



September 28, 2023

VIA ELECTRONIC SUBMISSION

Meena R. Sharma
Acting Director
Office of Investment Security Policy
U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20008

Docket ID TREAS-DO-2023-0009
RIN 1505-AC82

Re: Advance Notice of Proposed Rulemaking on Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern

Dear Ms. Sharma:

The American Investment Council (“AIC”)¹ appreciates the opportunity to submit comments to the U.S. Department of the Treasury (“Treasury”) regarding its advance notice of proposed rulemaking (“ANPRM”) to establish a framework to restrict certain U.S. outbound investments in critical Chinese technologies (“U.S. Outbound Investment Program”).² AIC also appreciates Treasury’s efforts to engage with stakeholders and solicit input on the development and implementation of the Executive Order (“Order”) signed by President Biden on August 9, 2023.³

¹ AIC is an advocacy, communications, and research organization established to advance access to capital, job creation, retirement security, innovation, and economic growth by promoting responsible long-term investment. In this effort, AIC develops, analyzes, and distributes information about the private equity and private credit industries and their contributions to the U.S. and global economy. Established in 2007, and formerly known as the Private Equity Growth Capital Council, AIC is based in Washington, D.C. AIC’s members are the world’s leading private equity and private credit firms, united by their commitment to growing and strengthening the businesses in which they invest. For further information about AIC and its members, please visit our website at <http://www.investmentcouncil.org>.

² Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 88 Fed. Reg. 54,961 (Aug. 14, 2023).

³ Exec. No. 14105, 3 CFR 54867 (2023), available at <https://home.treasury.gov/system/files/206/Executive%20Order%2014105%20August%209%2C%202023.pdf>.

AIC supports Treasury’s attention to national security concerns while simultaneously seeking to maintain the long-standing “commitment of the United States to open investment” and global capital flows, which, as both the Order and Treasury’s ANPRM recognize, create “valuable economic opportunities and promote competitiveness, innovation, and productivity.” AIC urges Treasury, as it builds out and establishes the U.S. Outbound Investment Program, to continue to bear in mind and appropriately balance these twin objectives.

We also urge Treasury to consider the following important principles in its implementation of the Order. AIC believes that, by doing so, Treasury can simultaneously promote the objectives of the Order and ensure that U.S. persons have clear standards that facilitate compliance with the proposed program.

- **Fairness and Parity**

Treasury has stated that the U.S. Outbound Investment Program is intended to be a “narrowly targeted action” that will complement and close gaps in existing controls, such as the Chinese Military-Industrial Complex Company (“CMIC”) sanctions regime, which restricts public investment activities. Given that objective, AIC encourages Treasury to provide parity, wherever possible, between the public and private capital regime. Treasury should consider using the CMIC framework as a guideline when promulgating regulations with respect to private capital, including a nuanced approach for equal treatment of private capital. In particular, the focus should be on the recipient of U.S. capital and not the form that the investment takes.

The importance of creating a level playing field is highlighted by the fact that only a relatively small portion of funds invested in China from the United States come from U.S. private equity investors. In fact, reported data suggests that, from 2018 to 2023, only 2% of U.S. investments in China – which totaled \$4.9 trillion – were from U.S. private equity investors.⁴ Moreover, many of the “intangible benefits” associated with U.S. investments, as to which Treasury expresses concern in the ANPRM, arise equally in both public and private investments.

- **Clarity**

AIC believes that it is vital to ensure that the U.S. Outbound Investment Program contains clear requirements to minimize burdens and facilitate compliance. In many places, Treasury’s ANPRM contains ambiguous standards and requirements (such as considering “covered transactions” to include those that “*could* result in the establishment of a covered foreign

⁴ PitchBook, Companies and Deals Charts, accessed on Sept. 26, 2023.

person”). To this end, and as examples, AIC respectfully requests that Treasury clarify (1) the knowledge standard; (2) the definition of covered foreign persons; (3) the exemption for limited partner investments; and (4) the notice requirements.

○ **Knowledge Standard.** AIC supports Treasury’s suggestion that a U.S. person’s obligations would be conditioned on the person’s knowledge of relevant circumstances, and AIC believes that unknowing violations should not result in adverse consequences. AIC also urges Treasury to limit the knowledge standard to “actual knowledge” – the “constructive knowledge”/“should have known” standard that Treasury also suggests could be applied is overly vague and creates opportunities for second-guessing and hindsight bias. Further, AIC respectfully requests that, to the extent that Treasury believes certain diligence steps would be prudent, it consider spelling out what diligence U.S. persons should undertake. AIC also believes U.S. persons should be permitted to obtain and rely on contractual representations from an investee firm that it is not engaged in covered activities and otherwise is not a covered foreign person. In addition, AIC urges implementation of a safe harbor and asks Treasury to specify the steps that can be undertaken by U.S. investors to qualify for that safe harbor.

○ **Covered Foreign Persons.** Treasury anticipates defining covered foreign persons to include persons whose direct or indirect subsidiaries or branches are engaged in an identified activity 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. It may, however, be impossible to obtain these metrics and, in particular, to determine the makeup of a company’s capital expenditure or operating expenses. At a minimum, AIC urges Treasury to rely on an approach that does not include reference to a company’s capital expenditures or operating expenses; doing so will provide clarity for market participants and their teams that are tasked with ensuring compliance with these requirements.

○ **Limited Partner Investments.** AIC appreciates Treasury considering an exclusion for limited partner investment interests. As the inherent nature of a limited partner is passive, AIC recommends Treasury consider permitting limited partners to invest beyond a de minimis threshold. Accordingly, we believe Treasury should examine whether limited partners should not be disqualified from the exemption if they have limited rights (such as seats on a limited partner advisory committee).

In this context, AIC supports Treasury’s proposal to apply the final rule on a go-forward basis and urges Treasury to provide certainty around follow-on investments. Specifically, and in line with the “timing of the rule” discussion in the comment letter submitted by the Institutional

Limited Partners Association, AIC believes the final rule should apply solely to new commitments entered into after the date of the final rule.

- **Reasonable Notice.** AIC supports Treasury’s proposal to require notice for certain types of investments and urges Treasury to implement clear, defined and reasonable notification requirements. AIC believes that notice requirements should not be overly burdensome, as requiring excessive details may cause unwarranted delays and costs in compliance.

- **Finality**

Treasury notes that it “is not considering a case-by-case determination on an individual transaction basis” as to whether a transaction is prohibited. AIC applauds this approach. At the same time, Treasury says it may ask questions about transactions conducted after the date of the Order (and conducted before a final U.S. Outbound Investment Program is put in place) and asks how it should deal with a notified transaction that it believes was a prohibited one. AIC believes only investments made after finalization of the proposed program should be subject to its requirements. We also believe that there should be finality in the process, as investments once made may not be able to be unwound; thus, absent extraordinary circumstances, investments that are notified to Treasury should not be subject to further review or determination as to prohibited status.

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We look forward to engaging with Treasury further on the implementation of the U.S. Outbound Investment Program, including by providing more detailed comments in response to a proposed rule. Meanwhile, AIC would be pleased to answer any questions that you might have concerning our comments.

Respectfully submitted,

/s/ Rebekah Goshorn Jurata
General Counsel
American Investment Council