

Statement on Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, Advance Notice of Proposed Rulemaking - ANPRM

September 2023

General Comments

- We thank you for the possibility to provide comments on the Advance Notice of Proposed Rulemaking. TBI also sees the challenges in the geopolitical landscape that also affect our businesses on both sides of the Atlantic. We support your efforts to respond to these challenges in a targeted manner.
- Implementing new mechanisms to control foreign direct investment would be a major interference in entrepreneurial decisions and international investment flows. German companies use foreign direct investment (FDI) to gain market shares worldwide. Such investments strengthen the German economy, secure jobs, and promote prosperity. The Transatlantic Business Initiative (TBI) therefore rejects any new mechanisms to control foreign direct investment.
- Current export control regimes take into account the transfer of technology, and thus should be sufficiently effective in preventing any technology outflows in safety-critical areas. Compared to restricting investment, current export controls represent a significantly less invasive market intervention. The TBI therefore suggests thoroughly evaluating current mechanisms at the national and EU level in consultation with relevant stakeholders before considering the implementation of stricter conditions for European investments abroad.
- Such an evaluation should identify any instruments deemed insufficient, including the specific loopholes and other causes of concern. In exceptional cases, where serious and specific safety concerns are given, a governmental intervention may serve as a last resort. In such cases, outbound investments should be restricted to those areas in which inbound investment screenings are applied already.
- In any case, the federal government should consult the business sector to ensure that any measures adopted are effective and have as little impact as possible on competitiveness. Measures should be laser-focused on achieving the defined goals in order not to affect unintended targets.

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Comments regarding the guiding questions

1. Comments on the ANPRM

- The Advance Notice of Proposed Rulemaking (ANPRM) is intended to introduce outbound investment screening toward China in certain areas. In sections B. through Q. contained therein, the U.S. Treasury Department requests responses to a total of 83 practice-related questions.
- From a business perspective, a major concern relates to the introduction of additional technology fields under G-I¹. As a matter of principle, the scope of protection and control must be defined as narrowly as possible. This applies to the U.S. as well as to the discussions in Germany and Europe more broadly. Ideally, there should be no outbound investment control at all.
- Regarding technologies like AI systems, quantum computing or semiconductors, companies anticipate potential impacts, but these cannot yet be foreseen conclusively. While certain companies in Germany offer technologies targeted by U.S. investment (e.g., providers of chip design software), these are not in the military sector. However, the potential indirect impact facing German companies as a result of U.S. investment restrictions in China remains uncertain.
- The technological definitions appear overly broad in all three technology areas or, in the case of quantum computing, quasi-all-encompassing. In the field of AI, it can be difficult to distinguish between civilian and military applications. Basic applications, such as foundational models, can be transferred relatively easily to different areas, provided the right training data is available. It would be all the more important therefore for the U.S. government to define as narrowly as possible AI applications in the military field.
- Under “covered transactions”, the ANPRM also includes the processing, clearing, and transfer of payments in U.S. Dollars by a bank. Including payments in U.S. Dollars could prevent investments by German companies in the controlled areas. Therefore, the Dollar clearing should remain exempt. Based on the drafted exceptions, large-scale investments in China would still be possible.

2. Specific Comments on selected questions in the ANPRM

What is the interpretation of the term U.S. person and covered foreign person?

Historically, the U.S. Treasury Department’s (Treasury) use of the term “United States person” has included any entities, including corporations. This definition is used in several

¹ G. Covered National Security Technology or Product: Semiconductors and Microelectronics (questions 26-32) and I. Covered National Security Technology and Product: AI Systems (questions 40-48).

instances in current U.S. law. It includes any foreign branch of a U.S. firm or U.S. branch/subsidiary of a foreign firm, but not a foreign parent company or affiliate organized under the laws of a non-U.S. country, unless of course that entity is controlled or owned by a U.S. person.

U.S. subsidiaries would definitely be subject to the Executive Order and any U.S. executives, no matter where they are, would need to recuse themselves from any covered transactions but depending on corporate structure non-U.S. headquarters and other non-U.S. subsidiaries would probably not be.

The program would, pursuant to implementing regulations: (1) require U.S. persons to notify Treasury of certain transactions, and (2) prohibit U.S. persons from undertaking certain other transactions, in either case involving certain entities engaged in activities related to narrow sub-sets of three advanced technology areas identified in the E.O.

In our view, the definition of U.S. companies should not apply to European parent companies. It remains open whether the definition of U.S. companies could also apply to German parent companies. This question is disputed in expert circles.²

The TBI requests clarification from the Treasury Department on determining factors for covered transactions controlled by U.S. persons. Are there clear functional, seniority, or ownership determinants that define a U.S. person as in control of a transaction? A too broad or vague definition will likely lead to a disproportionate chilling effect in investment involving firms with U.S. ownership or management. Similar uncertainty led to overcompliance and accompanying supply chain disruptions in chip manufacturing from European firms responding to the Bureau of Industry and Security's export controls on high performance semiconductors and associated manufacturing equipment last October (2023-00888) before those definitions were clarified. We recommend a very targeted definition of "control" insofar as an individual can "knowingly direct" a transaction as applied to U.S. persons and covered transactions to reduce uncertainty for businesses both in the U.S. and in third countries.

The TBI would similarly welcome clarification on the term "person of a country of concern." In the recently published final rule on CHIPS national security guardrails (2023-20471), The CHIPS Program Office provides clarification on their definition of "foreign entities of concern" to limit its impact on nationals of covered countries living in third countries. In responding to comments, CPO gives the example of Chinese nationals lawfully working in the United States or the Republic of Korea as not meeting the definition of a "foreign entity of concern." A similar clarification in the ANPRM's definition of "person of a country of concern" with ownership and/or seniority thresholds for nationals of a country of concern living in the U.S. or in third countries would be welcome. This would limit the

² Rhodium Group, China Corporate Advisory, Big Strides in a Small Yard: The New US Outbound Investment Screening Regime, August 11, 2023.

potential chilling effect on investment or even purchases from companies with employees who are nationals of a country of concern.

What are the consequences of the Executive Order for intra-company transfers?

The proposed definition of permissible transactions includes intra-company transfers from U.S. parents but does not include transactions from U.S. subsidiaries to foreign parents.

What are the problems in defining the principal place of business?

Regarding principal place of business, we assume that the Treasury Department will refer to § 802.232 of the Code of Federal Regulations:

§ 802.232 Principal place of business.

(a) The term principal place of business means, subject to paragraph (b) of this section, 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.

(b) If the location determined under paragraph (a) of this section is in the United States and the entity has represented to the U.S. Government or a subnational government of the United States or any foreign government, in the most recent submission or filing to such government (other than a submission or filing to the Committee) in which the entity has identified its principal place of business, principal office and place of business, address of principal executive offices, address of headquarters, or equivalent, that any of the foregoing is outside the United States, then the location identified in such submission or filing is deemed for purposes of this definition to be the entity's principal place of business unless the entity can demonstrate that such location has changed to the United States since such submission or filing.

[85 FR 3166, Jan. 17, 2020, as amended at 85 FR 45313, July 28, 2020]

About the TBI

The Transatlantic Business Initiative (TBI) is the point of contact for economic policy issues, particularly for the German government and the governments of the United States and Canada as well as for EU institutions. The initiative is supported by four business associations: the Federation of German Industries (BDI), the Association of German Chambers of Industry and Commerce (DIHK), the Federation of German Wholesale, Foreign Trade and Services (BGA) and the Association of German Banks (BdB) and advocates for strengthening the economic relations between Germany and the European Union on the one hand, and the United States and Canada on the other. Members of the TBI work in four steering committees, focusing in particular on trade and investment policy, energy and climate policy, data and the digital economy as well as business and finance, and seek to engage with policymakers, regulators and supervisors, business and trade representatives as well as other stakeholders to strengthen transatlantic ties and facilitate coordination on matters of shared interest.

Imprint

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