

MEMO# 35912

November 1, 2024

US Treasury Issues Final Rule Implementing Outbound Investment Security Program

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TO: ICI Members

ICI Global Members SUBJECTS: Compliance

International/Global

Operations RE: US Treasury Issues Final Rule Implementing Outbound Investment Security Program

On October 28, 2024, the US Department of the Treasury issued a final rule to implement Executive Order 14105 of August 9, 2023, "Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern" (the Outbound Order). The Final Rule provides the operative regulations and a detailed explanatory discussion regarding their intent and application. Information on the Outbound Order and the Final Rule are available at

<https://home.treasury.gov/policy-issues/international/outbound-investment-program>.

The Outbound Investment Security Program will be administered by the newly created Office of Global Transactions, within Treasury's Office of Investment Security. The Final Rule will become effective on January 2, 2025.

Key Elements

- **Requirements on US persons:** The Final Rule places obligations on US persons, including prohibition of certain transactions and a notification requirement for certain other transactions. A US person includes any United States citizen or lawful permanent resident, as well as any entity organized under the laws of the United States or any jurisdiction within the United States, including any foreign branch of any such entity, and any person in the United States.
- **Knowledge standard:** The obligations of a US person under the Final Rule apply if such person has knowledge of relevant facts or circumstances related to a transaction. Under the Final Rule, a US person has knowledge if the US person possesses actual knowledge that a fact or circumstance exists or is substantially certain to occur, if the US person possesses an awareness of a high probability of a

fact or circumstance's existence or future occurrence, or if the US person could have possessed such information through a reasonable and diligent inquiry. To provide clarity, the Final Rule includes factors that Treasury will consider in assessing whether a US person undertook a reasonable and diligent inquiry. Such factors incorporate information that should be ascertainable as well as contractual assurances that should be obtainable through reasonable due diligence. The Final Rule also clarifies that consideration will be given to the totality of the facts and circumstances related to the transaction.

- **Specific categories of covered transactions:** The Final Rule applies to certain transactions by US persons, including the acquisition of an equity interest or contingent equity interest; certain debt financing that affords certain rights to the lender; the conversion of a contingent equity interest; a greenfield investment or other corporate expansion; entrance into a joint venture; and certain investments as a limited partner or equivalent (LP) in a non-US person pooled investment fund.
- **Involving covered foreign persons:** The Final Rule applies to certain transactions by a US person that involve a covered foreign person—that is, a person of a country of concern that is engaged in a covered activity related to defined sub-sets of technologies and products or a person that has a voting or equity interest, board seat, or certain powers with respect to such a person of a country of concern where more than 50 percent of one of several key financial metrics of the person is attributable to one or more such persons of a country of concern. A person of a country of concern includes an individual who is a citizen or permanent resident of a country of concern (and not a US citizen or permanent resident of the United States); an entity that is organized under the laws of, headquartered in, incorporated in, or with a principal place of business in a country of concern; the government of a country of concern or a person acting for or on behalf of the government of a country of concern; or an entity that is directly or indirectly at least 50 percent-owned by any persons or entities in any of the aforementioned categories.
- **Excepted transactions:** The Final Rule excepts certain types of transactions from the rule's coverage, in some cases, provided that such transactions do not afford a US person certain rights that are not standard minority shareholder protections. Some of these excepted transactions include:
 - **Publicly traded securities:** An investment by a US person in a publicly traded security or a security issued by a registered investment company, such as an index fund, mutual fund, or exchange-traded fund;
 - **Certain LP investments:** A US person's investment made as an LP in a venture capital fund, private equity fund, fund of funds, or other pooled investment fund, if such investment is \$2,000,000 or less or if the US person has received a contractual assurance that its capital will not be used by the fund to engage in what would be a prohibited or notifiable transaction;
 - **Derivatives:** A US person's investment in certain derivative securities;
 - **Buyouts of country of concern ownership:** A US person's full buyout of all country of concern ownership of an entity, such that the entity does not constitute a covered foreign person following the transaction;
 - **Intracompany transactions:** An intracompany transaction between a US person and its controlled foreign entity to support operations that are not covered activities or to maintain ongoing operations with respect to covered activities that the controlled foreign entity was engaged in prior to January 2, 2025;
 - **Certain pre-Final Rule binding commitments:** A transaction fulfilling a

- binding, uncalled capital commitment entered into prior to January 2, 2025;
- **Certain syndicated debt financings:** Where the US person, as a member of a lending syndicate, acquires a voting interest in a covered foreign person upon default and the U.S. person cannot initiate any action vis-à-vis the debtor and is not the syndication agent;
 - **Equity-based compensation:** A US person's receipt of employment compensation in the form of an award or grant of equity or an option to purchase equity in a covered foreign person, or the exercise of such option; and
 - **Third-country measures:** Certain transactions involving a person of a country or territory outside of the United States may be excepted transactions where the Secretary of the Treasury determines that the country or territory is addressing national security concerns related to outbound investment and the transaction is of a type for which associated national security concerns are likely to be adequately addressed by the actions of that country or territory.
- **National interest exemption:** The Final Rule allows a US person to seek an exemption from the application of the prohibition or notification requirement on the basis that a transaction is in the national interest of the United States. Additional information on the process for seeking an exemption will be made available on the program's website.
 - **Notification requirements:** A US person subject to the notification requirement is required to file a notification form with Treasury that includes information related to the transaction, such as details about the US person, the covered foreign person, the covered transaction, and the relevant national security technologies and products. The Final Rule requires that a notification be filed no later than 30 days after the relevant covered transaction is completed or, where a US person acquires actual knowledge after the completion date of a transaction that the transaction would have been a covered transaction if such knowledge had been possessed at the time of the transaction, no later than 30 days after the US person's acquisition of such knowledge.

Violations

The Final Rule outlines the penalty and disclosure framework for violations:

- **Penalties:** Violations are subject to civil and criminal penalties as set forth in the International Emergency Economic Powers Act (IEEPA). In the event of a violation, Treasury is authorized to impose civil penalties and could also refer criminal violations to the Attorney General. Under IEEPA, as of the issuance of the Final Rule the maximum civil penalty for a violation is the greater of \$368,136 (as adjusted annually for inflation) or twice the value of the transaction that is the basis for the violation.
- **Divestment:** The Secretary of the Treasury can take any action authorized under IEEPA to nullify, void, or otherwise require divestment of any prohibited transaction.
- **Voluntary self-disclosure:** US persons may submit a voluntary self-disclosure if they believe their conduct may have resulted in a violation of any part of the Final Rule. Such self-disclosure will be taken into consideration during Treasury's determination of the appropriate response to the self-disclosed activity.

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