaction is *covered, notifiable,* or *prohibited.* Such a process does not exist for CFIUS reviews, for example, and, given the complexity and volume of potential transactions, would not be an efficient allocation of resources for the Office of Investment Security. Instead, as noted above, the Treasury Department anticipates making additional information available that can assist *U.S. persons* in understanding and complying with the Final Rule.

Competitiveness Considerations and Other Consequences

A number of commenters suggested that certain requirements in the Proposed Rule would affect the international competitiveness of U.S. investors, asset managers, and businesses in certain industries. Some commenters focused on the additional due diligence obligations with which U.S. investors must comply. Others emphasized the need for a multilateral approach so that foreign competitors are subject to similar requirements. Other commenters suggested that the proposed exception for transactions under § 850.501(f)(1) involving persons of a country or territory outside the United States designated by the Secretary after taking into account whether the country or territory is addressing national security concerns posed by outbound investment, would convey an unfair advantage on a foreign competitor unless the foreign program is equally stringent. Two commenters argued that limitations on U.S. investment in the semiconductor industry in a *country of concern,* to include the notification and prohibition requirements related to *AI systems,* would put U.S. businesses in the semiconductor and automotive industries at a disadvantage when compared to foreign competitors. One commenter suggested that the requirements would disadvantage U.S. LPs who would be required to seek additional information and governance rights compared to non-U.S. LPs investing in non-U.S. funds.

The Treasury Department recognizes that the obligations created by the Final Rule will impose certain costs and

restrictions on *U.S. persons.* To minimize those costs and restrictions, the rule focuses on only those types of U.S. investments that present a likelihood of conveying both capital and intangible benefits that can be exploited to accelerate the development of sensitive technologies or products critical for military, intelligence, surveillance, or cyber-enabled capabilities of such countries in ways that negatively impact the national security of the United States. Additionally, the Treasury Department is committed to working with its allies and partners to stand up their own similar mechanisms to help ensure that foreign capital and intangible benefits do not merely fill investment gaps resulting from the Final Rule.

Regarding the concern over potential designations under § 850.501(g)(1), the Treasury Department notes that any exceptions created under that section would ultimately benefit *U.S. persons.* These exceptions would permit or not require a notification by a *U.S. person* with respect to certain transactions that would otherwise be a *notifiable transaction* or a *prohibited transaction.*

Several commenters shared their views on possible unintended consequences of the Proposed Rule, including general concerns around the breadth of the rule impacting U.S. and other companies' ability to conduct global business, as well as concerns about impacts to U.S. competitiveness, innovation, and national security.

One commenter expressed concern about expansion of the scope of countries listed as ''countries of concern'' given past implementation of certain national security-related laws and regulations, citing the 2018 imposition of tariffs on steel imports under Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862) as an example.

Another commenter suggested that U.S. venture capital firms could become uncompetitive for deals involving a *country of concern* or in which determining the potential involvement of a *country of concern* takes time. The commenter also predicted a chilling effect from the compliance related to distinguishing between transactions that would be notifiable versus those that would be prohibited. A few commenters argued that the Proposed Rule could permit non-U.S. investors to more easily engage in transactions, pushing particular companies in these leading-edge sectors away from the United States and thus harming our national security and competitive edge.

Some commenters suggested that the Proposed Rule could impact investment activities of third-country entities and thereby increase the instability of global supply chains or impact U.S. investors' ability to do business in the broader Asia region. One commenter requested that the Treasury Department ensure the rule does not disrupt the day-to-day management of global diversified portfolios invested in publicly traded securities.

The Treasury Department notes that the Final Rule seeks to address the national security threat described in the Outbound Order while minimizing unintended consequences. Accordingly, the Final Rule includes tailored definitions and descriptions of terms and elements to appropriately scope coverage and facilitate compliance by *U.S persons.* Where appropriate and consistent with the goals of the Outbound Order, the Treasury Department has included exceptions to the coverage of the rule, to seek to minimize unintended consequences for *U.S. persons.*

The Treasury Department notes concerns around the practical effects of due diligence requirements associated with the Final Rule, especially as they relate to the timelines of private investments. As noted above, the Treasury Department intends to publish compliance resources and information on its Outbound Investment Security Program website to assist with implementing the Final Rule. In addition, as required by the Outbound Order, the Secretary of the Treasury, in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies, will assess, within one year of the effective date of the Final Rule and periodically thereafter, whether to amend the rule.

International Engagement

The Treasury Department received several comments related to U.S. Government engagement with foreign countries and territories on the Outbound Order and requirements described in the Proposed Rule. Several commenters expressed support for substantive engagement between the U.S. Government and foreign countries on the Outbound Order and similar programs being considered by foreign jurisdictions. One commenter recommended that the U.S. Government work with foreign partners to identify regulatory options for outbound investment screening reviews that are easier to implement and administer and are tailored to the particular investment relationship that these countries have with a *country of concern* and the national security risks arising therefrom.

Some commenters called out specific foreign jurisdictions with whom to prioritize coordination, including the European Union and South Korea. One commenter recommended that the Treasury Department engage with PRC commercial regulators to increase awareness of the Proposed Rule's objectives and compliance requirements for PRC businesses, in order to assist U.S. firms that are conducting due diligence and facilitate implementation of the Proposed Rule.

Other commenters noted potential outcomes they believe could arise if the U.S. Government does not engage substantively with foreign partners and align the approach in the Final Rule with those taken by foreign partners. These include the risk of backfilling capital and associated benefits from other economies, as well as disadvantaging U.S. firms and harming U.S. competitiveness.

As noted in the Proposed Rule, the Treasury Department recognizes the importance of working with our partners and allies as they explore options to address national security concerns related to outbound investment. The Treasury Department concurs with commenters that the goals of the Outbound Order and Final Rule will be enhanced if foreign allies and partners develop similar mechanisms. The Treasury Department, along with other relevant U.S. Government departments and agencies, such as the Departments of Commerce and State, will continue to collaborate with foreign partners to advance coordination on risks and policy responses related to outbound investment. In addition, to further U.S. Government efforts to encourage partners and allies to address risks related to outbound investment, the Final Rule includes as an *excepted transaction* certain transactions with or involving a person of a country or territory outside of the United States designated by the Secretary in accordance with certain criteria that relate to that country or territory's own measures to address the national security risk related to outbound investment.

Implementation Delay

A few commenters requested delaying the effective date of the rule to ensure *U.S. persons* and non-*U.S. persons* have enough time to analyze and comply with its requirements. One commenter suggested the implementation of the rule be delayed at least 120 days. Another commenter requested the Treasury Department not set an effective date for the rule until after a decision has been made by the 118th Congress on

a package of PRC-focused legislation given that the pending legislation could supersede portions of the rule.

The Treasury Department has determined to make the effective date of the Final Rule January 2, 2025. This provides time for *U.S. persons* to analyze and respond to the changes made between the Proposed Rule and the Final Rule, while still allowing the Treasury Department to expeditiously address the national security concerns identified in the Outbound Order. The Treasury Department notes that the issuing of the Outbound Order and ANPRM in August 2023 and the Proposed Rule in June 2024 provided notice about the creation and scope of the Final Rule. Moreover, much of the due diligence the Final Rule expects of firms overlaps with existing diligence provisions in other laws and regulations, as well as the routine due diligence performed in these types of transactions. While the Treasury Department welcomes continued engagement with Congress on addressing the national security concerns identified in the Outbound Order, given the lack of certainty surrounding the status of proposed legislation or its likelihood of passage over alternative proposals, the Treasury Department elects not to postpone the effective date of the Final Rule in response to a legislative proposal.

Alignment With Other Authorities

Some commenters discussed how the rule should interact with existing regulatory regimes. One commenter suggested that the rule should anticipate transactions that are subject to both the Outbound Order and CFIUS jurisdiction. They requested the Treasury Department exclude transactions that have been or will be notified to CFIUS from the jurisdiction of the Final Rule.

This commenter misinterprets the role of CFIUS in the context of overlapping authorities. CFIUS was designed to be a tool of last resort, only to be used when other authorities do not apply to a particular transaction. Applying CFIUS jurisdiction to a transaction prior to determining whether a separate authority may cover the transaction would reverse this process. The Treasury Department makes no change to the Final Rule in response to this comment.

A few commenters suggested areas where provisions of the Final Rule could be tied more closely to existing authorities. One commenter suggested tying *covered activities* and similar terms to export classifications or other methods already in use by the U.S. Government. Another commenter requested the rule be more consistent with existing national security regimes described in the EAR and ITAR, particularly the definitions and compliance standards.

While many of the due diligence expectations set forth in the Final Rule were designed to overlap with existing diligence provisions in other laws and regulations, the Treasury Department recognizes that areas of differentiation may impose some additional burden on market participants. The Treasury Department intends the Final Rule to increase the U.S. Government's visibility into *U.S. person* transactions involving sensitive technologies and products, which necessitates some deviation from existing national security regimes. The proposed provisions are tailored to specific, identified areas to prevent *U.S. persons* from investing in the development of technologies and products that pose a particularly acute national security threat. The Treasury Department makes no change to the Final Rule in response to these comments.

IV. Rulemaking Requirements

This rulemaking pertains to a foreign affairs function of the United States and therefore is not subject to the rulemaking requirements of the Administrative Procedure Act (APA) (5 U.S.C. 553), which exempts a rulemaking from notice and comment requirements ''to the extent there is involved . . . a military or foreign affairs function of the United States'' (5 U.S.C. 553(a)(1)). As required by the Outbound Order, the Final Rule is being issued to assist in addressing the national emergency declared by the President with respect to the threat posed to U.S. national security by *countries of concern* developing technologies that are critical to the next generation of military, intelligence, surveillance, or cyber-enabled capabilities. As described in the Outbound Order, this threat to the national security and foreign policy of the United States has its source in whole or substantial part outside the United States. The Final Rule will have a direct impact on a foreign affairs function of the United States, which includes the protection of national security against external threats (for example, limiting investment in specific sectors in designated countries of concern).

Although the Final Rule is not subject to the notice and comment requirements of the APA, the Treasury Department is engaged in notice and comment rulemaking for the Final Rule, consistent with section 1(a) of the Outbound Order. In addition, the Final Rule was designated as significant under Executive Order 12866, as amended, and was reviewed by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). The Treasury Department has undertaken an analysis of the anticipated costs and benefits of the Final Rule. Several commenters to the Proposed Rule discussed the potential burden associated with the Proposed Rule. The Treasury Department, after taking into account these comments, conducted an analysis of the relative costs and benefits of the Final Rule. For purposes of this analysis, the Treasury Department assessed the costs and benefits of the Final Rule relative to a no-action baseline reflecting *U.S. person* investment behavior in the absence of regulations.

In addition, this section includes the required assessments of the reporting and recordkeeping burdens under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), and the potential impact on small entities pursuant to the Regulatory Flexibility Act (RFA), (5 U.S.C. 601 *et seq.*), Unfunded Mandates Reform Act of 1995 (UMRA), and Executive Order 13102, in each case as discussed below.

A. Executive Orders 12866, 13563, and 14094

Executive Orders 12866, 13563, and 14094 direct agencies to assess the costs and benefits of available regulatory alternatives for certain types of rulemaking in certain circumstances and, if regulation is necessary, to select regulatory approaches that maximize net benefits. The Treasury Department has conducted an assessment of the costs and benefits of the Final Rule, as well as the costs and benefits of available regulatory alternatives. That cost-benefit analysis, along with a summary of comments to the cost-benefit analysis included in the Proposed Rule, is below.

As noted above in section I, the Outbound Order directs the Secretary to establish a program to prohibit *U.S. persons* from engaging in certain transactions and require *U.S. persons* to submit notifications of certain other transactions. These two primary components of the program established by the Outbound Order will serve distinct but interrelated objectives with respect to the relevant technologies and products. The first component requires the Secretary to prohibit certain types of investment by a *U.S. person* in a *covered foreign person* engaged in

certain categories of activities related to technologies and products that pose a particularly acute national security threat. The second component requires notification to the Secretary regarding certain types of investments by a *U.S. person* in a *covered foreign person* engaged in other categories of activities related to technologies and products that may contribute to the threat to national security. The focus of both components is on investments that can enhance a *country of concern's* military, intelligence, surveillance, or cyber-enabled capabilities through the advancement of technologies and products in particularly sensitive areas. In an Annex to the Outbound Order, the President identified the PRC, including Hong Kong and Macau, as a *country of concern.*

As described above in section II, this Final Rule is consistent with the President's mandate in the Outbound Order and prescribes procedures and obligations governing the (1) prohibition of certain types of investment by *U.S. persons* into certain entities located in or organized under the laws of a *country of concern,* certain other entities owned or controlled by *persons of a country of concern* or acting for or on behalf of the government of a *country of concern,* and certain entities with an interest in and significant financial connection to a *person of a country of concern* with capabilities or activities related to defined technologies and products; and (2) mandatory notification to the Secretary by *U.S. persons* for certain types of investment into certain entities located in or organized under the laws of a *country of concern,* certain other entities owned or controlled by *persons of a country of concern* or acting for or on behalf of the government of a *country of concern,* and certain entities with an interest in and significant financial connection to a *person of a country of concern* with capabilities or activities related to defined technologies and products. The implementation of the Outbound Order through this Final Rule will advance the President's objective of regulating certain investments from the United States into a *country of concern.*

The Final Rule will cover a defined set of transactions such as certain acquisitions of equity interests (*e.g.,* mergers and acquisitions, private equity, and venture capital) and *contingent equity interests,* certain debt financing transactions, greenfield and brownfield investments, joint ventures, and certain LP investments by *U.S. persons.* Given the focus on transactions that could aid in the development of technological advances that pose a risk to U.S. national security, the Treasury Department will except from the Final Rule certain transactions with a lower likelihood of having that effect. The exceptions extend to certain investments into publicly traded securities or into securities issued by an investment company, such as an index fund, mutual fund, or exchange traded fund.

1. Comments on Initial Executive Order 12866, 13563, and 14094 Analysis

Several commenters provided comments on the initial cost analysis, while another commenter provided additional data related to outbound and inbound investments involving the PRC.

Multiple commenters argued that the initial cost analysis underestimated the costs associated with the rule. In making this argument, a few commenters noted that the initial cost analysis underestimated the scope of affected transactions. One commenter noted that the Treasury Department's cost estimate relied on analysis of equity investments made by U.S.-based investors in the semiconductor, AI, and quantum science sectors of the PRC, but that the rule could apply to a range of investment and corporate activities beyond equity investments. It also noted that the rule could affect investment in countries other than the PRC because of the scope of the definition of *covered foreign person* and could affect non-U.S. based investors because of the scope of the definition of *controlled foreign entity.* Another commenter noted that the Treasury Department's estimate of direct costs for the rule is too low, and that the potential impact would be at least 10 times greater than the Treasury Department's estimate.

Regarding the number of transactions used for the initial cost analysis, as the Treasury Department noted in the Proposed Rule, precise data that matches the scope of potential *covered transactions* is not available. However, the Treasury Department disagrees that the scope of potential *covered transactions* is as broad as suggested by the commenters. The terms *covered transaction* and *covered foreign person,* along with other defined terms they incorporate, are scoped to apply to a relatively narrow subset of firms and activities involving either *U.S. persons* or *persons in a country of concern.* In the initial cost analysis, the Treasury Department doubled the average number of transactions derived from the existing data, in recognition of the lack of precision in the data used to estimate the number of potential *covered transactions,* and to account for the likely underrepresentation of potentially relevant transactions. While the Treasury Department declines to adopt an estimate 10 times greater than that set out in the Proposed Rule, as was suggested by one commenter, the Treasury Department has increased the estimated number of annual transactions for the cost analysis in the Final Rule from 120 entities and 212 transactions to 180 entities and 318 transactions. While commenters did not provide any more specific alternative data, the Treasury Department is making this adjustment in response to comments about underrepresentation and uncertainty for the number of potential *covered transactions.* The Treasury Department notes that this increase in the number of transactions increases estimated costs for the private sector but does not increase estimated costs for the U.S. Government. The U.S. Government costs associated with the Final Rule are not calculated on a per transaction basis.

One commenter argued that the estimated costs were too low because they did not take into account the costs of due diligence in the business sector more broadly. The commenter stated that in each case the party undertaking the transaction will be required to determine whether a *U.S. person* is involved, whether the transaction is a *covered transaction,* and whether the transaction counterparty is a *covered foreign person.* The commenter also noted that even for transactions that are not covered, parties will feel compelled to maintain records of the diligence they perform on such transactions, so they can demonstrate that they did not have *knowledge*—including ''reason to know''—that the transaction was a *covered transaction* in the event the Treasury Department decides to investigate the transaction after the fact. The commenter suggested that Treasury Department account for these costs as well.

With regard to the need to engage in due diligence and maintain records for transactions that are not covered to demonstrate the lack of *knowledge* about a potentially *covered transaction,* the Treasury Department declines to add additional costs. As noted in the Proposed Rule, most investment transactions, regardless of whether the investment would be potentially subject to the Final Rule, involve some level of review, diligence, assessment, and recordkeeping by the investor. For some transactions and investors, the level of information collection, retention, and diligence necessary to comply with the Final Rule may not give rise to any costs beyond what would be incurred in the absence of the Final Rule. The Treasury Department has added additional

discussion to the final cost analysis to note this. With regards to significantly higher costs noted by one commenter, the Treasury Department notes that the total annual direct costs associated with complying with the Proposed Rule were expected to have a range of between $2,811,120 and $6,148,000, and the total annual time burden was estimated at approximately 21,200 person hours. The commenter did not provide further evidence or data supporting its alternative estimate. As noted above, the Final Rule cost analysis increases the number of estimated transactions, but without more specific alternative data provided, it does not adjust the time or labor costs identified in the Proposed Rule cost.

Another commenter argued that the initial analysis understated the relevant costs because it omitted certain indirect costs. In particular, the commenter stated that while the initial analysis examined indirect costs such as foregone returns on investment incurred for *prohibited transactions,* it should also consider two other indirect costs related to *covered transactions.* The first indirect cost is for both ''uncovered'' and *notifiable transactions* that the commenter alleges some firms will abandon due to the ''actual or perceived costs'' associated with the rule. The second indirect cost is the loss associated with forgone returns of all investments that did not occur—*prohibited transactions* and transactions that were abandoned because of the perceived or actual cost of the rule, including forgone revenues, market access, market participation, and research and development expenditures. The commenter also noted that as the actual or perceived costs of compliance increase, it is more likely that the costs of the rule would exceed its benefits.

In response to this comment, the Treasury Department declines to add additional indirect costs associated with other *covered transactions* as well as transactions that are not covered. As noted in the Proposed Rule, other indirect costs are particularly difficult to assess due to individual decision-making, opportunities available, and market conditions, making any estimate highly speculative. The Treasury Department has updated the cost analysis to note that in a very small number of cases, companies might decide to forego a non-*prohibited transaction* in favor of a different investment that would be further away from the parameters of the Final Rule. The Treasury Department assesses that the impact of these costs is nominal, because if the difference in investment return between the forgone investment and alternate investment the company chose was more significant, then the company would have determined the diligence cost was acceptable, given the higher economic return. In addition, the Treasury Department notes it is very challenging to determine the particular sector, country, or investment structure that the U.S. investor would choose as the alternate and then quantify the impact of that determination.

Finally, a commenter noted that the Treasury Department should review how the rule will affect U.S. investments in sectors implicated by the definitions of *notifiable transaction* and *prohibited transaction* and whether they will be supplanted by investments from other countries. As noted above and discussed in the rule, several impacts of the Final Rule are particularly difficult to quantify, including the extent to which the Treasury Department can determine the percentage of investors from specific countries that will replace U.S. investors for *prohibited transactions.* The Treasury Department has added a brief discussion of this issue to the final cost analysis.

2. Final Executive Order 12866, 13563, and 14094 Analysis

(a) Costs

The primary direct costs to the public associated with the Final Rule relate to (1) understanding the Final Rule; (2) conducting the transaction-specific diligence that would be needed for a *U.S. person* to determine whether a particular transaction would be either a *notifiable transaction* or a *prohibited transaction* under the Final Rule; and (3) if applicable, preparing and submitting a mandatory notification of certain transactions or other information to the Treasury Department pursuant to the Final Rule. The Final Rule may also involve certain additional indirect costs associated with *prohibited transactions.* Investors who would have otherwise engaged in a *prohibited transaction* absent the Final Rule may pursue alternative investment opportunities since they are precluded from undertaking a *prohibited transaction.*

The Final Rule will apply to all *U.S. persons* who undertake, directly or indirectly, a *covered transaction.* Because of the tailored scoping of the Final Rule, the Treasury Department estimates that it will apply to a relatively modest volume of potential *covered transactions.* While precise data that matches the scope of *covered transactions* including the relevant technology and products in the Final Rule is not available—and is one of the reasons for the notification requirement, which will increase the U.S. Government's visibility into the relevant transactions—available data appears to support this estimate of a modest volume. For example, to estimate the number of entities that will be potentially affected by the Final Rule and would incur associated direct compliance costs, the Treasury Department considered data available through PitchBook from approximately 2021 to 2023.[1] This data indicates that over this three-year period, 180 unique U.S.-based investors made around 318 equity and add-on investment transactions in the semiconductor, AI, and quantum science sectors of the PRC (as defined by PitchBook). This data suggests an annual average of 60 different investors engaging in an annual average of 106 potentially *covered transactions.* Since details of U.S. private investment overseas cannot be determined with precision through the available data, and there are limitations in any dataset based on the parameters set by the provider, the Treasury Department has determined this figure to be a lower bound.

The Treasury Department also acknowledges that some *U.S. person* investors may incur costs even where the Final Rule does not appear to apply directly to their transaction. To clarify, the figure used to estimate the volume of potentially *covered transactions* may not capture all instances of parties who may incur costs as a result of the Final Rule. For example, a *U.S. person* may not always know in advance of the due diligence process whether the *U.S. person* will want or need to collect information related to the Final Rule and then proceed to spend resources on diligence, only to confirm that the relevant transaction is not a *covered transaction.* However, as noted in the Proposed Rule, most investment transactions, regardless of whether the investment would be potentially subject to the Final Rule, involve some level of review, diligence, assessment, and recordkeeping by the investor. For some transactions and investors, the level of information collection, retention, and diligence necessary to comply with the Final Rule may not give rise to any costs beyond what would be incurred in the absence of the Final Rule.

For purposes of the Final Rule cost analysis, the Treasury Department tripled the averages from the available data to account for the likely underrepresentation of potentially relevant transactions. Thus, the Treasury Department's analysis is based

[1] PitchBook, *https://pitchbook.com* (last visited May 24, 2024).

on the estimate of approximately 180 entities and 318 transactions annually (based on an assumption of an annual average of 1.77 transactions per entity) that may be affected by the Final Rule. For the remainder of this analysis, however, the Treasury Department relied on the estimates as described above.

To derive an estimate for the costs related to the Final Rule, the Treasury Department first estimated the associated labor costs related to interpreting and applying the Final Rule. The Treasury Department expects that individuals and entities reviewing the Final Rule and engaging in potentially relevant transactions will engage on their own and through their own employees as well as hire lawyers or advisors from outside firms.

For a low-end estimate, the Treasury Department relied on a figure from the Bureau of Labor Statistics (BLS), which reports the mean hourly wage for Standard Occupational Classification System Code (SOC Code) 231011—Lawyers to be $84.84 per hour and SOC Code 111021—General and Operations Managers to be $62.18 per hour.[2] In each instance the Treasury Department tripled the BLS mean hourly wage figure. This adjustment is intended to not only account for employee benefits and overhead, but also to reflect the presumption that hourly labor costs of the investors and their advisors likely to be affected by the Final Rule will often be higher than the hourly mean wage in these occupation categories across the United States. Accordingly, the Treasury Department estimates that the impacted entities will each incur costs of $187 per hour for managers and $255 for lawyers. As the Treasury Department is unable to determine which particular tasks will be performed by managers or lawyers, the Final Rule cost analysis uses the average wage of the two positions for both the low-end and high-end estimate, which the Treasury Department assesses is a reasonable method for estimating the hourly cost. The average of these figures is $221 per hour and, again, this is a low-end estimate.

For a high-end estimate, the Treasury Department acknowledges that the hourly rate billed for a lawyer performing the relevant type of work at a private firm may be significantly higher than the average hourly wage of a lawyer from the BLS figure. The global data and business intelligence platform Statista reports that the average hourly attorney billing rate in Washington, DC in 2023 was $392.[3] The average of the hourly cost of a manager at $187 per hour and the Statista figure of the hourly rate of a lawyer at $392 per hour is $290.

Costs Associated With Understanding the Proposed Rule

Based on the above assumptions and estimates of affected entities, number of transactions, and labor costs, the Treasury Department has estimated the annual time and cost that would be spent by affected entities in understanding the Final Rule. While recognizing that the extent of this diligence will necessarily vary from transaction to transaction, the Treasury Department arrived at the below estimates for purposes of this regulatory analysis.

The range of estimated aggregate annual costs for understanding the Final Rule begins at $702,780 on the low end and goes up to $922,200 on the high end. This is based on the estimate of an average time burden to be 10 total person hours per transaction for understanding the Final Rule. As such, 10 total person hours per transaction multiplied by 318 annual transactions and the low-end hourly labor cost range and high-end hourly labor cost range described above, respectively, result in the total cost range for understanding the Final Rule.

Costs Associated With Diligence and Maintaining Records

Based on the above assumptions and estimates of affected entities, number of transactions and labor costs, the Treasury Department has estimated the annual time and cost that would be spent by affected entities on conducting additional transactional diligence with respect to this Final Rule. These economic estimates should in no way be construed as relevant to the reasonableness of the inquiry a party would pursue in light of the particular facts and circumstances of a transaction and the requirements of the Proposed Rule. While recognizing that the extent of this diligence will necessarily vary from transaction to transaction, the Treasury Department arrived at the below estimates for purposes of this regulatory analysis.

The Treasury Department recognizes that most investment transactions, regardless of whether the investment is potentially subject to this Final Rule, involve some level of review, diligence, assessment, and recordkeeping by the investor. And, for some transactions and investors, the level of information collection, retention, and diligence necessary to comply with the Final Rule may not give rise to any costs beyond what would be incurred in the absence of the Final Rule. This conclusion is reached by focusing on the nature of the information required for a notification, which consists of data typically gathered or available in the process of making an investment. This includes, for example, the proposed information requirements regarding transaction party identifying information as well as the commercial rationale, transaction structure, financial details, and *completion date* of the transaction itself.

The Treasury Department assesses that it is reasonable in some cases to assume that customary transactional due diligence would involve the collection and review of this required information, meaning that only incremental costs would be incurred for the review of the information from the perspective of ensuring compliance with the Final Rule. While the notification requirement also includes (1) information regarding *covered activities* undertaken by the *covered foreign person* that make the transaction a *notifiable transaction,* as well as a brief description of the known end uses and end users of the *covered foreign person's* technology, products, or services; (2) a statement of the attributes that cause the entity to be a *covered foreign person;* and (3) in certain cases, the identification of the technology nodes at which any applicable product is produced, the due diligence underlying many *covered transactions* will include gathering and reviewing this information even if not specifically to comply with the Final Rule. The Final Rule further states that a *U.S. person* that has failed to conduct a ''reasonable and diligent inquiry'' as of the time of a given transaction may be assessed to have had awareness or ''reason to know'' of a given fact or circumstance, including facts or circumstances that would cause the transaction to be a *covered transaction.* Compliance with this provision and the requirements of the Final Rule may in some cases require enhanced diligence. Recognizing that in some instances, compliance with the Final Rule may not require the collection and retention of additional transaction-related information, this analysis considers reasonable estimates of the additional due diligence and recordkeeping costs that could be associated with the Final Rule as described below.

The range of estimated annual incremental cost for conducting due

[2] Figures based on May 2023 data.

[3] Statista (Feb. 26, 2024), *https://www.statista.com/statistics/941146/legal-services-hourly-rates-metropolitan-region-united-states/.*

diligence and recordkeeping associated with the Final Rule runs from $0 on the low end to $3,688,800 on the high end. These are two ends of the range, and it is anticipated that the costs for most transactions will fall between these figures. The Treasury Department estimates that the average time burden will likely not exceed 40 total person hours per transaction for conducting additional due diligence and recordkeeping with respect to the Final Rule.

For the low end of this range, it is reasonable to anticipate that some investors, having spent resources learning about the Final Rule, as discussed above, will be able to quickly collect and assess the information needed to determine whether a potential transaction would be a *prohibited transaction.* As such, the low-end estimate is a zero-dollar incremental cost for additional due diligence and recordkeeping. Not all transactions will be this simple, and it is reasonable to anticipate more costs at the higher end of the range. As such, 40 total person hours per transaction multiplied by 318 annual transactions and the high-end hourly labor cost estimate described above results in the high-end estimate for additional due diligence and recordkeeping related to the Final Rule. The Treasury Department estimates 40 person hours per transaction, based on approximately a total of eight person hours across all involved general and operations managers and lawyers per business day for one week. However, the cost of a *U.S. person* conducting diligence and the difficulty of that exercise will vary depending on a transaction's complexity, the availability of relevant information, and the incremental person hours may be higher for certain transactions, for example those that involve indirect transactions.

Costs Associated With Providing Information

The Final Rule requires the submission of information to the Treasury Department for *notifiable transactions* and provides for certain other circumstances that require information submission. The Treasury Department requires *U.S. persons* to provide notification of certain transactions under the Final Rule. The Final Rule requires that a *person* seeking a national interest exemption from the Final Rule's notification requirement or prohibition must submit certain information to the Treasury Department. The Final Rule also requires a *U.S. person* to make a post-closing submission regarding a transaction that it believed at closing was not a *covered transaction* when the *U.S. person* later discovers information which, had it been known at closing, would have caused the transaction to be a *covered transaction.* Also, the Final Rule requires a *U.S. person* to inform the Treasury Department of any material omission or inaccuracy in any previous representation, statement, or certification. Lastly, the Treasury Department anticipates time and cost associated with responding to inquiries by the Treasury Department.

The Treasury Department expects that of the universe of potentially *covered transactions* for which *U.S. persons* perform due diligence each year, certain transactions will turn out not to be covered, others will turn out to be *notifiable,* and still others will turn out to be *prohibited.* For purposes of this analysis, however, the Treasury Department has assumed that *U.S. persons* will perform due diligence with respect to the estimated 318 potentially *covered transactions* each year, and that all 318 will turn out to be *notifiable transactions.* The Treasury Department took this approach in the interest of estimating a theoretical maximum upper bound, recognizing that the number of actual *notifiable transactions* is likely to be less than 100 percent of potentially *covered transactions.* A *notifiable transaction* would likely cost more in terms of time and resources than a *prohibited transaction,* because, in addition to the due diligence cost, a *notifiable transaction* would entail resources to prepare and submit a notification.

The estimated annual cost range for time spent submitting information would be $3,513,900 to $4,611,000. This estimate assumes 50 person hours per transaction for preparing and submitting a notification through an online portal, combined with the number of transactions per year (318) and the hourly labor cost range described above—$221 to $290. As discussed above, this number reflects the high-end estimate, since this analysis assumes that every potentially relevant transaction would result in a notification.

For purposes of this analysis, the Treasury Department estimated only the total annual costs of preparing and submitting a notification under § 850.404 of the Final Rule. The Treasury Department anticipates that the time and cost behind preparing and submitting a post-transaction notice, notice of any material omission or inaccuracy in any previous representation, statement, or certification, or responding to agency inquiries may be comparable to the costs of preparing and submitting a notification. Likewise, where a *U.S. person* elects to provide information in seeking a national interest exemption, the Treasury Department anticipates that the associated costs will be comparable to or will slightly exceed the costs of preparing and submitting a notification.

Estimated Total Direct Costs

Based on the direct cost estimates above, the total annual direct costs associated with complying with the Final Rule can be expected to have a range of between $4,216,680 and $9,222,000 and the total annual time burden will be approximately 31,800 person hours.

Additional Indirect Costs Associated With Prohibited Transactions and Non-Covered Transactions

With respect to *prohibited transactions,* the Treasury Department has no basis to conclude that the Final Rule will have additional direct economic costs to U.S. investors beyond those described above. There may, however, be additional indirect costs associated with *prohibited transactions.* Investors who would have otherwise engaged in a *prohibited transaction* absent the Final Rule may pursue alternative investment opportunities since they will be precluded from undertaking a *prohibited transaction.* These indirect costs amount to the difference, if any, between the return on investment that would have been generated by a *prohibited transaction* and the return on investment that will result from an alternative transaction. The Treasury Department notes that in a very small number of cases, companies might decide to forego a non-prohibited transaction in favor of a different investment that is not subject to the Final Rule or a similar regulatory regime. The Treasury Department assesses that the impact of these costs are nominal, because if the difference in investment return between the forgone investment and alternate investment the company chose was more significant, then the company would have determined the diligence cost was acceptable given the higher economic return. In addition, Treasury notes it is very challenging to determine the particular sector, country, or investment structure that the U.S. investor will choose as the alternate and then quantify the impact of that determination. The Treasury Department also notes that investors from specific countries, including those that are not U.S. allies, may replace U.S.

investors for *prohibited transactions.* Similarly, Treasury notes that it is particularly difficult to quantify these and other impacts of the Final Rule.

Any attempt to quantify this cost would be speculative and difficult to assess in any specificity due to individual decision-making, opportunities available, and market conditions. In addition, while the Final Rule may have an economic impact on investment targets that are *covered foreign persons* because certain transactions will be prohibited, the Final Rule is not designed to nor does it prohibit all *U.S. person* investments into such persons, due to the scope of transactions covered as well as the exceptions provided for in the Final Rule.

Costs to the U.S. Government

Administering the Final Rule will also entail costs to the U.S. Government. Such costs will include information technology (IT) development and ongoing annual maintenance, as well as processing electronic notifications. The Treasury Department estimates that initial IT development costs will be between $4 million and $8 million with an additional $2 million to $3 million required to maintain the systems and the underlying technology being leveraged to support the capabilities. The Treasury Department and other relevant agencies, including the Department of Commerce, may incur additional costs besides those estimated above. These include other responsibilities related to the implementation of the Final Rule such as analyzing notifications submitted as well as complying with the reporting requirements under the Outbound Order. Furthermore, costs may be associated with efforts to promote compliance with the notification requirement and prohibition, potentially including education on the requirements, provision of information and FAQs, and conducting stakeholder outreach. The Treasury Department does not currently have specific estimates for these costs but estimates that there will be personnel costs of less than $2 million associated with the Final Rule in Fiscal Year 2024 with additional costs for ongoing outreach and enforcement thereafter.

The Treasury Department and other U.S. Government agencies may also incur costs in enforcing compliance with the Final Rule. The Treasury Department does not currently have estimates for these costs, and they are not included in the estimates above.

The Treasury Department plans to monitor compliance with the Final Rule by leveraging a variety of data sources, both internal and external. If the external data sources include third-party commercial data, the Treasury Department assesses that the cost associated with accessing these databases will be modest and incremental, given that the Treasury Department regularly maintains access to such databases in the course of other work but may need to request additional licenses for employees. After identifying an instance of apparent non-compliance, the Treasury Department may initiate outreach to the involved entity, work with law enforcement to investigate the apparent non-compliance, or initiate an enforcement action. The Treasury Department's enforcement of the Final Rule will also involve coordination with law enforcement agencies. These law enforcement agencies may also incur costs (time and resources) while conducting investigations into potential non-compliance.

(b) Benefits

The President found in the Outbound Order that the advancement by *countries of concern* in sensitive technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities of such countries constitutes an unusual and extraordinary threat to the national security of the United States, which has its source in whole or substantial part outside the United States, and that certain U.S. investments risk exacerbating this threat. The potential military, intelligence, surveillance, or cyber-enabled applications of these technologies and products pose risks to U.S. national security particularly when developed by a *country of concern* in which the government seeks to (1) direct entities to obtain technologies to achieve national security objectives; and (2) compel entities to share with or transfer these technologies to the government's military, intelligence, surveillance, or security apparatuses. As part of their strategy of advancing the development of these sensitive technologies and products, *countries of concern* are exploiting or could exploit certain U.S. outbound investments, including certain intangible benefits that often accompany U.S. investments and that help companies succeed, such as enhanced standing and prominence, managerial assistance, investment and talent networks, market access, and enhanced access to additional financing. Such investments, therefore, risk exacerbating this threat to U.S. national security. Although the United States has undertaken efforts to enhance existing policy tools and develop new policy initiatives aimed at maintaining U.S. leadership in technologies critical to national security, there remain instances where the risks presented by U.S. investments enabling *countries of concern* to develop critical military, intelligence, surveillance, or cyber-enabled capabilities are not sufficiently addressed by existing tools.

The Final Rule is designed to complement existing tools and effectively address the threat to the national security of the United States described in the Outbound Order. The benefit of protecting national security is difficult to quantify. Furthermore, the notification component of the Final Rule is intended to provide key information that the Treasury Department can use to better inform the development and implementation of the Final Rule. These notifications will increase the U.S. Government's visibility into transactions by *U.S. persons* or their *controlled foreign entities* and involving technologies and products relevant to the threat to the national security of the United States due to the policies and actions of *countries of concern.* These notifications will be helpful in highlighting trends with respect to related capital flows and will inform future policy development. The Treasury Department expects that the national security benefits, while qualitative, will outweigh the compliance costs of the Final Rule.

(c) Alternatives

The Outbound Order requires the Secretary to issue implementing regulations subject to public notice and comment. As a result, the Treasury Department did not have the discretion to refrain from promulgating the Final Rule or to promulgate it without notice and comment. However, the Treasury Department considered different approaches to the Final Rule that would be available under the Outbound Order. Specifically, the Treasury Department considered the following potential alternatives to the Final Rule:

- *Scope of covered transaction and excepted transaction.* The Treasury Department could have proposed a broader definition of *covered transaction* or fewer exceptions, and the Treasury Department considered certain alternatives to the scope of *covered transaction* and *excepted transaction* in developing the Final Rule. This discussion does not cover each alternative considered for the scope of *covered transaction* but provides a summary of a few alternatives the Treasury Department considered. The

Treasury Department considered and selected regulatory approaches that maximize net benefits (including effectively addressing the national security threat identified in the Outbound Order) while balancing potential compliance and implementation costs. For example, an alternative that the Treasury Department considered in relation to *contingent equity interests* in particular was to limit the scope of *covered transaction* to just the acquisition of a *contingent equity interest* and not separately cover the conversion of the *contingent equity interest.* This would have reduced some of the compliance and resource burden on a *U.S. person,* who would have, in the context of a *notifiable transaction,* been required to submit a notification only at the time of acquisition rather than a notification at the time of acquisition and another notification at the time of conversion of contingent equity. However, this alternative would have reduced the ability of the U.S. Government to observe the frequency and instances in which the relevant contingent interests convert. Another example is with respect to the exception for LP investments. As discussed above, in the Proposed Rule the Treasury Department offered and sought comment on two alternatives for this exception. Under proposed Alternate 1, a *U.S. person's* investment made as an LP in a pooled investment fund would have constituted an *excepted transaction* if (1) the LP's rights were consistent with a passive investment and (2) the LP's committed capital was not more than 50 percent of the total AUM of the pooled investment fund. If the *U.S. person* LP's committed capital were to constitute more than 50 percent of the total AUM of the pooled investment fund, its investment would have qualified as an *excepted transaction* only if the *U.S. person* secured a binding agreement that the pooled investment fund would not use its capital for a *prohibited transaction.* This approach would have addressed situations where the *U.S. person's* LP investment falls below the threshold but contains one of several indicia of control or influence over the pooled investment fund or the ultimate *covered foreign person* investment target. Compared to Alternate 2, Alternate 1 would have scoped in fewer LP investments as *covered transactions* but could potentially have been more challenging for a *U.S. person* to comply with, as it required a multi-factor analysis for assessing whether a *U.S. person's* LP investment is an *excepted transaction.* Under Alternate 2, a *U.S. person* LP's committed capital in a pooled investment fund that then invests in a *covered foreign person* would have been an *excepted transaction* only if the committed capital was not more than $1,000,000. Although this alternative would have likely scoped in a greater number of LP investments as *covered transactions* compared to Alternate 1 (and potentially increase the compliance costs of this program), the bright-line approach may have been easier for *U.S. persons* to comply with than Alternate 1. As discussed above at the preamble to Subpart E, the Treasury Department has adopted a hybrid approach in the Final Rule—defining *excepted transaction* as any LP investment of $2,000,000 or less, or any LP investment accompanied by a binding contractual assurance that the LP's capital invested in the pooled investment fund would not be made to effect an indirect *prohibited transaction* or *notifiable transaction,* as applicable.

- *Covered national security technologies using broad definition of sectors rather than specific activities and technologies.* In the Proposed Rule, the Treasury Department proposed to define *notifiable transaction* and *prohibited transaction* in §§ 850.217 and 850.224, respectively, by reference to certain technologies and activities, and in some instances, end uses. Alternatively, the Treasury Department could have opted for a broad sectoral categorization, such as, for example, all technologies and products in the artificial intelligence sector, regardless of the end use of such artificial intelligence related technologies or products. If the Treasury Department had proposed that approach, the Treasury Department estimates that the economic impact for *U.S. persons* subject to the rule, and for the overall U.S. economy, would be significantly greater than under the Final Rule. Instead, the Treasury Department, along with other relevant agencies, carefully tailored the *covered activities* and technical descriptions under the definitions of *notifiable transaction* and *prohibited transaction.* In the case *of AI systems,* the Final Rule addresses *covered activities* related to certain *AI systems* that would have applications that pose or have the potential to pose national security risks without broadly capturing *AI systems* intended only for commercial applications or other civilian end uses that do not have potential national security consequences, thereby limiting the additional compliance and implementation burden on *U.S. persons.*

The Treasury Department intends the Final Rule to provide a *U.S. person* with clarity and information regarding its obligations with respect to a *covered transaction,* while effectively addressing the national emergency identified in the Outbound Order in a targeted manner. The Treasury Department expects that the national security benefits, while qualitative, will outweigh the compliance costs of the Final Rule.

B. Paperwork Reduction Act

The collections of information contained in this Final Rule have been submitted to OMB for review in accordance with the PRA under control number 1505–0282.

The Final Rule will require a *U.S. person* to submit a notification with respect to (1) any *notifiable transaction;* (2) any transaction by a *controlled foreign entity* that would be a *notifiable transaction* if engaged in by a *U.S. person;* and (3) any transaction for which a *U.S. person* acquires actual *knowledge* after the *completion date* of the transaction that the transaction would have been a *prohibited transaction* or a *notifiable transaction* if *knowledge* had been possessed by the relevant *U.S. person* at the time of the transaction. Such notification must include relevant details on the *U.S. person* involved in the transaction as well as information on the transaction and the *covered foreign person* involved. The Final Rule will require any *U.S. person* that has filed a notification to respond to any questions or document requests from the Treasury Department related to the transaction or compliance with the Final Rule; any information or documents provided to the Treasury Department in response to such request will be deemed part of the notification under the Final Rule.

The Final Rule will also require any *U.S. person* that files a notification to maintain a copy of the notification filed and supporting documentation for a period of 10 years from the date of the filing. Further, the Final Rule will require any person who has made any representation, statement, or certification subject to the Final Rule to notify the Treasury Department in writing of any material omission or inaccuracy in such representation, statement, or certification. Finally, the Final Rule will also require any *U.S. person* seeking a national interest exemption to submit information to the Treasury Department regarding the scope of the transaction including, as applicable, the information required for a notification of a *notifiable transaction.*

The collections of information described will be used by the Treasury

Department and the Department of Commerce, and, as appropriate, other relevant agencies, in connection with the analysis of notifiable transactions pursuant to the Outbound Order. The information provided in the notifications will increase the U.S. Government's visibility into the volume and nature of *U.S. person* transactions involving the defined technologies and products that may contribute to the threat to the national security of the United States. The information in the notifications will be helpful in highlighting trends with respect to related capital flows. It may also inform future policy development and decisions, including any modifications to the scope of *notifiable transactions* and *prohibited transactions.* Additionally, the information will assist the Secretary in complying with the report requirements in section 4 of the Outbound Order and in determining whether to grant a national interest exemption to a particular *covered transaction.* The Final Rule will prohibit the Treasury Department from making public any information or documentary materials submitted to or filed with the Treasury Department under the Final Rule unless required by law or otherwise provided in the Final Rule.

The Treasury Department used the methodology described in the previous section to estimate the total annual reporting and recordkeeping burden of the information collections in this Final Rule. The Treasury Department estimates that the annual hourly burden will be up to 28,620 hours. This annual total is based on the Treasury Department's assumption that: (1) 180 entities per year will respond to the information collections in this Final Rule and each entity will submit an average of 1.77 notifications annually, meaning these respondents will file a total 318 responses to the information collections annually; and (2) each respondent will spend an estimated 50 to 90 person hours per response. The Treasury Department estimates that the annual cost burden associated with the information collections and recordkeeping in the Final Rule will range between $3,513,900 and $8,299,800.

Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the OMB.

C. Regulatory Flexibility Act

The RFA requires an agency either to provide a final regulatory flexibility analysis with a final rule or certify that the final rule would not have a significant economic impact on a substantial number of small entities. The Treasury Department certified that the Proposed Rule would not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the RFA. The Treasury Department did not receive any comments from the public or the Chief Counsel for the Office of Advocacy of the Small Business Administration (SBA) on this certification.

The Treasury Department is hereby certifying that the Final Rule will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the RFA.

The Final Rule may impact any *U.S. person,* including a small business that engages in a *covered transaction* with a *covered foreign person.* The Treasury Department does not anticipate that the Final Rule will affect ''small organizations'' or ''small governmental jurisdiction[s],'' as defined in the RFA.

The Treasury Department expects the Final Rule to have a negligible baseline impact on small businesses because the Final Rule's obligations on *U.S. persons* target investments generally associated with larger institutions that more often are involved in cross-border investments related to the sectors under the Final Rule. These larger institutions are more likely to enter into transactions that will trigger the definition of *covered transaction.* The Final Rule will except specific types of transactions that may be more attractive or accessible to small business investors. And, as discussed below, the Treasury Department has assessed that small businesses will be likely to enter into transactions that constitute *excepted transactions.*

As an example, the SBA's Table of Size Standards with respect to North American Industry Classification System (NAICS) U.S. Industry Sector 52 ''Finance and Insurance'' defines a small business in this sector by dollar value of assets or revenue rather than by number of employees. As discussed below, the Treasury Department believes that the relevant SBA thresholds are too low to capture the type of U.S. investor likely to actively invest in an entity that engages in the identified activities related to technologies and products in the semiconductors and microelectronics, quantum information technologies, and artificial intelligence sectors that are critical for the military, intelligence, surveillance, or cyber-enabled capabilities of a *country of concern.* For example, SBA categories such as ''open end investment funds,'' and ''other financial vehicles'' are not considered small businesses if their average annual receipts exceed $40 million. As a reference point, IBISWorld reports that for NAICS Industry Code 52591 ''Open-End Investment Funds,'' for years 2018 to 2023, there were 825 businesses in this category and a total 2023 revenue across those businesses of $191.1 billion.

Extrapolating from this data, the average 2023 revenue per firm in this category would have been $231.5 million. In fact, the total number of potential investors subject to the regulation is likely limited to a small set of relatively large and sophisticated investors. As discussed above, the Treasury Department considered PitchBook Data from approximately 2021 through 2023. Notably, the most common type of U.S. based investors in this survey were identified by PitchBook Data as a venture capital business, corporation, private equity or buyout firm, or comparable investor types.

Given the applications of technologies and products in these sectors, the Treasury Department believes investments into these sectors involving *a person of a country of concern* is not typical for a small business, as these investor types are treated in the SBA's Table of Size Standards. Importantly, the Final Rule will also except certain types of transactions, including certain investments into publicly traded securities or into securities issued by an investment company, such as an index fund, mutual fund, or exchange traded fund, where a small business is more likely to consider investing. Given the narrow scoping of what constitutes a *covered transaction* under the Final Rule, the Treasury Department expects that few small businesses, as that term is defined by the SBA, will be impacted by the Final Rule.

In the unlikely event that a small entity is subject to the requirements of the Final Rule, such entity will be expected to incur the costs described in the cost benefit analysis above. For submission of notifications, the Treasury Department has endeavored to develop information gathering procedures that minimize the burden on *U.S. persons,* both large and small. *U.S. persons* who file a notification will use a fillable form that will be available online and is intended to facilitate submission through an electronic format. This fillable form will benefit anyone who submits a notification, regardless of their size, but may be especially helpful for small businesses

who will be able to submit directly to the Treasury Department.

D. Unfunded Mandates Reform Act

Section 202 of UMRA requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. The Final Rule does not include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector in excess of that threshold.

E. Executive Order 13132: Federalism

Executive Order 13132 prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the order. The Final Rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of Executive Order 13132.

F. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

List of Subjects in 31 CFR Part 850

Administrative practice and procedure, Artificial intelligence, Business and industry, Confidential business information, Electronic filing, Executive orders, Foreign persons, Hong Kong, Holding companies, Investigations, Investments, Investment companies, Microelectronics, National defense, National security, Macau, Penalties, People's Republic of China, Quantum information technologies, Reporting and recordkeeping requirements, Science and technology, Securities, Semiconductors, U.S. investments abroad.

■ For the reasons set forth in the preamble, the Treasury Department adds part 850 of title 31 of the Code of Federal Regulations to read as follows:

PART 850—PROVISIONS PERTAINING TO U.S. INVESTMENTS IN CERTAIN NATIONAL SECURITY TECHNOLOGIES AND PRODUCTS IN COUNTRIES OF CONCERN

Subpart A—General

Sec.

Subpart B—Definitions

Subpart C—Prohibited Transactions and Other Prohibited Activities

Subpart D—Notifiable Transactions and Other Notifiable Activities

Subpart E—Exceptions and Exemptions

Subpart F—Violations

Subpart G—Penalties and Disclosures

Subpart H—Provision and Handling of Information

Subpart I—Other Provisions

Authority: 50 U.S.C. 1701 *et seq.;* E.O. 14105, 88 FR 54867, 31 U.S.C. 321.

Subpart A—General

§ 850.101 Scope.

(a) This part implements Executive Order 14105 of August 9, 2023, ''Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern'' (the Order), directing the Secretary of the Treasury (the Secretary), in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant executive departments and agencies, to issue, subject to public notice and comment, regulations that require U.S. persons to provide notification of information relative to certain transactions involving covered foreign persons and that prohibit U.S. persons from engaging in certain other transactions involving covered foreign persons.

(b) The regulations identify certain types of transactions that are *covered transactions*—that is, transactions that are either notifiable or prohibited. Additionally, the regulations identify other instances where a U.S. person has obligations with respect to certain transactions. The regulations prescribe exceptions to the definition of *covered transaction.* A transaction that meets an exception is not a *covered transaction* and is referred to as an *excepted transaction.* Finally, the regulations prescribe a process for the Secretary to exempt certain *covered transactions* from the rules otherwise prohibiting or requiring notification of *covered transactions* on a case-by-case basis.

(c) The regulations identify categories of *covered transactions* that are

notifiable transactions. A *notifiable transaction* is a transaction by a *U.S. person* or its *controlled foreign entity* with or resulting in the establishment of a *covered foreign person* that engages in a *covered activity* that the Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other *relevant agencies,* has determined may contribute to the threat to the national security of the United States identified in the Order, or the engagement of a *person of a country of concern* in a *covered activity* that the Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other *relevant agencies,* has determined may contribute to the threat to the national security of the United States identified in the Order. The regulations require a *U.S. person* to notify the Department of the Treasury of each such notifiable transaction by such *U.S. person* or its *controlled foreign entity.* The regulations also require a *U.S. person* to provide prompt notice to the Department of the Treasury upon acquiring actual knowledge after the *completion date* of a transaction of facts or circumstances that would have caused the transaction to be a *covered transaction* if the *U.S. person* had had such knowledge on the *completion date.* Additionally, any person who makes a representation, statement, or certification under this part is required to promptly notify the Department of the Treasury upon learning of a material omission or inaccuracy in such representation, statement, or certification.

(d) The regulations identify categories of *covered transactions* that are *prohibited transactions.* A *prohibited transaction* is a transaction by a *U.S. person* with or resulting in the establishment of a *covered foreign person* that engages in a *covered activity* that the Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other *relevant agencies,* has determined poses a particularly acute national security threat because of its potential to significantly advance the military, intelligence, surveillance, or cyber-enabled capabilities of a *country of concern,* or engagement of a *person of a country of concern* in a *covered activity* that the Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other *relevant agencies,* has determined poses a particularly acute national security threat because of its potential to significantly advance the military, intelligence, surveillance, or cyber-enabled capabilities of a *country of concern.* The regulations prohibit a *U.S. person* from engaging in a *prohibited transaction* and also prohibit a *U.S. person* from *knowingly directing* a transaction that the *U.S. person* knows would be a *prohibited transaction* if engaged in by a *U.S. person.* The regulations also require a *U.S. person* to take all reasonable steps to prohibit and prevent any transaction by its *controlled foreign entity* that would be a *prohibited transaction* if undertaken by a *U.S. person.*

(e) Pursuant to the Order, the Secretary shall, as appropriate:

(1) Communicate with the Congress and the public with respect to the implementation of the Order;

(2) Consult with the Secretary of Commerce on industry engagement and analysis of notifiable transactions;

(3) Consult with the Secretary of State, the Secretary of Defense, the Secretary of Commerce, the Secretary of Energy, and the Director of National Intelligence on the implications for military, intelligence, surveillance, or cyber-enabled capabilities of covered national security technologies and products in the Order and potential covered national security technologies and products;

(4) Engage, together with the Secretary of State and the Secretary of Commerce, with allies and partners regarding the national security risks posed by countries of concern advancing covered national security technologies and products;

(5) Consult with the Secretary of State on foreign policy considerations related to the implementation of the Order, including but not limited to the issuance and amendment of regulations; and

(6) Investigate, in consultation with the heads of relevant agencies, as appropriate, violations of the Order or the regulations in this part and pursue available civil penalties for such violations.

§ 850.102 Relation of this part to other laws and regulations.

Nothing in this part shall be construed as altering or affecting any other authority, process, regulation, investigation, enforcement measure, license, authorization, or review provided by or established under any other provision of Federal law, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), or any other authority of the President or the Congress under the Constitution of the United States. This part is separate from, and independent of, the other parts of this subtitle. Differing foreign policy and national security circumstances may result in differing interpretations of the same or similar language among the parts of this subtitle. No action taken pursuant to any other provision of law or regulation, including the other parts of this subtitle, authorizes any transaction prohibited by this part or alters any other obligation under this part. No action taken pursuant to this part relieves the involved parties from complying with any other applicable laws or regulations.

§ 850.103 Rules of construction and interpretation.

(a) As used in this part, the term ''including'' (or variations such as ''include'') means ''including but not limited to.''

(b) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate.

(c) Section headings are included for convenience of reference only and shall not affect the interpretation of this part.

§ 850.104 Knowledge standard.

(a) Certain provisions of this part apply only if a U.S. person *knows* of a fact or circumstance. The term *knowledge* is defined in § 850.216. In determining whether a U.S. person is complying with this part or has violated any obligation under this part, the Department of the Treasury will assess whether such person has or had knowledge of the relevant facts and circumstances at the specified time.

(b) Such assessment as to whether, at the time of a given transaction, a U.S. person has or had knowledge of a given fact or circumstance will be made based on information a U.S. person had or could have had through a reasonable and diligent inquiry. A U.S. person that has failed to conduct a reasonable and diligent inquiry by the time of a given transaction may be assessed to have had reason to know of a given fact or circumstance, including facts or circumstances that would cause the transaction to be a covered transaction.

(c) In assessing whether a U.S. person has undertaken such a reasonable and diligent inquiry, the Department of the Treasury's considerations will include the following, as applicable, among others that the Department of the Treasury deems relevant, with respect to a particular transaction:

(1) The inquiry a U.S. person has made regarding an investment target or other relevant transaction counterparty (such as a joint venture partner), including questions asked of the investment target or relevant

counterparty, as of the time of the transaction;

(2) The contractual representations or warranties the U.S. person has obtained or attempted to obtain from the investment target or other relevant transaction counterparty (such as a joint venture partner) with respect to the determination of a transaction's status as a covered transaction and status of an investment target or other relevant transaction counterparty (such as a joint venture partner) as a covered foreign person;

(3) The efforts by the U.S. person as of the time of the transaction to obtain and consider available non-public information relevant to the determination of a transaction's status as a covered transaction and the status of an investment target or other relevant transaction counterparty (such as a joint venture partner) as a covered foreign person;

(4) Available public information, the efforts undertaken by the U.S. person to obtain and consider such information, and the degree to which other information available to the U.S. person as of the time of the transaction is consistent or inconsistent with such publicly available information;

(5) Whether the U.S. person purposefully avoided learning or seeking relevant information;

(6) The presence or absence of warning signs, which may include evasive responses or non-responses from an investment target or other relevant transaction counterparty (such as a joint venture partner) to questions or a refusal to provide information, contractual representations, or warranties; and

(7) The use of available public and commercial databases to identify and verify relevant information of an investment target or other relevant transaction counterparty (such as a joint venture partner).

(d) An assessment of whether a U.S. person has undertaken a reasonable and diligent inquiry shall be based on a consideration of the totality of relevant facts and circumstances.

Subpart B—Definitions

§ 850.201 Advanced packaging.

The term *advanced packaging* means to package integrated circuits in a manner that supports the two-and-one-half-dimensional (2.5D) or three-dimensional (3D) assembly of integrated circuits, such as by directly attaching one or more die or wafer using through-silicon vias, die or wafer bonding, heterogeneous integration, or other advanced methods and materials.

§ 850.202 AI system.

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:

(1) Uses data inputs to perceive real and virtual environments;

(2) Abstracts such perceptions into models through automated or algorithmic statistical analysis; and

(3) Uses 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 paragraph (a) of this section.

§ 850.203 Certification.

(a) The term *certification* means a written statement signed by the chief executive officer or other duly authorized designee of the person filing a notification or providing other information that certifies under the penalties provided in the False Statements Accountability Act of 1996, as amended (18 U.S.C. 1001) that the notification or other information filed or provided:

(1) Fully complies with the regulations in this part; and

(2) Is accurate and complete in all material respects to the best knowledge of the person filing a notification or other information.

(b) For purposes of this section, a duly authorized designee is:

(1) In the case of a partnership, any general partner thereof;

(2) In the case of a corporation, any officer thereof; and

(3) In the case of any entity lacking partners and officers, any individual within the organization exercising executive functions similar to those of a general partner of a partnership or an officer of a corporation or otherwise authorized by the board of directors or equivalent to provide such certification.

(c) In each case described in paragraphs (b)(1) through (3) of this section, such designee must possess actual authority to make the certification on behalf of the person filing a notification or other information.

Note 1 to § 850.203: A template for certifications may be found at the Outbound Investment Security Program section of the Department of the Treasury website.

§ 850.204 Completion date.

The term *completion date* means:

(a) With respect to a covered transaction other than under § 850.210(a)(6), the earliest date upon which any interest, asset, property, or right is conveyed, assigned, delivered, or otherwise transferred to a U.S. person, or as applicable, its controlled foreign entity; or

(b) With respect to a covered transaction under § 850.210(a)(6), the earliest date upon which any interest, asset, property, or right in the relevant covered foreign person is conveyed, assigned, delivered, or otherwise transferred to the applicable fund.

§ 850.205 Contingent equity interest.

The term *contingent equity interest* means a financial interest (including debt) that currently does not constitute an equity interest but is convertible into, or provides the right to acquire, an equity interest upon the occurrence of a contingency or defined event or at the discretion of the *U.S. person* that holds the financial interest.

§ 850.206 Controlled foreign entity.

(a) The term *controlled foreign entity* means any entity incorporated in, or otherwise organized under the laws of, a country other than the United States of which a U.S. person is a parent.

(b) For purposes of this term, the following rules shall apply in determining whether an entity is a parent of another entity in a tiered ownership structure:

(1) Where the relationship between an entity and another entity is that of parent and subsidiary, the holdings of voting interest or voting power of the board, as applicable, of a subsidiary shall be fully attributed to the parent.

(2) Where the relationship between an entity and another entity is not that of parent and subsidiary (*i.e.,* because the holdings of voting interest or voting power of the board, as applicable, of the first entity in the second entity is 50 percent or less), then the indirect downstream holdings of voting interest or voting power of the board, as applicable, attributed to the first entity shall be determined proportionately.

(3) Where the circumstances in paragraphs (b)(1) and (2) of this section apply (*i.e.,* because a U.S. person holds both direct and indirect downstream holdings in the same entity), any holdings of voting interest shall be aggregated for the purposes of applying this definition, and any holdings of voting power of the board shall be aggregated for the purposes of applying this definition. Voting interest shall not be aggregated with voting power of the board for the purposes of applying this definition.

§ 850.207 Country of concern.

The term *country of concern* has the meaning given to it in the Annex to the Order.

§ 850.208 Covered activity.

The term *covered activity* means, in the context of a particular transaction, any of the activities referred to in the definition of notifiable transaction in § 850.217 or prohibited transaction in § 850.224.

§ 850.209 Covered foreign person.

(a) The term *covered foreign person* means:

(1) A person of a country of concern that engages in a covered activity; or

(2) A person that directly or indirectly holds a board seat on, a voting or equity interest (other than through securities or interests that would satisfy the conditions in § 850.501(a) if held by a U.S. person) in, or any contractual power to direct or cause the direction of the management or policies of any person or persons described in paragraph (a)(1) of this section from or through which it:

(i) Derives more than 50 percent of its revenue individually, or as aggregated across such persons from each of which it derives at least $50,000 (or equivalent) of its revenue, on an annual basis;

(ii) Derives more than 50 percent of its net income individually, or as aggregated across such persons from each of which it derives at least $50,000 (or equivalent) of its net income, on an annual basis;

(iii) Incurs more than 50 percent of its capital expenditure individually, or as aggregated across such persons from each of which it incurs at least $50,000 (or equivalent) of its capital expenditure, on an annual basis; or

(iv) Incurs more than 50 percent of its operating expenses individually, or as aggregated across such persons from each of which it incurs at least $50,000 (or equivalent) of its operating expenses, on an annual basis.

(3) With respect to a covered transaction described in § 850.210(a)(5), the person of a country of concern that participates in the joint venture is deemed to be a covered foreign person by virtue of its participation in the joint venture.

(b) For purposes of paragraph (a)(2) of this section:

(1) Calculations shall be based on an audited financial statement from the most recent year. If an audited financial statement is not available, the most recent unaudited financial statement shall be used instead. If no financial statement is available, an independent appraisal shall be used instead. If no independent appraisal is available, a good-faith estimate shall be used instead.

(2) Where an amount is not denominated in U.S. dollars, the U.S. dollar equivalent shall be determined based on the most recent published rate of exchange available on the Department of the Treasury's website.

Note 1 to § 850.209: References in this section to revenue, net income, capital expenditure, or operating expenses refer to overall revenue, net income, capital expenditure, or operating expenses, as applicable, without subtracting amounts attributable to persons described in paragraph (a)(1) of this section of less than $50,000 (or equivalent).

§ 850.210 Covered transaction.

(a) The term *covered transaction* means a U.S. person's direct or indirect:

(1) Acquisition of an equity interest or contingent equity interest in a person that the U.S. person knows at the time of the acquisition is a covered foreign person;

(2) Provision of a loan or a similar debt financing arrangement to a person that the U.S. person knows at the time of the provision is a covered foreign person, where such debt financing affords or will afford the U.S. person an interest in profits of the covered foreign person, the right to appoint members of the board of directors (or equivalent) of the covered foreign person, or other comparable financial or governance rights characteristic of an equity investment but not typical of a loan;

(3) Conversion of a contingent equity interest into an equity interest in a person that the U.S. person knows at the time of the conversion is a covered foreign person, where the contingent equity interest was acquired by the U.S. person on or after January 2, 2025;

(4) Acquisition, leasing, or other development of operations, land, property, or other assets in a country of concern that the U.S. person knows at the time of such acquisition, leasing, or other development will result in, or that the U.S. person plans to result in:

(i) The establishment of a covered foreign person; or

(ii) The engagement of a person of a country of concern in a covered activity;

(5) Entrance into a joint venture, wherever located, that is formed with a person of a country of concern, and that the subject U.S. person knows at the time of entrance into the joint venture that the joint venture will engage, or plans to engage, in a covered activity; or

(6) 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 U.S. person) that a U.S. 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 U.S. person.

(b) Notwithstanding paragraph (a) of this section, a transaction is not a covered transaction if it is:

(1) An excepted transaction as set forth in § 850.501; or

(2) For the conduct of the official business of the United States Government by employees, grantees, or contractors thereof.

(c) The acquisition of a contingent interest described in paragraph (a)(1) of this section may constitute a covered transaction, and the subsequent occurrence of a conversion event described in paragraph (a)(3) of this section may constitute a separate covered transaction. A U.S. person should assess each of the acquisition and the conversion to determine the applicability of this part.

Note 1 to § 850.210: An indirect covered transaction includes a U.S. person's use of an intermediary to engage in a transaction that would be a covered transaction if engaged in directly by a U.S. person. However, for purposes of paragraph (a)(1) of this section, a U.S. person is not considered to have acquired an indirect equity interest or contingent equity interest in a covered foreign person when the U.S. person acquires a limited partner or equivalent interest in a venture capital fund, private equity fund, fund of funds, or other pooled investment fund and that fund then acquires an equity interest or contingent equity interest in a covered foreign person. (A U.S. person's acquisition of a limited partner or equivalent interest in a non-U.S. person venture capital fund, private equity fund, fund of funds, or other pooled investment fund may, however, be a covered transaction under paragraph (a)(6) of this section.)

Note 2 to § 850.210: Neither the issuance of a secured loan or similar debt financing for which equity is pledged as collateral, nor the acquisition of such secured debt on the secondary market, is an acquisition of an equity interest. However, foreclosure on collateral where the debtholder takes possession of the pledged equity is an acquisition of an equity interest; *provided that* such an acquisition is not a covered transaction where the equity was pledged prior to January 2, 2025, or where the U.S. person did not know at the time of issuing or acquiring the debt that the pledged equity was in a covered foreign person.

§ 850.211 Develop.

Except as used in § 850.210(a)(4), the term *develop* means to engage in any stages prior to serial production, such as design or substantive modification, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, and layouts.

§ 850.212 Entity.

The term *entity* means any branch, partnership, association, estate, joint venture, trust, corporation or division of a corporation, group, sub-group, or other organization (whether or not organized under the laws of any State or foreign state).

§ 850.213 Excepted transaction.

The term *excepted transaction* means a transaction that meets the criteria in § 850.501.

§ 850.214 Fabricate.

The term *fabricate* means to form devices such as transistors, poly capacitors, non-metal resistors, and diodes on a wafer of semiconductor material.

§ 850.215 Knowingly directing.

The term *knowingly directing* has the definition set forth in § 850.303.

§ 850.216 Knowledge.

Knowledge of a fact or circumstance (the term may be a variant, such as ''know'') means:

(a) Actual knowledge that a fact or circumstance exists or is substantially certain to occur;

(b) An awareness of a high probability of a fact or circumstance's existence or future occurrence; or

(c) Reason to know of a fact or circumstance's existence.

Note 1 to § 850.216: See the discussion of the knowledge standard in § 850.104 for more information about how this term is applied in this part.

§ 850.217 Notifiable transaction.

The term *notifiable transaction* means a covered transaction (that is not a prohibited transaction) in which the relevant covered foreign person or, with respect to a covered transaction described in § 850.210(a)(5), the relevant joint venture:

(a) Designs any integrated circuit that is not described in § 850.224(c);

(b) Fabricates any integrated circuit that is not described in § 850.224(d);

(c) Packages any integrated circuit that is not described in § 850.224(e);

(d) Develops any AI system that is not described in § 850.224(j) or (k) and that is:

(1) Designed to be used for any military end use (*e.g.,* for weapons targeting, target identification, combat simulation, military vehicle or weapons control, military decision-making, weapons design (including chemical, biological, radiological, or nuclear weapons), or combat system logistics and maintenance); or government intelligence or mass-surveillance end use (*e.g.,* through incorporation of features such as mining text, audio, or video; image recognition; location tracking; or surreptitious listening devices);

(2) Intended by the covered foreign person or joint venture to be used for any of the following:

(i) Cybersecurity applications;

(ii) Digital forensics tools;

(iii) Penetration testing tools; or

(iv) The control of robotic systems; or

(3) Trained using a quantity of computing power greater than 10^23 computational operations (*e.g.,* integer or floating-point operations).

Note 1 to § 850.217: Consistent with section 3 of the Order, the Secretary, in consultation with the Secretary of Commerce, and, as appropriate, the heads of other relevant agencies, shall periodically assess whether the criterion described in paragraph (d)(3) of this section is serving to effectively address threats to the national security of the United States described in the Order and make updates, as appropriate, through public notice.

Note 2 to § 850.217: Consistent with the definition for develop at § 850.211, to develop an AI system defined at § 850.202(b) in a manner subject to these notification requirements, the relevant covered foreign person or joint venture must engage in the activities enumerated in § 850.211, such as design or substantive modification, with respect to the third-party AI model or machine-based system that is being used by a data system, software, hardware, application, tool, or utility to operate in whole or in part.

Note 3 to § 850.217: For purposes of paragraph (d) of this section, a person customizing, configuring, or fine-tuning a third-party AI model or machine-based system strictly for its own internal, non-commercial use (*e.g.,* not for sale or licensing) would not implicate the notification requirements for related transactions solely on that basis unless the person's internal, non-commercial use is for government intelligence, mass-surveillance, or military end use, or for digital forensics tools, penetration testing tools, or the control of robotic systems.

§ 850.218 Package.

The term *package* means to assemble various components, such as the integrated circuit die, lead frames, interconnects, and substrate materials to safeguard the semiconductor device and provide electrical connections between different parts of the die.

§ 850.219 Parent.

The term *parent* means, with respect to an entity:

(a) A person who or which directly or indirectly holds more than 50 percent of:

(1) The outstanding voting interest in the entity; or

(2) The voting power of the board of the entity;

(b) The general partner, managing member, or equivalent of the entity; or

(c) The investment adviser to any entity that is a pooled investment fund, with ''investment adviser'' as defined in the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(11)).

Note 1 to § 850.219: Any entity that meets the conditions of paragraph (a), (b), or (c) of this section with respect to another entity is the parent, even if the parent entity is an intermediate entity and not the ultimate parent.

§ 850.220 Person.

The term *person* means any individual or entity.

§ 850.221 Person of a country of concern.

The term *person of a country of concern* means:

(a) Any individual that:

(1) Is a citizen or permanent resident of a country of concern;

(2) Is not a U.S. citizen; and

(3) Is not a permanent resident of the United States;

(b) 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;

(c) The government of a country of concern, including any political subdivision, political party, agency, or instrumentality thereof; any person acting for or on behalf of the government of a country of concern; or any entity with respect to which the government of a country of concern holds individually or in the aggregate, directly or indirectly, 50 percent or more of the entity's outstanding voting interest, voting power of the board, or equity interest, or otherwise possesses the power to direct or cause the direction of the management and policies of such entity (whether through the ownership of voting securities, by contract, or otherwise);

(d) Any entity in which one or more persons identified in paragraph (a), (b), or (c) of this section, individually or in the aggregate, directly or indirectly,

holds at least 50 percent of any of the following interests of such entity: outstanding voting interest, voting power of the board, or equity interest; or

(e) Any entity in which one or more persons identified in paragraph (d) of this section, individually or in the aggregate, directly or indirectly, holds at least 50 percent of any of the following interests of such entity: outstanding voting interest, voting power of the board, or equity interest.

§ 850.222 Principal place of business.

The term *principal place of business* means the primary location where an entity's management directs, controls, or coordinates the entity's activities, or, in the case of an investment fund, where the fund's activities are primarily directed, controlled, or coordinated by or on behalf of the general partner, managing member, or equivalent.

§ 850.223 Produce.

The term *produce* means to engage in any of the post-development stages of realizing the relevant technology or product, such as engineering, manufacture, integration, assembly, inspection, testing, and quality assurance.

§ 850.224 Prohibited transaction.

The term *prohibited transaction* means a covered transaction in which the relevant covered foreign person or, with respect to a covered transaction described in § 850.210(a)(5), the relevant joint venture:

(a) Develops or produces any electronic design automation software for the design of integrated circuits or advanced packaging;

(b) Develops or produces any:

(1) 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);

(2) Equipment for performing volume advanced packaging; or

(3) Commodity, material, software, or technology designed exclusively for use in or with extreme ultraviolet lithography fabrication equipment.

(c) Designs any integrated circuit that meets or exceeds the performance parameters in Export Control Classification Number 3A090.a in supplement No. 1 to 15 CFR part 774, or integrated circuits designed for operation at or below 4.5 Kelvin;

(d) Fabricates any of the following:

(1) 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;

(2) NOT–AND (NAND) memory integrated circuits with 128 layers or more;

(3) Dynamic random-access memory (DRAM) integrated circuits using a technology node of 18 nanometer half-pitch or less;

(4) Integrated circuits manufactured from a gallium-based compound semiconductor;

(5) Integrated circuits using graphene transistors or carbon nanotubes; or

(6) Integrated circuits designed for operation at or below 4.5 Kelvin;

(e) Packages any integrated circuit using advanced packaging techniques;

(f) Develops, installs, sells, or produces any supercomputer enabled by advanced integrated circuits that can provide a theoretical compute capacity of 100 or more double-precision (64-bit) petaflops or 200 or more single-precision (32-bit) petaflops of processing power within a 41,600 cubic foot or smaller envelope;

(g) Develops a quantum computer or produces any of the critical components required to produce a quantum computer such as a dilution refrigerator or two-stage pulse tube cryocooler;

(h) Develops or produces any quantum sensing platform designed for, or which the relevant covered foreign person intends to be used for, any military, government intelligence, or mass-surveillance end use;

(i) Develops or produces any quantum network or quantum communication system designed for, or which the relevant covered foreign person intends to be used for:

(1) Networking to scale up the capabilities of quantum computers, such as for the purposes of breaking or compromising encryption;

(2) Secure communications, such as quantum key distribution; or

(3) Any other application that has any military, government intelligence, or mass-surveillance end use;

(j) Develops any AI system that is designed to be exclusively used for, or which the relevant covered foreign person intends to be used for, any:

(1) Military end use (*e.g.,* for weapons targeting, target identification, combat simulation, military vehicle or weapon control, military decision-making, weapons design (including chemical, biological, radiological, or nuclear weapons), or combat system logistics and maintenance); or

(2) Government intelligence or mass-surveillance end use (*e.g.,* through incorporation of features such as mining text, audio, or video; image recognition; location tracking; or surreptitious listening devices);

(k) Develops any AI system that is trained using a quantity of computing power greater than:

(1) 10^25 computational operations (*e.g.,* integer or floating-point operations); or

(2) 10^24 computational operations (*e.g.,* integer or floating-point operations) using primarily biological sequence data;

(l) Meets the conditions set forth in § 850.209(a)(2) because of its relationship to one or more covered foreign persons engaged in any covered activity described in any of paragraphs (a) through (k) of this section; or

(m) Engages in a covered activity, whether referenced in this section or § 850.217 and is:

(1) Included on the Bureau of Industry and Security's Entity List (15 CFR part 744, supplement no. 4);

(2) Included on the Bureau of Industry and Security's Military End User List (15 CFR part 744, supplement no. 7);

(3) Meets the definition of ''Military Intelligence End-User'' by the Bureau of Industry and Security in 15 CFR 744.22(f)(2);

(4) Included on the Department of the Treasury's list of Specially Designated Nationals and Blocked Persons (SDN List), or is an entity in which one or more individuals or entities included on the SDN List, individually or in the aggregate, directly or indirectly, own a 50 percent or greater interest;

(5) Included on the Department of the Treasury's list of Non-SDN Chinese Military-Industrial Complex Companies (NS–CMIC List); or

(6) Designated as a foreign terrorist organization by the Secretary of State under 8 U.S.C. 1189.

Note 1 to § 850.224: Consistent with section 3 of the Order, the Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies, shall periodically assess whether the criterion described in paragraph (k) of this section is serving to effectively address threats to the national security of the United States described in the Order and make updates, as appropriate, through public notice.

Note 2 to § 850.224: Consistent with the definition for develop at § 850.211, to develop an AI system defined at § 850.202(b) in a manner subject to these prohibition requirements, the relevant covered foreign person or joint venture must engage in the activities enumerated in § 850.211, such as design or substantive modification, with respect to the third-party AI model or machine-based system that is being used by a data system, software, hardware, application, tool, or utility to operate in whole or in part.

Note 3 to § 850.224: For purposes of paragraphs (j) and (k) of this section, a person customizing, configuring, or fine-tuning a third-party AI model or machine-based system strictly for its own internal, non-commercial use (*e.g.,* not for sale or licensing) would not implicate a prohibition for related transactions solely on that basis unless the person's internal, non-commercial use is for government intelligence, mass-surveillance, or military end use, or for digital forensics tools, penetration testing tools, or the control of robotic systems.

§ 850.225 Quantum computer.

The term *quantum computer* means a computer that performs computations that harness the collective properties of quantum states, such as superposition, interference, or entanglement.

§ 850.226 Relevant agencies.

The term *relevant agencies* means the Departments of State, Defense, Justice, Commerce, Energy, and Homeland Security, the Office of the United States Trade Representative, the Office of Science and Technology Policy, the Office of the Director of National Intelligence, the Office of the National Cyber Director, and any other department, agency, or office the Secretary determines appropriate.

§ 850.227 Subsidiary.

The term *subsidiary* means, with respect to a person, an entity of which such person is a parent.

§ 850.228 United States.

The term *United States* or *U.S.* means the United States of America, the States of the United States of America, the District of Columbia, and any commonwealth, territory, dependency, or possession of the United States of America, or any subdivision of the foregoing, and includes the territorial sea of the United States of America. For purposes of this part, an entity organized under the laws of the United States of America, one of the States, the District of Columbia, or a commonwealth, territory, dependency, or possession of the United States is an entity organized ''in the United States.''

§ 850.229 U.S. person.

The term *U.S. person* means 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 branch of any such entity, or any person in the United States.

Subpart C—Prohibited Transactions and Other Prohibited Activities

§ 850.301 Undertaking a prohibited transaction.

A U.S. person may not engage in a prohibited transaction unless an exemption for that transaction has been granted under § 850.502.

§ 850.302 Actions of a controlled foreign entity.

(a) A U.S. person shall take all reasonable steps to prohibit and prevent any transaction by its controlled foreign entity that would be a prohibited transaction if engaged in by a U.S. person.

(b) If a controlled foreign entity engages in a transaction that would be a prohibited transaction if engaged in by a U.S. person, in determining whether the relevant U.S. person took all reasonable steps to prohibit and prevent such transaction, the Department of the Treasury will consider, among other factors, any of the following with respect to a U.S. person and its controlled foreign entity:

(1) The execution of agreements with respect to compliance with this part between the subject U.S. person and its controlled foreign entity;

(2) The existence and exercise of governance or shareholder rights by the U.S. person with respect to the controlled foreign entity, where applicable;

(3) The existence and implementation of periodic training and internal reporting requirements by the U.S. person and its controlled foreign entity with respect to compliance with this part;

(4) The implementation of appropriate and documented internal controls, including internal policies, procedures, or guidelines that are periodically reviewed internally, by the U.S. person and its controlled foreign entity; and

(5) Implementation of a documented testing and/or auditing process of internal policies, procedures, or guidelines.

Note 1 to § 850.302: Findings of violations of this section and decisions related to enforcement and penalties will be made based on a consideration of the totality of relevant facts and circumstances, including whether the U.S. person has taken the steps described in paragraph (b) of this section and whether such steps were reasonable in light of the relevant facts and circumstances.

§ 850.303 Knowingly directing an otherwise prohibited transaction.

(a) A U.S. person is prohibited from knowingly directing a transaction by a non-U.S. person that the U.S. person knows at the time of the transaction would be a prohibited transaction if engaged in by a U.S. person. For purposes of this section, a U.S. person ''knowingly directs'' a transaction when the U.S. person has authority, individually or as part of a group, to make or substantially participate in decisions on behalf of a non-U.S. person, and exercises that authority to direct, order, decide upon, or approve a transaction. Such authority exists when a U.S. person is an officer, director, or otherwise possesses executive responsibilities at a non-U.S. person.

(b) A U.S. person that has the authority described in paragraph (a) of this section and recuses themself from each of the following activities will not be considered to have exercised their authority to direct, order, decide upon, or approve a transaction:

(1) Participating in formal approval and decision-making processes related to the transaction, including making a recommendation;

(2) Reviewing, editing, commenting on, approving, and signing relevant transaction documents; and

(3) Engaging in negotiations with the investment target (or, as applicable, the relevant transaction counterparty, such as a joint venture partner).

Subpart D—Notifiable Transactions and Other Notifiable Activities

§ 850.401 Undertaking a notifiable transaction.

A U.S. person that undertakes a notifiable transaction shall file a notification of that transaction with the Department of the Treasury pursuant to § 850.404.

§ 850.402 Notification of actions of a controlled foreign entity.

A U.S. person shall file a notification with the Department of the Treasury pursuant to § 850.404 with respect to any transaction by a controlled foreign entity of that U.S. person that would be a notifiable transaction if engaged in by a U.S. person.

§ 850.403 Notification of post-transaction knowledge.

A U.S. person that acquires actual knowledge after the completion date of a transaction of a fact or circumstance such that the transaction would have been a covered transaction if such knowledge had been possessed by the relevant U.S. person at the time of the transaction shall promptly, and in no event later than 30 calendar days following the acquisition of such knowledge, submit a notification pursuant to § 850.404. This requirement applies regardless of whether the

transaction would have been a notifiable transaction or a prohibited transaction.

Note 1 to § 850.403: A U.S. person's submission of a notification pursuant to this section shall not preclude a finding by the Department of the Treasury that as a factual matter the U.S. person had relevant knowledge of the transaction's status at the time of the transaction.

§ 850.404 Procedures for notifications.

(a) A U.S. person that has an obligation under § 850.401, § 850.402, or § 850.403 shall file an electronic copy of the notification of the transaction with the Department of the Treasury including the information set out in § 850.405 and the certification referred to in § 850.203. The U.S. person shall follow the electronic filing instructions posted on the Department of the Treasury's Outbound Investment Security Program website. No communications or submissions other than those described in this section shall constitute the filing of a notification for purposes of this part.

(b) The Department of the Treasury may contact a U.S. person that has filed a notification with questions or document requests related to the transaction or compliance with this part. The U.S. person shall respond to any such questions or requests within the time frame and in the manner specified by the Department of the Treasury. Information and other documents provided by the U.S. person to the Department of the Treasury after the filing of the notification under this section shall be deemed part of the notification and shall be subject to the certification referred to in § 850.203.

(c) A U.S. person shall file a notification under § 850.401 or § 850.402 with the Department of the Treasury no later than 30 calendar days following the completion date of a notifiable transaction. A U.S. person shall file a notification required under § 850.403 with the Department of the Treasury no later than 30 calendar days after it acquires the knowledge referred to in § 850.403.

(d) If a U.S. person files a notification prior to the completion date of the notifiable transaction, the U.S. person shall update such notification no later than 30 calendar days following the completion date of the notifiable transaction if information in the original filing has materially changed.

(e) A U.S. person shall inform the Department of the Treasury in writing no later than 30 calendar days following the acquisition of previously unavailable information required under § 850.405.

Note 1 to § 850.404: While the Department of the Treasury may engage with the U.S. person following notification, it is also possible the U.S. person will receive no communication from the Department of the Treasury other than an electronic acknowledgment of receipt after notification is submitted.

§ 850.405 Content of notifications.

(a) A U.S. person that has an obligation under this part to file a notification shall provide the information set forth in this section, which must be accurate and complete in all material respects, subject to paragraph (d) of this section.

(b) A notification shall provide, as applicable:

(1) The contact information of a representative of the U.S. person filing the notification who is available to communicate with the Department of the Treasury about the notification including such representative's name, title, email address, mailing address, phone number, and employer;

(2) A description of the U.S. person, including name, and as applicable, principal place of business and place of incorporation or legal organization, company address, website, and, if the U.S. person is an entity, such U.S. person's ultimate owner;

(3) A post-transaction organizational chart of the U.S. person that includes the name and principal place of business and place of incorporation or legal organization of the intermediate and ultimate parent entities of the U.S. person, identifies the U.S. person's relationship with any controlled foreign entity or entities of the U.S. person, and identifies the covered foreign person and other relevant persons involved in the transaction;

(4) A brief description of the commercial rationale for the transaction;

(5) A brief description of why the U.S. person has determined the transaction is a covered transaction that includes a discussion of the nature of the transaction, its structure, reference to the paragraph of § 850.210(a) that best describes the transaction type, and whether the notification is being submitted pursuant to § 850.401, § 850.402, or § 850.403.

(6) The status of the transaction, including the actual or expected completion date of the transaction;

(7) The total transaction value in U.S. dollars or U.S. dollar equivalent, an explanation of how the transaction value was determined, and a description of the consideration for the transaction (including cash, securities, other assets, and debt forgiveness);

(8) The aggregate equity interest, voting interest, board seats (or equivalent holdings) of the U.S. person and its affiliates in the covered foreign person (or in the joint venture, as applicable) following the completion date of the transaction, including a description of any agreements or commitments for future investment or options to make future investments in the covered foreign person (or joint venture);

(9) Information about the covered foreign person, including its name, and as applicable, principal place of business and place of incorporation or legal organization, company address, website, and if the covered foreign person is an entity, such covered foreign person's ultimate owner, and the full legal names and titles of each officer, director, and other member of management of the covered foreign person, and a post-transaction organizational chart of the covered foreign person that includes the name and principal place of business and place of incorporation or legal organization of the intermediate and ultimate parent entities of the covered foreign person;

(10) Identification and description of each of the covered activity or activities undertaken by the covered foreign person that makes the transaction a covered transaction, as well as a brief description of the known end use(s) and end user(s) of the covered foreign person's technology, products, or services;

(11) A statement describing the attributes that cause the entity to be a covered foreign person, and any other relevant information regarding the covered foreign person and covered activity or activities;

(12) If a transaction involves a covered activity identified in § 850.217(a), (b), or (c), identification of the technology node(s) at which any applicable product is produced; and

(13) If the notification is required under § 850.403:

(i) Identification of the fact or circumstance of which the U.S. person acquired knowledge post-transaction;

(ii) The date upon which the U.S. person acquired such knowledge;

(iii) A statement explaining why the U.S. person did not possess or obtain such knowledge at the time of the transaction; and

(iv) A description of any pre-transaction diligence undertaken by the U.S. person, including, as applicable, any steps described in § 850.104(c).

(c) The U.S. person shall maintain a copy of the notification filed and supporting documentation for a period of ten years from the date of the filing. Such supporting documentation shall

include, as applicable, any pitch decks, marketing letters, and offering memorandums; transaction documents including side letters and investment agreements; and due diligence materials related to the transaction. The U.S. person shall make all supporting documentation available upon request by the Department of the Treasury.

(d) If the U.S. person does not provide responses to the information required in paragraph (b) of this section, the U.S. person shall provide sufficient explanation for why the information is unavailable or otherwise cannot be obtained and explain the U.S. person's efforts to obtain such information. If such information subsequently becomes available, the U.S. person shall provide such information to the Department of the Treasury promptly, and no later than 30 calendar days following the availability of such information.

§ 850.406 Notice of material omission or inaccuracy.

A person who has made any representation, statement, or certification subject to this part shall inform the Department of the Treasury in writing promptly, and in no event later than 30 calendar days after learning of a material omission or inaccuracy in such representation, statement, or certification.

Subpart E—Exceptions and Exemptions

§ 850.501 Excepted transaction.

A transaction that would be either a prohibited transaction or a notifiable transaction if engaged in by a U.S. person but for this section is not a prohibited transaction or a notifiable transaction, as applicable, if the conditions set forth in this section are met. In that case, the transaction is an excepted transaction. The following transactions are excepted transactions:

(a)(1) An investment by a U.S. person:

(i) In any publicly traded security, with ''security'' as defined in section 3(a)(10) of the Securities Exchange Act of 1934, as amended, at 15 U.S.C. 78c(a)(10), 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'' as defined in section 3(a)(1) of the Investment Company Act of 1940, as amended, at 15 U.S.C. 80a–3(a)(1), that is registered with the U.S. Securities and Exchange Commission, such as index funds, mutual funds, or exchange traded funds; or

(B) Any company that has elected to be regulated or is regulated as a business development company pursuant to section 54 of the Investment Company Act of 1940, as amended, at 15 U.S.C. 80a–53;

(iii) Made as a limited partner or equivalent in a venture capital fund, private equity fund, fund of funds, or other pooled investment fund other than as described in paragraph (a)(1)(ii) of this section where:

(A) The limited partner or equivalent's committed capital is not more than $2,000,000, aggregated across any investment and co-investment vehicles of the fund; or

(B) The limited partner or equivalent has secured a binding contractual assurance that its capital in the fund will not be used to engage in a transaction that would be a prohibited transaction or notifiable transaction, as applicable, if engaged in by a U.S. person; or

(iv) In a derivative, so long as such derivative does not confer the right to acquire equity, any rights associated with equity, or any assets in or of a covered foreign person.

(2) Notwithstanding paragraph (a)(1) of this section, an investment is not an excepted transaction if it affords the U.S. person rights beyond standard minority shareholder protections with respect to the covered foreign person. Such standard minority shareholder protections include:

(i) The power to prevent the sale or pledge of all or substantially all of the assets of an entity or a voluntary filing for bankruptcy or liquidation;

(ii) The power to prevent an entity from entering into contracts with majority investors or their affiliates;

(iii) The power to prevent an entity from guaranteeing the obligations of majority investors or their affiliates;

(iv) The right to purchase an additional interest in an entity to prevent the dilution of an investor's pro rata interest in that entity in the event that the entity issues additional instruments conveying interests in the entity;

(v) The power to prevent the change of existing legal rights or preferences of the particular class of stock held by minority investors, as provided in the relevant corporate documents governing such stock; and

(vi) The power to prevent the amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of an entity with respect to the matters described in paragraphs (a)(2)(i) through (v) of this section;

(b) The acquisition by a U.S. person of equity or other interests in an entity held by one or more persons of a country of concern; *provided that:*

(1) The U.S. person is acquiring all equity or other interests in such entity held by all persons of a country of concern; and

(2) Following such acquisition, the entity does not constitute a covered foreign person;

(c) A transaction that, but for this paragraph, would be a covered transaction between a U.S. person and its controlled foreign entity that supports operations that are not covered activities or that maintains covered activities that the controlled foreign entity was engaged in prior to January 2, 2025;

(d) A transaction made after January 2, 2025, pursuant to a binding, uncalled capital commitment entered into before January 2, 2025;

(e) The acquisition of a voting interest in a covered foreign person by a U.S. person upon default or other condition involving a loan or a similar financing arrangement, where the loan was made by a syndicate of banks in a loan participation where the U.S. person lender(s) in the syndicate:

(1) Cannot on its own initiate any action vis-à-vis the debtor; and

(2) Is not the syndication agent;

(f) The receipt of employment compensation by an individual in the form of an award of equity or the grant of an option to purchase equity in a covered foreign person, or the exercise of such option; or

(g)(1) A transaction that is:

(i) With or involving a person of a country or territory outside of the United States designated by the Secretary, after taking into account whether the country or territory is addressing national security risks substantially similar to those described in the Order and related to outbound investment; and

(ii) Of a type for which the Secretary has determined that the related national security concerns are likely to be adequately addressed by measures taken or that may be taken by the government of the relevant country or territory.

(2) Prior to making a designation or determination under this paragraph (g), the Secretary shall consult with the Secretary of State, the Secretary of Commerce, and, as appropriate, the heads of other relevant agencies.

(3) The Secretary's designations and determinations under paragraph (g)(1) of this section shall be made available through public notice.

(4) The Secretary may rescind a designation or determination under

paragraph (g)(1) of this section if the Secretary, in consultation with the Secretary of State, Secretary of Commerce, and, as appropriate, the heads of other relevant agencies, determines that such a rescission is appropriate. Any rescission shall be made available through public notice.

§ 850.502 National interest exemption.

(a) The Secretary, in consultation with the Secretary of Commerce, the Secretary of State, and the heads of relevant agencies, as appropriate, may determine that a covered transaction is in the national interest of the United States and therefore is exempt from applicable provisions in subparts C and D of this part (excluding §§ 850.406, 850.603, and 850.604). Such a determination may be made following a request by a U.S. person on its own behalf or on behalf of its controlled foreign entity.

(b) Any determination pursuant to paragraph (a) of this section will be based on a consideration of the totality of the relevant facts and circumstances and may be informed by, among other considerations, the transaction's effect on critical U.S. supply chain needs; domestic production needs in the United States for projected national defense requirements; United States' technological leadership globally in areas affecting U.S. national security; and impact on U.S. national security if the U.S. person is prohibited from undertaking the transaction.

(c) A U.S. person seeking a national interest exemption shall submit relevant information to the Department of the Treasury regarding the transaction and shall articulate the basis for the request, including the U.S. person's analysis of the transaction's potential impact on the national interest of the United States and the certification referred to in § 850.203. Information and other documents submitted by the U.S. person to the Department of the Treasury under this section shall be deemed part of the national interest exemption request. The U.S. person shall follow the instructions posted on the Department of the Treasury's Outbound Investment Security Program website. No communications or submissions other than those described in this section shall constitute a request for a national interest exemption. The Department of the Treasury may request additional information that may include some or all of the information required under § 850.405.

(d) A determination that a covered transaction is exempt under this section may be subject to binding conditions.

(e) No determination pursuant to paragraph (a) of this section will be valid unless provided to the subject U.S. person in writing and signed by the Assistant Secretary or Deputy Assistant Secretary of the Treasury for Investment Security.

Note 1 to § 850.502: A process and related information for exemption requests will be made available on the Department of the Treasury's Outbound Investment Security Program website.

§ 850.503 IEEPA statutory exception.

Conduct referred to in 50 U.S.C. 1702(b) shall not be regulated or prohibited, directly or indirectly, by this part.

Subpart F—Violations

§ 850.601 Taking actions prohibited by this part.

The taking of any action prohibited by this part is a violation of this part.

§ 850.602 Failure to fulfill requirements.

Failure to take any action required by this part, and within the time frame and in the manner specified by this part, as applicable, is a violation of this part.

§ 850.603 Misrepresentation, concealment, and omission of facts.

With respect to any information submission to or communication with the Department of the Treasury pursuant to any provision of this part, the making of any materially false or misleading representation, statement, or certification, or falsifying, concealing or omitting any material fact is a violation of this part.

§ 850.604 Evasions; attempts; causing violations; conspiracies.

(a) Any action on or after the effective date of this part that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this part is prohibited.

(b) Any conspiracy formed to violate the prohibitions set forth in this part is prohibited.

Subpart G—Penalties and Disclosures

§ 850.701 Penalties.

(a) Section 206 of IEEPA applies to any person subject to the jurisdiction of the United States who violates, attempts to violate, conspires to violate, or causes a violation of any order, regulation, or prohibition issued by or pursuant to the direction or authorization of the Secretary pursuant to this part or otherwise under IEEPA.

(1) A civil penalty may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any order, regulation, or prohibition issued under IEEPA, including any provision of this part in an amount not to exceed the greater of:

(i) $250,000, as such amount is adjusted pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (Pub. L. 101–410, 28 U.S.C. 2461 note); or

(ii) An amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(2) A person who willfully commits, willfully attempts to commit, willfully conspires to commit, or aids or abets in the commission of a violation, attempt to violate, conspiracy to violate, or causing of a violation of any order, regulation, or prohibition issued under IEEPA, including any provision of this part, shall, upon conviction, be fined not more than $1,000,000, or if a natural person, be imprisoned for not more than 20 years, or both.

(b) The Secretary may refer potential criminal violations of the Order, or of this part, to the Attorney General.

(c) The civil penalties provided for in IEEPA are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (Pub. L. 101–410, 28 U.S.C. 2461 note). Notice of the maximum penalty which may be assessed under this section will be published in the **Federal Register** and on Treasury's Outbound Investment Security Program website on an annual basis on or before January 15 of each calendar year.

(d) The criminal penalties provided for in IEEPA are subject to adjustment pursuant to 18 U.S.C. 3571.

(e) The penalties available under this section are without prejudice to other penalties, civil or criminal, and forfeiture of property, available under other applicable law.

(f) Pursuant to 18 U.S.C. 1001, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact; makes any materially false, fictitious, or fraudulent statement or representation; or makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry shall be fined under title 18, United States Code, or imprisoned not more than 5 years, or both.

§ 850.702 Administrative collection; referral to United States Department of Justice.

The imposition of a monetary penalty under this part creates a debt due to the U.S. Government. The Department of the Treasury may take action to collect the penalty assessed if not paid. In addition or instead, the matter may be referred to the Department of Justice for appropriate action to recover the penalty.

§ 850.703 Divestment.

(a) The Secretary, in consultation with the heads of relevant agencies, as appropriate, may take any action authorized under IEEPA to nullify, void, or otherwise compel the divestment of any prohibited transaction entered into after the effective date of this part.

(b) The Secretary may refer any action taken under paragraph (a) of this section to the Attorney General to seek appropriate relief to enforce such action.

§ 850.704 Voluntary self-disclosure.

(a) Any person who has engaged in conduct that may constitute a violation of this part may submit a voluntary self-disclosure of that conduct to the Department of the Treasury.

(b) In determining the appropriate response to any violation, the Department of the Treasury will consider the submission and the timeliness of any voluntary self-disclosure.

(c) In assessing the timeliness of a voluntary self-disclosure, the Department of the Treasury will consider whether it has learned of the conduct prior to the voluntary self-disclosure. The Department of the Treasury may consider disclosure of a violation to another government agency other than the Department of the Treasury as a voluntary self-disclosure based on a case-by-case assessment.

(d) Notwithstanding the foregoing, identification to the Department of the Treasury of conduct that may constitute a violation of this part may not be assessed to be a voluntary self-disclosure in one or more of the following circumstances:

(1) A third party has provided a prior disclosure to the Department of the Treasury of the conduct or similar conduct related to the same pattern or practice, regardless of whether the disclosing person knew of the third party's prior disclosure;

(2) The disclosure includes materially false or misleading information;

(3) The disclosure, when considered along with supplemental information timely provided by the disclosing person, is materially incomplete;

(4) The disclosure is not self-initiated, including when the disclosure results from a suggestion or order of a Federal or state agency or official;

(5) The disclosure is a response to an administrative subpoena or other inquiry from the Department of the Treasury or another government agency;

(6) The disclosure is made about the conduct of an entity by an individual in such entity without the authorization of such entity's senior management; or

(7) The filing is made pursuant to a required notification under this part, including § 850.403 or § 850.406.

(e) A voluntary self-disclosure to the Department of the Treasury must take the form of a written notice describing the conduct that may constitute a violation and each of the persons involved. A voluntary self-disclosure must include, or be followed within a reasonable period of time by, a report of sufficient detail to afford a complete understanding of the conduct that may constitute the violation. A person making a voluntary self-disclosure must respond in a timely manner to any follow-up inquiries by the Department of the Treasury.

Subpart H—Provision and Handling of Information

§ 850.801 Confidentiality.

(a) Except to the extent required by law or otherwise provided in paragraphs (b) through (d) of this section, information or documentary materials not otherwise publicly available that are submitted to the Department of the Treasury under this part shall not be disclosed to the public.

(b) Notwithstanding paragraph (a) of this section, except to the extent prohibited by law, the Department of the Treasury may disclose information or documentary materials that are not otherwise publicly available, subject to appropriate confidentiality and classification requirements, when such information or documentary materials are:

(1) Relevant to any judicial or administrative action or proceeding;

(2) Provided to Congress or to any duly authorized committee or subcommittee of Congress; or

(3) Provided to any domestic governmental entity, or to any foreign governmental entity of a United States partner or ally, where the information or documentary materials are important to the national security analysis or actions of such governmental entity or the Department of the Treasury.

(c) Notwithstanding paragraph (a) of this section, the Department of the Treasury may disclose to third parties information or documentary materials that are not otherwise publicly available when the person who submitted or filed the information or documentary materials has consented to its disclosure to such third parties.

(d) Notwithstanding paragraph (a) of this section, the Department of the Treasury may disclose information that is not already publicly available, when such disclosure of information is determined by the Secretary to be in the national interest. Any determination under this paragraph (d) may not be delegated below the level of the Assistant Secretary of the Treasury.

(e) The Department of the Treasury may use the information gathered pursuant to this part to fulfill its obligations under the Order, which may include publication of anonymized data.

§ 850.802 Language of information.

All materials or information filed with the Department of the Treasury under this part shall be submitted in English. If supplementary or additional materials were originally written in a foreign language, they shall be submitted in their original language. Where English versions of those documents exist, they shall also be submitted.

Subpart I—Other Provisions

§ 850.901 Delegation of authorities of the Secretary of the Treasury.

Any action that the Secretary is authorized to take pursuant to the Order and any further executive orders relating to the national emergency declared in the Order may be taken by the Assistant Secretary of the Treasury for Investment Security or their designee or by any other person to whom the Secretary has delegated the authority so to act, as appropriate.

§ 850.902 Amendment, modification, or revocation.

(a) Except as otherwise provided by law, and in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies, the Secretary may amend, modify, or revoke provisions of this part at any time.

(b) Except as otherwise provided by law, any instructions, orders, forms, regulations, or rulings issued pursuant to this part may be amended, modified, or revoked at any time.

(c) Unless otherwise specifically provided, any amendment, modification, or revocation of any provision in or appendix to this part does not affect any act done or omitted, or any civil or criminal proceeding commenced or pending, prior to such amendment, modification, or

revocation. All penalties, forfeitures, and liabilities under any such instructions, orders, forms, regulations, or rulings pursuant to this part continue and may be enforced as if such amendment, modification, or revocation had not been made.

§ 850.903 Severability.

The provisions of this part are separate and severable from one another. If any of the provisions of this part, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

§ 850.904 Reports to be furnished on demand.

(a) Any person is required to furnish under oath, in the form of reports or otherwise, at any time as may be required by the Department of the Treasury, complete information regarding any act or transaction subject to the provisions of this part, regardless of whether such act or transaction is effected pursuant to a national interest exemption under § 850.502. Except as provided otherwise, the Department of the Treasury may, through any person or agency, conduct investigations, hold hearings, administer oaths, examine witnesses, receive evidence, take depositions, and require by subpoena the attendance and testimony of witnesses and the production of any books, contracts, letters, papers, and other hard copy or electronic documents relating to any matter under investigation, regardless of whether any report has been required or filed under this section.

(b) For purposes of paragraph (a) of this section, the term *document* includes any written, recorded, or graphic matter or other means of preserving thought or expression (including in electronic format), and all tangible things stored in any medium from which information can be processed, transcribed, or obtained directly or indirectly.

(c) Persons providing documents to the Department of the Treasury pursuant to this section must do so in a usable format agreed upon by the Department of the Treasury.

Paul M. Rosen,

Assistant Secretary for Investment Security.

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