Comments of the
Semiconductor Industry Association

On

The Advance Notice of Proposed Rulemaking Entitled
"Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern"

88 Fed. Reg. 54961 (August 14, 2023)
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September 28, 2023

The Semiconductor Industry Association (SIA) submits these comments in response to the request from the Office of Investment Security within the Department of the Treasury ("Treasury") in the above-captioned notice. The Advance Notice of Proposed Rulemaking ("ANPRM") seeks public comment on various topics related to the implementation of the Executive Order 14105 of August 9, 2023, "Addressing United States Investment in Certain National Security Technologies and Products in Countries of Concern" ("the Order"). The Order declared a national emergency using the International Emergency Economic Powers Act to address the threat to the United States posed by the advancement by countries of concern in sensitive technologies and products.

Part I contains some introductory and background comments about SIA and semiconductors. Part II contains general comments about the new program and related requests for Treasury to consider. Part III contains responses to relevant issues for stakeholder comment that are set forth in the ANPRM.

Part I – Introduction and Background

SIA has been the voice of the U.S. semiconductor industry for over 40 years. SIA member companies represent more than 99% of the U.S. semiconductor industry by revenue (and nearly two-thirds of the global semiconductor industry by revenue) and are engaged in the research, design, and manufacture of semiconductors. The U.S. is the global leader in the semiconductor industry, and continued U.S. leadership in semiconductor technology drives economic strength, national security, and global competitiveness. More information about SIA and the semiconductor industry is available at www.semiconductors.org.

SIA has long supported policies that safeguard national security without unduly harming commercial innovation, manufacturing, employment, and continued American

leadership in critical technologies. SIA recognizes that appropriate measures designed to address risks from outbound investment are necessary to fill gaps in existing legal authorities and complement policy tools like export control and inbound investment review. SIA understands that Treasury's intention is to narrowly limit the scope of the program so as to only to prohibit certain transactions that pose a threat to national security and provide notification of others that accelerate the development of sensitive technologies to enhance a country of concern's military, intelligence, surveillance, or cyber-enabled capabilities and negatively impact the strategic position of the United States. By not imposing sector-wide restrictions on U.S. persons' activity, Treasury, and the Biden Administration (the "Administration") recognize that open and rules-based investment is essential to America's economic growth and sustained technological leadership.

In an Annex to the Order, the President identified the People's Republic of China, along with the Special Administrative Region of Hong Kong and the Special Administrative Region of Macau as a "country of concern."[1] The China market is critical for the continued success of U.S. semiconductor firms across the industry ecosystem. It is the single largest market, accounting for more than a third of U.S. chip revenue. Such revenues are vital for research and development that is critical to supporting U.S. innovation and technological leadership. It is also the largest market for the sale of semiconductor manufacturing equipment and plays a critical role in the globally interdependent semiconductor supply chain, comprising around 20% of front-end capacity and nearly 40% of back-end capacity. We hope the final rules allow U.S. chip firms to compete on a level-playing field and access key global markets, including China, to promote the long-term strength of the U.S. semiconductor industry and its ability to out-innovate global competitors, thereby strengthening U.S. national security over the long term.

SIA appreciates the opportunity to provide its comments, questions, and requests.

Part II – General Comments

Comment II.A: We ask Treasury to consider that in several areas the regulations would exceed the current export controls on advanced semiconductor technology and capture items that have a myriad of commercial applications and widespread foreign availability, and do not necessarily align with the proposed "guardrails" provisions in the CHIPS and Science Act (the "CHIPS Act").

[1] The White House, Executive Order on Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern. August 9, 2023. (*Available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2023/08/09/executive-order-on-addressing-united-states-investments-in-certain-national-security-technologies-and-products-in-countries-of-concern/)

In October 2022, the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") imposed unprecedented export controls on the sale of advanced computing and semiconductor manufacturing items to China. These novel and complex controls increased industry uncertainty and have accelerated the "design-out" of U.S.-origin and U.S. company branded content to "de-risk" supply chains. We understand the national security intent behind those regulations and commend the efforts of the Administration to make portions of the rules plurilateral.

However, the ANPRM outlines several potential investment prohibitions pertaining to semiconductors for which there are not corresponding export controls:

- *"Software for Electronic Design Automation: The development or production of electronic design automation software designed to be exclusively used for integrated circuit design.*
- *Advanced Integrated Circuit Fabrication: The fabrication of integrated circuits that meet any of the following criteria: …(iv) integrated circuits manufactured from a gallium-based compound semiconductor; (v) integrated circuits using graphene transistors or carbon nanotubes...*
- *Advanced Integrated Circuit Packaging: The packaging of integrated circuits that support the three-dimensional integration of integrated circuits, using silicon vias or through mold vias.*
    - *"Packaging of integrated circuits" is defined as the assembly of various components, such as the integrated circuit die, lead frames, interconnects, and substrate materials, to form a complete package that safeguards the semiconductor device and provides electrical connections between different parts of the die."*

When the U.S. government identifies a discrete national security concern, restricting the transfer of items with export controls is prudent. Casting a wider net that entangles "enabling" technologies will only accelerate decoupling and "design-outs" in non-sensitive areas, thereby damaging the competitiveness of the U.S. semiconductor industry. For example, BIS, in cooperation with allies who are members of the Wassenaar Arrangement, has already identified specific gallium-based compound semiconductors and electronic design automation ("EDA") software for gate-all-around field effect transistors ("GAAFET") as subject to national security controls. A successful outbound investment screening program should conform to, and should not exceed, these specific multilateral controls (please also see response to Question 29).

Companies in third countries are positioned to simply backfill investment in areas that have questionable linkages to national security:

- In October 2022, a German automotive manufacturer launched a joint venture with a Chinese robotics firm to develop semiconductor-based autonomous

driving systems for the Chinese domestic market.[2]

- In June 2023, a European semiconductor firm announced a joint venture for manufacturing a high-volume 200mm SiC device with a Chinese market leader in compound semiconductors to support rising demand for car electrification.[3]
- Recent reports indicate that one of Germany's largest venture capital firms will invest $700 million into Chinese technology start-ups, apparently capitalizing on political tensions between the U.S. and China.[4]

Moreover, as the U.S. restricts more and more items in the semiconductor supply chain, the incentives to develop foreign alternatives will only grow. Recent history cautions against this policy approach. A BIS survey found that export regulations on satellites directly encouraged non-U.S. organizations to "design-out" or avoid buying U.S.-origin space-related products and services, degrading U.S. leadership in this sector.[5] The continued availability of non-U.S. suppliers also means that U.S. controls will be ineffectual from a national security standpoint.

Furthermore, it is critical that the outbound investment rules are aligned with the CHIPS Act's "guardrails" and recapture rules set forth in the statute. In particular, administrative requirements such as reporting and recordkeeping should be harmonized. This will ensure that the administrative burden on U.S. companies is minimized and prevent unnecessary supply chain disruptions.

Comment II.B: We thank the Administration for trying to align approaches to regulate outbound investment with allies and partners. However, in the absence of parallel regimes, foreign entities can replace U.S. financing and technological expertise as the program is implemented.

In a background press call on the Order, a senior Administration official stated, *"Throughout the [implementation] process, we will continue to coordinate closely with our allies and partners to advance our shared goals and our collective security."*[6] The

[2] Volkswagen to strengthen regional development competence for autonomous driving in China through joint venture between CARIAD and Horizon Robotics. October 13, 2022. (*Available at* https://www.volkswagen-newsroom.com/en/press-releases/volkswagen-to-strengthen-regional-development-competence-for-autonomous-driving-in-china-through-joint-venture-between-cariad-and-horizon-robotics-15248)

[3] STMicroelectronics and Sanan Optoelectronics to advance Silicon carbide ecosystem in China. June 7, 2023. (*Available at* https://newsroom.st.com/media-center/press-item.html/c3186.html)

[4] *Financial Times*. Bertelsmann Investments to plough $700mn into Chinese start-ups. August 5, 2023. (Available at https://www.ft.com/content/3cc57802-a606-4175-9f96-3677ab5a4b7e)

[5] Department of Commerce, Bureau of Industry and Security, U.S. Space Industry "Deep Dive" Assessment: Impact of U.S. Export Controls on the Space Industrial Base. February 2014. (*Available at* https://www.bis.doc.gov/index.php/documents/technology-evaluation/898-space-export-control-report/file)

[6] The White House, Background Press Call by Senior Administration Officials Previewing Executive Order on Addressing U.S. Investments in Certain National Security Technologies and Products in Countries of Concern. August 10, 2023. (*Available at* https://www.whitehouse.gov/briefing-room/press-briefings/2023/08/10/background-press-call-by-senior-administration-officials-previewing-executive-order-

press release accompanying the ANPRM also notes that, "*In developing the ANPRM, the Administration engaged with U.S. allies and partners regarding its important national security goals."*[7] We understand that this is a complex and ongoing diplomatic process; however, key semiconductor-producing countries are either still in the exploratory phase of implementing similar programs or have not publicly indicated they are considering such measures. If these programs are not implemented until after the U.S. mechanism has gone into effect or cover a narrower scope of transactions, U.S. semiconductor companies will lose ground to foreign competitors, while the targeted sectors in countries of concern might not be adversely affected and will continue to have access to sensitive technologies and the "intangible benefits" described in the ANPRM.

SIA has previously submitted comments to BIS regarding the export control systems of countries with significant semiconductor industries.[8] Of these countries, only South Korea and Taiwan have some authority to limit exports of technology for economic security considerations in connection with outbound investments. In Taiwan, the Ministry of Foreign Investment reviews all outbound investments over $50 million on a case-by-case basis, with additional regulations regarding outbound investments in mainland China.[9] In Korea, the Ministry of Trade, Industry and Energy oversees outbound investment screening with a focus on preventing the leakage of items in critical sectors due to frequent incidents of industrial espionage. Crucially, the European Union, France, Germany, Israel, Japan, the Netherlands, Singapore, and the United Kingdom do not have outbound investment screening regimes.

Therefore, the market demand in the country of concern will still exist, however this demand will now be backfilled by foreign companies who are unrestricted from providing advanced technology. As a result, U.S. companies could lose important product demand – demand which generates the manufacturing volume necessary to fill facilities that employ thousands of U.S. workers. This manufacturing volume will be transferred to foreign jurisdictions instead. Already, foreign direct investment flows from the

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on-addressing-u-s-investments-in-certain-national-security-technologies-and-products-in-countries-of-concern/)

[7] Department of the Treasury, Office of Public Affairs, FACT SHEET: President Biden Issues Executive Order Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern; Treasury Department Issues Advance Notice of Proposed Rulemaking to Enhance Transparency and Clarity and Solicit Comments on Scope of New Program. August 9, 2023. **(***Available at https://home.treasury.gov/system/files/206/Outbound-Fact-Sheet.pdf*)

[8] Comments of the Semiconductor Industry Association (SIA) in Response to the Request for Comments about Areas and Priorities for US and EU Export Control Cooperation under the Trade and Technology Council, 86 Fed. Reg. 67904 (Nov. 30, 2021). January 14, 2022. (*Available at* https://www.semiconductors.org/wp-content/uploads/2022/01/Comment-2-of-2-SIA-Response-to-RFI-on-U.S.-EU-Export-Control-Cooperation.pdf)

[9] The Center for Strategic & International Studies, The United States Prepares to Screen Outbound Investment. April 27, 2023. (*Available at* https://www.csis.org/analysis/united-states-prepares-screen-outbound-investment)

European Union into China have caught up to or even surpassed such U.S. investment flows in recent years.[10]

Part III – Issues for Comment

B. U.S. Persons

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

SIA Comment: Having one set of clear standards regarding the definition of "U.S. person" will ensure greater ease in implementing the program. It would also be helpful to have the "U.S. person" definition clarify that it does not cover foreign-owned entities or persons that are already subject to review by the Committee on Foreign Investment in the United States ("CFIUS"). For example, a U.S. entity organized under the laws of the U.S. that is foreign-owned and subject to CFIUS's jurisdiction would not be considered a "U.S. person." Additionally, it is unclear from this definition when a foreign national who is traveling to the U.S. is established as a "U.S. person." Do the requirements in the EO stop applying when they have left the U.S.? Relatedly, SIA is also seeking confirmation on how dual citizens would be included within the definition of "U.S. person."

C. Covered Foreign Person; Person of a Country of Concern

3. Should the Treasury Department further elaborate in any way on the definitions of "covered foreign person" and "person of a country of concern" to enhance clarity or close any loopholes?

SIA Comment: Treasury is considering defining ''covered foreign person'' to mean:

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

This definition of "covered foreign person" leaves considerable ambiguity about the extent of the regulations. Does it include any transaction that establishes individuals as covered foreign persons – such as U.S. persons working towards establishing a joint

[10] Rhodium Group, Big Strides in a Small Yard: The New US Outbound Investment Screening Regime. August 11, 2023. (*Available at* https://rhg.com/research/big-strides-in-a-small-yard-the-new-us-outbound-investment-screening-regime/)

venture with a Chinese citizen residing in the U.S. or a U.S person or third country person with operations in China? See the responses to Questions 6 and 7 for concerns around determining a "covered foreign person." Another potential ambiguity may arise if a U.S. company has a significant subsidiary or branch in China that accounts for more that 50% of the U.S. company's revenue, capital expenditures, or operational expenditures. Is that U.S. company now a "covered foreign person"? This definition would also benefit from clear guidance regarding dual citizens.

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

SIA Comment: Access to Chinese banking information is not readily available, which could lead to inconsistent application and an overly cautious practice of not engaging in certain transactions, even though they fall outside the scope of the program. For publicly traded companies, it may be relatively straightforward to determine whether their subsidiaries or branches meet the criteria described in item (2) of the "covered foreign person" definition; but financial information of closely held companies is not as readily available, meaning that the due diligence required to satisfy the "knows or should know" standard will be much more extensive, and in some circumstances, may not be possible to discern.

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

SIA Comment: As part of the rulemaking process for the Order, the Treasury Department should seek to narrowly target activities that raise specific national security concerns and work in tandem with existing restrictions on the affected industries. A unilateral, rather than multilateral, approach that also overlays regulations could create counterproductive results by ensuring U.S. companies are unable to operate in large markets where their foreign competitors can operate without similar restrictions. This approach will disadvantage U.S. companies and technological leadership over the long term, while the targeted sectors in countries of concern might not be adversely affected.

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

SIA Comment: We believe that Questions 6 and 7 implicate Treasury's proposed "knowledge standard" definition and potentially raise some compliance issue for impacted companies. While we support the harmonization of definitions across related regulatory regimes as detailed in Section J of the ANPRM, we are concerned that the proposed "knowledge standard" would penalize companies who have conducted good faith due diligence based on all relevant information available to them. The very nature of Questions 6 and 7 appear to illustrate the Treasury's awareness of the difficulties of conducting such due diligence.

Setting a financial threshold – whether it be revenue, net income, capital expenditures or operational expenditures – would require data that could be challenging for a U.S. person to obtain and verify when evaluating a potential investment in a possible covered foreign person. To obtain consolidated financial statements (assuming a multi-party entity is even required to consolidate its financial statements in a way that breaks out the separate financial information of a subsidiary or related party), the U.S. person considering the investment would need to obtain the consolidated financial statements of the parent entity. There are many circumstances where a parent entity does not have publicly available financial statements and as a result, is unwilling to share such information. Further, the related entity's (the potential covered foreign person's) financial results may not be broken out in the parent's financial statements. If the two entities are formed in different governing jurisdictions, the accounting rules may be inconsistent such that it would be akin to comparing apples to oranges to determine whether the percentage threshold is met. As noted in our response to Question 7, for these reasons and others referenced throughout the ANPRM, we believe the U.S. person must be able to rely on diligence information provided by the possible covered foreign person, such as representations and warranties.

Additional problems with item (2) of the "covered foreign person" definition arise in practice. For example, the percentages may fluctuate from year to year. If a subsidiary is undertaking a capital-intense project financed by the parent company in one year, the parent's capital expenditures for that year may be largely dedicated to that subsidiary, but this may be an aberration. Moreover, even to the extent that the consolidated revenue, net income, capital expenditures, or operating expenses of a party's subsidiaries are available to a U.S. person, those financial metrics probably will be based on a period in the past (e.g., the prior fiscal year), potentially diminishing the real value of these metrics.

Any threshold for determining a covered foreign person should be measured at the time of the investment (or as of a date prior to the execution of a definitive transaction agreement) –there should not be an ongoing obligation for the investor to confirm whether the threshold is met after the closing of the investment. For example, a U.S. person should not have to assess whether a follow-on transaction is a "covered

transaction" once a U.S. person has already made its initial investment properly under the regulations (e.g., into an entity that was not a "covered foreign person" at the time of the investment or after notifying Treasury of the initial investment if it was a "covered transaction").

7. What analysis or due diligence would a U.S. person anticipate undertaking to ascertain whether they are investing in a covered foreign person? What challenges could arise in this process for the investor and what clarification in the regulations would be helpful? How would U.S. persons anticipate handling instances where they attempt to ascertain needed information but are unable to, or receive information they have doubts about? What contractual or other methods might a U.S. person employ to enhance certainty that a transaction they are undertaking is not a covered transaction?

SIA Comment: We would encourage Treasury to add exemption from liability to the regulations. For example, if (a) a U.S. company conducts reasonable due diligence on a proposed investment target and confirms that it does not meet the definition of a covered foreign person, (b) the target provides contractual representations to the U.S. person confirming that it is not a covered foreign person, and (c) the U.S. person has not identified any publicly available information indicating that the target is a covered foreign person, the U.S. person would not be deemed to be in violation of the regulations if it engages in a transaction that is later determined to be a covered transaction.

At a minimum, the regulations should clarify that, unless a prospective investor knows, or can readily conclude that the investment target is a covered foreign person, a U.S. person (prospective investor) can rely on diligence responses and representations and warranties from the prospective investee that the prospective target is not a covered foreign person. An investor could ask pertinent questions and seek representations and negative covenants from a target regarding such target's status as a covered foreign person or not, but it is difficult if not impossible for an investor to ensure that is the case. Ultimately, the information may only be available to the prospective covered foreign person and the U.S. person will need to be able to rely on that information.

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

SIA Comment: As with past practice, the application of the Order should be prospective. It is not appropriate for the U.S. government to require submission of transaction documents or any other information regarding investments or other transactions signed prior to the issuance of the Order but which close after the issuance of the Order and before adoption of the final regulations. The parties to these transactions could not have foreseen this obligation and therefore, requesting such information does not contribute to "better inform[ing] the development and implementation of the program" covered by the Order and the ANPRM, while increasing costs for U.S. investors.

D. Covered Transactions

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

SIA Comment: The intent of the Order is to identify transactions involving technologies and products that may have negative implications for U.S. national security. Businesses will frequently take minority, non-controlling positions in companies to gain insight into a local market and better understand emerging trends, which in turn, protect their U.S.-based operations and ultimately safeguard national security. Given the intended scope of the EO, we would encourage Treasury to consider establishing a numerical threshold for what constitutes a covered transaction.

It appears a divestment from a joint venture engaged in activities related to a covered national security technology that is structured as a joint venture with a "person of a country of concern" would not be a "covered transaction." Additionally, the text of the Order would seem to carve out divestment from the intended scope of the regulations. However, if a corporate restructuring results in the U.S. person acquiring a minority ownership in a new joint venture with a "person of a country of concern," then it may be a covered transaction and may be prohibited. That would seem contrary to the intent of the Order. Is the intent to force a U.S. person to continue owning a factory manufacturing or assembling a covered national security technology?

Also, what happens if the U.S. person currently has a joint venture with a "person of a country of concern" in a covered national security technology and the U.S. person gradually draws down on its ownership interest? We assume that drawdowns would not require notification to the Treasury Department and request confirmation. If divestment drawdowns are not covered, this could require companies to maintain their status quo business operations in China. We would encourage Treasury to consider excluding divestments entirely, including from the notification requirements, since such actions would normally not be the provisioning of capital and investments into a country of concern but rather the surrender of it.

It is also important that the final program make clear, as suggested in the ANPRM, that the definition of "covered transaction" does not include contractual arrangements for the procurement of material inputs for any of the covered national security technologies or products (such as raw materials).

The proposed definition of "covered transaction" also creates uncertainty and risk for U.S. persons considering investing in start-up and other early-stage companies. It may not be possible to "know" (which the Treasury Department indicates may be defined to include "reason to know") at the time of the investment that such a company will be engaged in identified activities at some point in the future. Perhaps the regulations could borrow from the CFIUS regulations' definition of sensitive personal data and specify that a covered foreign person is a person of a country of concern that is engaged in an identified activity with respect to a covered national security technology or product *or that a U.S. person knows or should know has a demonstrated business objective* to engage in an identified activity with respect to a covered national security technology or product. This could help shield a U.S. person from liability who invests in a Chinese company or non-Chinese subsidiary of a Chinese company that several years later begins to engage in an identified activity. The final regulations could include examples of when a company has a demonstrated business objective. As proposed, the definition of covered foreign person does not differentiate between a company whose primary business is engaging in an identified activity and a company that engages in many different types of activities, whose activities related to a covered national security technology or product constitute only a small percentage of the company's activities. The final regulation should except from the definition a company whose "identified activities" constitute only a small percentage of the company's business.

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

SIA Comment: There should be parity treatment among different types of debt financing (i.e., convertible debt vs. bank lending or other financial debt). Treasury should consider the challenges and disparities created by including convertible debt as a covered transaction while excluding bank debt. Limiting the definition to convertible debt would create disparate treatment for similar activities and provide favorable treatment to commercial and other private lenders at the expense of equity investors and other large corporations that do business in China.

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

SIA Comment: With respect to any follow-on transaction in a venture capital fundraising, whether the initial financing transaction closed prior to issuance of the EO, after

issuance of the EO but before finalization of the regulations or after finalization of the regulations, we do not believe that a follow-on investment transaction should require notification if a U.S. person is only purchasing up to its pro rata share of the offering (and thereby not increasing its fully-diluted percentage ownership in the covered foreign person), unless the company has materially changed its business in a way that would result in the follow-on transaction being prohibited under the regulations. As further discussed below, capital investments to maintain operations should not be covered as follow-on investment.

If the Treasury Department decides to cover follow-on transactions, it is crucial that it provides a clear definition of "follow-on transactions" to assist companies in determining what activities would be in scope. For example, if there was an existing joint venture between a U.S. person and a "covered foreign person," what types of "follow-on transactions" would trigger the requirements for reporting or notification? We recommend that deploying additional capital in a "follow-on transaction" to maintain operations should not be covered.

15. How could prongs (3) and (4) of the "covered transaction" definition under consideration be clarified in rulemaking such that a U.S. person can ascertain whether a greenfield or joint venture investment "could result" in the establishment of a covered foreign person? What are the impacts and consequences if a knowledge standard, actual or constructive, is used as part of these prongs? What are the impacts and consequences if a foreseeability standard is used as part of these prongs? (For more information on the knowledge standard under consideration, see subsection J below.)

SIA Comment: The proposed knowledge standard uses the Export Administration Regulations ("EAR") definition, where "knowledge" includes "high probability of [a covered activity's] existence or future occurrence." This foreseeability standard would be particularly challenging if applied to prongs (3) and (4) of the "covered transaction" definitions under consideration in this program. In both greenfield investment and early-stage joint ventures, there is a high degree of uncertainty for future plans and technological development. Therefore, the foreseeability standard could have a chilling effect and prevent investments that are not intended to be covered by this program.

If Treasury decides to adopt the EAR definition, U.S. persons would be subject to penalties for material misstatements. Therefore, it would be critical to offer "Know Your Customer Guidance" to industry (like BIS).[11] This would provide more certainty with regards to what constitutes reasonable due diligence.

16. Please specify whether and how any of the following could fall within the considered definition of "covered transaction" such that additional clarity would

[11] Department of Commerce, Bureau of Industry and Security, Know Your Customer Guidance. 2020. (*Available at* https://www.bis.doc.gov/index.php/all-articles/23-compliance-a-training/47-know-your-customer-guidance)

be beneficial given the policy intent of this program is not to implicate these activities unless undertaken as part of an effort to evade these rules:

- **University-to-university research collaborations;**
- **Contractual arrangements or the procurement of material inputs for any of the covered national security technologies or products;**
- **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; and**
- **Equity research or analysis.**

SIA Comment: We agree that these activities should not fall within the definition of "covered transaction" because they do not further the policy intent of the Order. Additionally, ANPRM excludes university-to-university collaborations but does not speak to *company-to-university* collaborations. We believe this should similarly be excluded from the scope of the regulations. The list of activities that the notice states are not "covered transactions" should also include the sale of intellectual property. References in the ANPRM should be changed to read "intellectual property licensing *and sale* activities." The rationale for excluding IP licensing activities (ensuring that U.S. companies are compensated when foreign parties utilize their patented technologies) also applies for IP sales, and the regulations should clarify this point.

E. Excepted Transactions

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

SIA Comment: Given that companies are expected to bear the burden of determining whether a transaction is prohibited, notifiable, or permissible without notification, it is important that the category of "excepted transactions" be as clear and comprehensive as possible. These exclusions are essential to ensuring that the Order does not unintentionally impair U.S. national security by prohibiting or requiring notification for transactions that benefit U.S. innovation and advance U.S. national security interests.

It is our understanding based on the ANPRM and statements from U.S. government officials that "an intracompany transfer of funds from a U.S. parent company to a subsidiary located in a country of concern" is considered an "excepted transaction" for which the restrictions would not apply. This is a necessary exception category, and it is critical that this remains as part of any final program, including that the definition of a covered transaction would not apply to most routine intracompany actions such as the sale or purchase of inventory or fixed assets, the provision of paid services, the licensing of technology, or the provision of loans, guarantees, or other obligations. We recommend that the phrase "subsidiary located in a country of concern" be amended to

a "subsidiary that is a 'covered foreign person'" because not all "covered foreign persons" are necessarily located in a country of concern."

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

SIA Comment: It appears the definition would limit certain financial transactions for foreign subsidiaries, especially if the country of concern has rules or requirements on local management of these subsidiaries (e.g., a requirement to have one country national be a director). It is important that the final program be clear and not include ambiguous rules.

As discussed above, investors from third countries are likely to backfill prohibited U.S. investment.

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

SIA Comment: Ongoing support of existing U.S. subsidiaries in a country of concern must be excepted transactions to ensure business continuity. Therefore, the exception for intracompany transfer of funds should expressly encompass capital expenditures for equipment ramp-up and tool upgrades for existing semiconductor facilities. Any definition or exception for "routine intracompany transactions" should include any transaction needed for the ongoing operation of an existing U.S. subsidiary in a country of concern, including but not limited to equipment and tool maintenance or upgrades (that do not result in the business activities being expanded into prohibited activities). This clarity will help achieve the objective of item 3 to "avoid unintended interference with the ongoing operation of a U.S. subsidiary in a country of concern."

As currently drafted, the definition of "excepted transactions" does not include any *de minimis* threshold for investments by a venture capital fund, private equity fund, fund of funds or other pooled investment fund in a covered foreign person. Under prong 1a(iii), the *de minimis* exception is only being considered for the fund's investment that a U.S. "limited partner" investor makes into one of those investing vehicles. We believe an additional subsection (iv) should be added to Section 1a for investments by a U.S. venture capital fund, private equity fund, fund of funds, corporate venture capital, or other pooled investment fund in a covered foreign person that are below certain thresholds. In our view, both a dollar threshold of at least $25 million and a minimum percentage ownership test should be added to exclude out smaller investments and/or investments that result in a small ownership stake in a covered foreign person. Note that as drafted, the definition would *not* exclude very small investments where a board

seat or other involvement in substantive decision making is granted to the investor, which supports our assertion that there should be a broader *de minimis* threshold.

We also believe that the phrase "or observer rights" should be removed from the language in Section 1b that provides a list of items beyond minority shareholder rights that would take an investment out of the realm of an "excepted transaction." A board observer position does not give an investor any "control" rights, such as voting or otherwise. Permitting U.S. persons to have a board observer at a covered foreign person enables U.S. persons to better track company activities and gain insights into new technologies, which benefits the U.S. person and by extension U.S. industry and U.S. national security. Further, we would recommend clarifying that this restriction only applies prospectively, so as not to disrupt preexisting arrangements in which board seats or board observer rights were procured as part of initially establishing a relationship.

22. The Treasury Department is considering the appropriate scope of item 1.a.iii of "excepted transaction," which carves out from program coverage certain transactions by U.S. persons made as a limited partner where the investment is below a *de minimis* threshold. The goal of the qualifier in item 1.a.iii.B is to exclude from the "excepted transaction" carveout those transactions in excess of a set threshold, which would be set at a high level, where there is a greater likelihood of additional benefits being conveyed, and the U.S. limited partner knows or should have known that the venture capital fund, private equity fund, fund of funds, or other pooled investment fund into which the U.S. person is investing as a limited partner, itself invests in one or more covered foreign persons. The Treasury Department is considering defining such a threshold with respect to one or more factors such as the size of the U.S. limited partner's transaction, and/or the total assets under management of the U.S. limited partner. The concern is the enhanced standing and prominence that may be associated with the size of the transaction or the investor, and increased likelihood of the conveyance of intangible benefits to the covered foreign person. What are the considerations as to the impact of this potential limitation on U.S. investors, and in particular, categories of U.S. investors that may invest in this manner as limited partners? If the Treasury Department includes a threshold based on the size of the U.S. limited partner's investment in the fund, what should this threshold be, and why? If the Treasury Department includes a threshold based on assets under management, what should this threshold be, and why? What are the costs and benefits to either of these approaches? What other approaches should the Treasury Department consider in creating a threshold, above which the "excepted transaction" exception would not apply—for example, what would be the considerations if the threshold size was with respect to the limited partner's investment as a percentage of the fund's total capital?

SIA Comment: As drafted, the definition of "excepted transactions" does not address the corporate venture capital (CVC) structure that many corporations use. The commentary

describes the rationale for setting a *de minimis* threshold as, "the U.S. limited partner knows or should have known that the venture capital fund, private equity fund, fund of funds, or other pooled investment fund into which the U.S. person is investing … invests in one or more covered foreign persons". That language calls into question the size of the investment that a parent entity can make in a subsidiary that uses a portion of the funds to invest in a covered foreign person. Parent corporations of CVCs and their contributions to subsidiaries or an affiliate should be addressed by the rules to avoid confusion and inadvertent violation. Since a *de minimis* threshold is being considered (note that such *de minimis* threshold is different from the threshold discussed in response to Question 21 above), the parent entity could then specify in its resolutions that the amount to be invested by a subsidiary in a country of concern would not exceed the *de minimis* limits, which the ANRPM specifically states is intended to be a high number. Whether the *de minimis* limit is a percentage of the total amount invested each year or some other metric, it should be a high number so as not to inadvertently freeze U.S. CVC's investments in a country of concern that do not run afoul of the broader rules.

In addition, adding a *de minimis* requirement to the limited partner exception seems unnecessary; if the investment has all the other indicia of being a passive investment, it doesn't automatically cease to be a passive investment simply because it exceeds an arbitrary *de minimis* threshold. The focus should be on whether the investment is truly passive in nature; if so, it should qualify for the exception.

24. With respect to item 3. of "excepted transaction," regarding intracompany transfers of funds from a U.S. parent company to a subsidiary located in a country of concern, the Treasury Department is interested in understanding how frequently such intracompany transfers would meet the definition of a "covered transaction." What would be the impact if the exception were applicable only to relevant subsidiaries that were established as a subsidiary of the U.S. parent before the date of the Order versus also including subsidiaries established at any time in the future? Note that an exception for intracompany transfers from the parent company would not change the status of the subsidiary as a covered foreign person for purposes of receiving investments from other U.S. persons.

SIA Comment: Companies will frequently engage in legal entity restructuring for a variety of legal or tax reasons, even if the underlying activities taking place in the country do not change. As a result, we would encourage Treasury not to limit "excepted transactions" to the grandfathering of historical operations (i.e., subsidiaries created prior to the date of the Order) and also extend this exception to subsidiaries established at any time in the future.

G. Covered National Security Technology or Product: Semiconductors and Microelectronics

27. Please identify any areas within this category where investments by U.S. persons in countries of concern may provide a strategic benefit to the United

States, such that continuing such investment would benefit, and not impair, U.S. national security. Please also identify any key factors that affect the size of these benefits (*e.g.,* do these benefits differ in size depending on the application of the technology or product at issue?). Please be specific and where possible, provide supporting material, including empirical data, findings, and analysis in reports or studies by established organizations or research institutions and indicate material that is business confidential per the instructions at the beginning of this ANPRM.

SIA Comment: Historically, U.S. companies have not entered into investment transactions with Chinese entities unless they derive a benefit that outweighed the value of their contribution to the Chinese entity. In general, they do not enter into such investments purely for a financial return, but because they were able to gain access to technology or developments that benefitted their business as a whole.

28. What modifications, if any, should be made to the definitions under consideration to enhance clarity or close any loopholes? Please provide supporting rationale(s) and data, as applicable, for any such proposed modification.

SIA Comment**:** We suggest amending the definition of Integrated Circuit Manufacturing Equipment to cover only advanced manufacturing equipment, but not legacy equipment that utilizes low-level, readily available technology that can be widely copied and therefore does not pose national security risk. Excluding such legacy equipment, which is already widely employed in China, would provide major economic benefits to U.S. and other third country companies without raising national security concerns. For example, Treasury could consider amending the definition of Manufacturing Equipment to be harmonized with the existing Commerce Control List.

29. With respect to the definition of "Electronic Design Automation Software," would incorporation of a definition, including one found in the EAR, be beneficial? If so, how? Practically speaking, how would a focus on software for the design of particular integrated circuits—*e.g.,* fin field-effect transistors (FinFET) or gate-all-around field effect transistors (GAAFET)—be beneficial? If so, how could such a focus be incorporated into the definition?

SIA Comment**:** As Treasury Department has recognized in Section J of the ANPRM, we believe that harmonization of definitions, especially those definitions of a technical nature, should align with the definitions outlined in the EAR. We believe that such an action would be consistent with the requirements of Executive Order 13563 which states:

> *"Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules. In developing regulatory actions and identifying appropriate approaches, each*

> *agency shall attempt to promote such coordination, simplification, and harmonization."*[12]

Indeed, the regulatory scope of the proposed outbound investment rules would cover many different industries – information technology, manufacturing R&D, and finance – each with their own regulatory domain knowledge and expertise. Consistent with Executive Order 13563, we believe Treasury should harmonize definitions with the EAR where possible. There are many compliance professionals with deep domain expertise in the EAR and its technical definitions. Coordination between the outbound investment rules and the EAR's technical descriptions and definitions would aid the compliance efforts of industry.

When proposing a definition for EDA the Treasury Department must consider two aspects:

> (1) EDA software tools are not a single software package used by design engineers throughout the design cycle of electronic components. Rather, there are numerous specialized EDA products to address each specific step in capturing, analyzing, and verifying designs of electronic devices. For example, EDA Printed Circuit Board (PCB) tools are used for the development of PCB designs, which is the board that holds the integrated circuits and electronic components; EDA packaging tools are for the development of the Integrated Circuit (IC) package designs, which is the "wrapper" or "layer" that allows the IC to be put on the PCB; EDA IC tools are for the development of IC designs, which is the semiconductor die incorporating logic designed to function in a specific manner. It is this last category of EDA tools – those which are used for the design of semiconductor devices (integrated circuits, or "ICs") - that appear to be the focus in the EO and ANPRM. Given the multifaceted nature of EDA tools, the proposed definition in the ANPRM could lead to confusion regarding the scope of EDA tools that is captured in the proposed notification or prohibition requirements. The definition of EDA should clearly focus only on software that is specially designed for EDA IC tools. Without appropriate language identifying functionality, a generic definition threatens to capture sections of the EDA industry that are not intended to be within the scope of the EO and ANPRM.

> (2) The stated policy intent of the new controls is to prohibit U.S. investments which enable countries of concern to further their military, intelligence, surveillance, and cyber-enabled capabilities. It is our understanding that the intent of the new controls is *not* to harm U.S. EDA companies from legitimate exports of EDA software to the People's Republic of China. Without market

[12] The White House, Executive Order on Improving Regulation and Regulatory Review. January 18, 2011. (*Available at* https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review)

access, indigenous competitors to U.S. EDA providers will be able to backfill demand.

Taking these two aspects into consideration, we believe that controls should be focused on transactions that involve investments in source code or technology that is necessary for the development or production of electronic design automation software. The developer's source code is editable code which a programmer can modify. For this reason, source code is frequently regarded as a "crown jewel" of an EDA software company, as opposed to the corresponding object code, which is widely distributed. Moreover, the EDA definition should be multilateral and consistent with the Commerce Department, Bureau of Industry and Security's (BIS) implementation as adopted by the Wassenaar Arrangement (WA) in its dual-use list. The WA currently controls EDA software under its item 3D6, which focuses on GAAFET, and BIS has adopted parallel control under its Export Control Classification Number (ECCN) 3D006. Multilateral controls are more effective than unilateral controls and consistency between outbound investment and export controls gives industry certainty in planning. Therefore, we believe that controls should only focus on transactions involving source code for EDA IC tools consistent with ECCN 3D006 and aligned multilaterally.

32. In what ways could the definition of "Supercomputer" be clarified? Are there any alternative ways to focus this definition on a threshold of computing power without using the volume metric, such that it would distinguish supercomputers from data centers, including how to distinguish between low latency high-performance computers and large datacenters with disparate computing clusters? Are there any other activities relevant to such supercomputers other than the installation or sale of systems that should be captured?

SIA Comment: While we believe that harmonization with the EAR is critical to ensure understanding and compliance with the proposed outbound investment regulations, we believe that the cubic or square footage definition of a Supercomputer (see below) in the EAR[13] is not an effective technical parameter to use because it can be circumvented by simply adding additional racks in the supercomputer cluster with fewer nodes.

"Supercomputer. (734, 744) A computing "system" having a collective maximum theoretical compute capacity of 100 or more double-precision (64-bit) petaflops or 200 or more single-precision (32-bit) petaflops within a 41,600 ft3 or smaller envelope.

Note 1 to "Supercomputer": The 41,600 ft3 envelope corresponds, for example, to a 4x4x6.5ft rack size and therefore 6,400 ft2of floor space. The envelope may include empty floor space between racks as well as adjacent floors for multi-floor systems.

[13] Department of Commerce, Bureau of Industry and Security, Export Administration Regulations (EAR) § 772.1. (*Available at* https://www.ecfr.gov/current/title-15/subtitle-B/chapter-VII/subchapter-C/part-772/section-772.1)

> *Note 2 to "Supercomputer": Typically, a 'supercomputer' is a high-performance multi-rack system having thousands of closely coupled compute cores connected in parallel with networking technology and having a high peak power capacity requiring cooling elements. They are used for computationally intensive tasks including scientific and engineering work. Supercomputers may include shared memory, distributed memory, or a combination of both."*

Relying on the supercomputer definition in the EAR will complicate implementation of the regulations.

H. Covered National Security Technology or Product: Quantum Information Technologies

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

SIA Comment**:** Expanding the scope of this language from "exclusively" to "primarily" could be problematic and could end up inadvertently sweeping in dual-use products. With many such products it may be difficult, if not impossible, to determine what the "primary" use is intended to be.

I. Covered National Security Technology and Product: AI Systems

44. With respect to AI systems designed to be used for specific end uses, what are the impacts or consequences of including the following end uses:

- **Military;**
- **Government intelligence;**
- **Mass-surveillance;**
- **Cybersecurity applications;**
- **Digital forensics tools;**
- **Penetration testing tools;**
- **Control of robotic systems;**
- **Surreptitious listening devices that can intercept live conversations without the consent of the parties involved;**
- **Non-cooperative location tracking (including IMSI catchers and automatic license plate readers); or**
- **Facial recognition?**

Should any of these items be clarified? Are there other end uses that should be considered?

SIA Comment: With respect to the list of end uses for which an "AI system" would require notification, we believe the qualifier "with dual-use application" should be incorporated. For example, an AI system with "digital forensic tools" as an end use,

without the addition of "dual-use application", could be covered by the definition even if it were only capable of being used for civilian, non-military purposes. Likewise, there are many "robotic systems" that are used for non-military purposes (e.g., cleaning, factory automation, assembly). It does not appear that the regulations were intended to require notification of investments in all those companies. Without the concept of "dual-use application" in defining the range of end-use applications in AI systems, the notification requirements could become overly extensive and inadvertently encompass various companies that only develop technologies for civilian use.

45. To make sure the development of the software that incorporates an AI system is sufficiently tied to the end use, two primary alternatives are under consideration: "designed to be exclusively used" and "designed to be primarily used." What are the considerations regarding each approach? Is there another approach that should be considered?

SIA Comment: We believe that the most narrow and targeted definition of end use should apply. Therefore, "designed to be exclusively used" would be the appropriate language when coupled with a clear and specific end use description. We would ultimately prefer the "exclusively used" qualifier, as this would create a more realistic and narrow scope.

47. What analysis or considerations would a U.S. person anticipate undertaking to ascertain whether investments in this category are covered? In what manner would the investor approach this via due diligence with the target? What challenges could arise in this process for the investor and what clarification in the regulations would be helpful? How would U.S. persons anticipate handling instances where they attempt to ascertain the information but are unable to, or receive information they have doubts about?

SIA Comment: The answer overlaps with Question 7 – as in any venture capital investment, the investor would need to rely on company diligence replies, sales representations, warranties, and negative covenants beyond its own review/diligence to assure itself that the investee is or isn't a covered foreign person. The reality is that these regulations will have a chilling effect much wider than its intended scope, to the detriment of U.S. companies. Most investors and investees will avoid pursuing a deal when in doubt as to whether it falls within the scope of a prohibited activity as the prospect of penalties and even divestiture is unpalatable. Furthermore, the leading start-ups in China have many financing options and can look to other non-U.S. investors for their funding, resulting in the U.S. being cut out of industry developments and revenue streams. As it is already quite competitive as a U.S. investor to be accepted to participate in a "hot" Chinese start-up, these regulations will only further complicate the situation without a discernible benefit to U.S. national security.

One suggestion is for Treasury to open a consultation hotline (or a similar web-based consultation forum), as the SEC does with respect to certain SEC filings that are fact-specific. The SEC consultation line permits public filers or their counsel to call on an

anonymous basis to determine whether a particular fact pattern requires a filing, and those fact patterns are later reflected in the FAQs the SEC publishes on its website. While the results of those phone calls are non-binding, they usually provide helpful direction to would-be filers.

48. What, if any, additional considerations not discussed in section III.I should the Treasury Department be aware of in considering a prohibition and notification framework as it relates to AI systems? What if any alternate frameworks should the Treasury Department consider, and why?

SIA Comment: Because "AI systems" is a broad area of technology – and as reflected in the proposed rules – being very specific about the end uses subject to prohibition and notification is critical to keeping the rules as narrow as possible and meeting the Administration's objectives. The broader and less definitive these definitions are, the more extensive will be the chilling effect on a U.S. person's opportunity to invest in cutting-edge technologies in a country of concern.

J. Knowledge Standard

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

SIA Comment: Please see response to Question 15.

50. Is this due diligence already being done by U.S. persons in connection with transactions that would be covered transactions— *e.g.,* for other regulatory purposes, prudential purposes, or otherwise? If so, please explain. What, if any, third-party services are used to perform due diligence as it relates to transactions involving the country of concern or more generally?

SIA Comment: As a part of a prudent investment strategy that aligns with corporate responsibility, companies undertake significant due diligence reviews to ensure covered transactions meet internal standards. Specifically, many companies conduct: (A) business, finance, and technology related diligence (typically in-house) to determine the viability of an investment; (B) legal diligence, in most cases, via a combination of internal legal and external law firm efforts; and (C) on geopolitical, military-related, and other sensitive considerations, background diligence on founders, co-investors and the prospective investee using a third-party U.S. investigative firm.

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

SIA Comment: The addition of due diligence to determine compliance with the regulations would surely increase due diligence costs and the time expended to conduct such diligence and would likely include an increased use of third-party service providers

such as consultants, accountants, and investigative firms. In addition to increased financial cost and time, companies investing would also suffer the myriad intangible costs of losing out on investment opportunities to local Chinese investors and other non-U.S. investors due to (i) transactions that are prohibited under the new regulations; (ii) concerns from Chinese investee entities and/or non-U.S. co-investors that a transaction may be at risk under the new regulations; and (iii) the chilling effect of complying with and potentially being penalized under the new regulations.

K. Notification Requirements; Form, Content, and Timing

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

> *"(i) The identity of the person(s) engaged in the transaction and nationality (for individuals) or place of incorporation or other legal organization (for entities)"*

SIA Comment: It is important to clarify that the filing person is only required to report as to itself and the investment target (not as to all persons involved in the transaction, such as co-investors in a preferred stock financing round, who should be responsible for their own reporting). Further, U.S. persons who are owners of the U.S. investor should not need to report.

> *"(ii) basic business information about the parties to the transaction, including name, location(s), business identifiers, key personnel, and beneficial ownership"*

SIA Comment: There needs to be clarification around what is intended by requesting "a business identifier. Providing a NAICS code could be one such sufficient identifier. It is also important to clarify that the filing U.S. person is only required to report information as to itself and the covered foreign person (not co-investors and other parties to transaction which should be responsible for their own reporting). What is the benefit of reporting "key personnel" and how is that defined? "Beneficial ownership" of the covered foreign person may not be obtainable by the U.S. person. In some cases, not even the covered foreign person will know who all its "beneficial owners" are. If the U.S. person has determined it is required to notify Treasury under the regulations, what is the benefit to the U.S. government of ascertaining all beneficial owners – no matter the percentage ownership- in the covered foreign person? At a minimum, there should be a reasonable minimum threshold for ownership – such as 5%.

> *"(vi) additional transaction information including transaction documents, any agreements or options to undertake future transactions, partnership agreements, integration agreements, or other side agreements relating to the transaction with the covered foreign person and a description of rights or other involvement afforded to the U.S. person(s)"*

SIA Comment: Rather than propose that parties produce all transaction documents, if there are certain terms that the government is interested in, those should be delineated and can be described in the notice form. Moreover, many of the terms in the list of requested documents are confidential, and a requirement to provide such documents would disadvantage U.S. investors against investors from third countries.

> *"(vii) additional detailed information about the covered foreign person, which could include products, services, research and development, business plans, and commercial and government relationships with a country of concern;"*

SIA Comment: The covered foreign person may have great concern about providing detailed information on R&D and business plans, considering their proprietary and commercial nature. Additionally, the U.S. person would need to rely on the company's representations without an independent means to validate this information. We recommend that the information provided should be of a "general" nature, focusing on publicly accessible or non-confidential information about the products, services, and business activities of the covered foreign entity.

> *"(viii) a description of due diligence conducted regarding the investment;"*

SIA Comment: This is vague and would be difficult to describe in a meaningful way.

> *"(x) additional details and information about the U.S. person, such as its primary business activities and plans for growth."*

SIA Comment: The requirement to provide the "plans for growth" of the U.S. person goes beyond the stated scope of the program and is information that is highly speculative and subject to change.

57. Should the Treasury Department require prior notification of a covered transaction (i.e., pre-closing) or permit post-closing notification within a specified period, such as 30 days? What are the anticipated consequences and impacts of these alternatives? Should the notification period be shorter or longer, and why?

SIA Comment: Given that this is only a notification requirement, post-closing notification is more appropriate. Requiring pre-closing notification is unnecessary and would further disadvantage U.S. investors against investors from third countries, particularly given coverage of some entities outside of China. For an investment that may fall under the category of either notifiable transaction or prohibited transaction, Treasury may consider giving the discretion to the investor, allowing the investor to determine whether to make notification before closing or within 30 days of closing.

If a transaction is otherwise subject to disclosure (e.g., pursuant to an 8-K filing), the timing of notification should align with the public disclosure rules. It is important that the notification to Treasury not result in the inadvertent disclosure of a transaction that otherwise is not yet subject to a public disclosure requirement.

59. How should the Treasury Department address the scenario where a transaction for which notification was provided was actually a prohibited transaction? How should the Treasury Department consider options such as ordering divestment and/or the issuance of civil monetary penalties?

SIA Comment: If a U.S. person incorrectly determines that an investment is a notifiable transaction, but it turns out in actuality to be a prohibited transaction, it is important that the U.S. person is afforded due process before any divestment is ordered. Additionally, unless Treasury establishes a procedure for requesting and receiving a determination letter in advance, it may be not always be clear whether a particular transaction is prohibited or merely requires notification. If the U.S. person's determination that the investment was a notifiable transaction was made in good faith, then no civil penalties should be imposed.

61. Would U.S. persons ordinarily rely on legal counsel to assemble and submit the required information for notification? What factors might inform parties' decision as to whether to engage legal counsel?

SIA Comment: Having to engage counsel for every notifiable or potentially prohibited transaction may result in increasing the costs associated with a transaction, and in some cases, may reduce or eliminate the business justification for making the investment in the first place.

L. Knowingly Directing Transactions

62. What modifications, if any, should be made to the proposed definition of "knowingly directing" to enhance clarity or close any loopholes?

SIA Comment**:** Treasury is considering defining "directing" to mean that a U.S. person "orders, decides, approves, or otherwise causes to be performed a transaction that would be prohibited under these regulations if engaged in by a U.S. person." We suggest that "directing" be defined to mean only "ordering or approving a transaction or deciding that another party will undertake a transaction." The term "otherwise causes to be performed" a transaction may create ambiguity and could inadvertently sweep in purely administrative or clerical activities that relate to a transaction. We recommend that Treasury follow the approach taken by the Commerce Department in FAQs issued for the advanced computing and semiconductor manufacturing equipment rule.[14] In Section IV.A2, the Commerce Department confirmed that the prohibitions in the relevant rule do not extend to:

[14] Department of Commerce, Bureau of Industry and Security, FAQs for Interim Final Rule - Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification. October 28, 2022. (*Available at* https://www.bis.doc.gov/index.php/documents/product-guidance/3181-2022-10-28-bis-faqs-advanced-computing-and-semiconductor-manufacturing-items-rule-2/file)

> *"U.S. persons conducting administrative or clerical activities (e.g., arranging for shipment or preparing financial documents) or otherwise implementing a decision to approve a restricted shipment transmittal, or in-country transfer, or "development" or "production" activities that are not directly related to the provision of specific items to or servicing of specific items."*

If Treasury does not follow this approach, the "directing" prohibition would become more like a facilitation prohibition. Without clarification, U.S. citizen employees of non-U.S. companies could be at risk of violating the regulations if they implement their employer's plans (which they did not approve or order) to make certain investments in China.

Similarly, SIA strongly encourages Treasury to explicitly exclude "Scenario 6" from this prohibition, ensuring that the following circumstance would not constitute "knowingly directing" by a U.S. person:

> *"A U.S. person serves on the management committee at a foreign fund, which makes an investment into a person of a country of concern that would be a prohibited transaction if performed by a U.S. person. While the management committee reviews and approves all investments made by the fund, the U.S. person has recused themselves from the particular investment."*

N. National Interest Exemption

69. What would be the consequences and impacts of allowing for exemptions for certain transactions that ordinarily would be prohibited? What, if any, additional or alternate criteria should be enumerated for an exemption?

SIA Comment: SIA is supportive of the national interest exemption outlined in this section. It is important that Treasury establish a process to accommodate unforeseen and extenuating circumstances, as well as situations where U.S. investments would allow for U.S. entities to retain or establish leverage or control and retain visibility into the operation of a covered foreign person.

The exemption process considered by Treasury would benefit from a few revisions. First, the national interest exemption should follow clear timelines by which an entity would provide the required information, by which Treasury would need to request supplementary information, and by which Treasury would be required to decide. The exemption process should also outline an appeals process and timeline.

P. Penalties

73. How, if at all, should penalties and other enforcement mechanisms (such as ordering the divestment of a prohibited transaction) be tailored to the size, type, or sophistication of the U.S. person or to the nature of the violation?

SIA Comment: As stated in the response to Question 59, if the U.S. person's determination that the investment was a notifiable transaction was made in good faith, then no civil penalties should be imposed.

* * *

Thank you for the opportunity to provide these comments and we look forward to continued engagement with Treasury during the rulemaking process.