

TheCityUK comments on the Notice of Proposed Rulemaking (NPRM) on Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern

1. TheCityUK is the industry-led body representing United Kingdom-based financial and related professional services. We champion and support the success of the ecosystem, and thereby our members, promoting policies in the UK and internationally that drive competitiveness, support job creation and enable long-term economic growth. The industry contributes 12% of the UK's total economic output and employs over 2.4 million people – with two thirds of these jobs outside London across the country's regions and nations. It pays more corporation tax than any other sector and is the largest net exporting industry. The industry plays an important role in enabling the transition to net zero and driving economic growth across the wider economy through its provision of capital, investment, professional advice and insurance. It also makes a real difference to people in their daily lives, helping them save for the future, buy a home, invest in a business and manage risk.
2. We welcome the opportunity to comment on US Treasury's Notice of Proposed Rulemaking (NPRM) on the proposed rule setting out regulations that would implement Executive Order (EO) 14105 of August 9, 2023, "Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern."
3. TheCityUK previously submitted comments on the Advance Notice of Proposed Rulemaking (ANPRM) implementing the EO.¹

Extraterritoriality

4. Our previous submission stressed the need for clear guidance from US Treasury on how third-country firms employing US personnel should assess their internal procedures, so that these firms and their US personnel can be satisfied they have taken the necessary steps to comply with the proposed rule. Without clarity, financial institutions could be discouraged from employing US persons into senior decision-making roles. Therefore, we welcome Treasury's acknowledgement of this risk and Treasury's desire to ensure its approach avoids "broad implications on the employment of U.S. persons."
5. We note that § 850.303 (b) is intended to carve out a "U.S. person who recuses themselves from an investment even if that person has the authority to make or substantially participate in decisions on behalf of a non-U.S. person entity."
6. However, there remains a risk that, unless Treasury provides clear guidance on how non-US firms (and their US employees) can satisfactorily demonstrate and record compliance with this provision, individual firms' interpretation and compliance with this provision could be

¹ TheCityUK (28 September 2023), 'TheCityUK Comments on Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern'; <https://www.thecityuk.com/media/431cljne/thecityuk-comments-on-provisions-pertaining-to-us-investments.pdf>

inconsistent. This could be particularly problematic when a prohibited ‘covered transaction’ under § 850.210(a)(4)(ii) results from a new business change through a “development of operations” or assets that was not present at the time of an original investment decision, making it difficult for a US person to effectively recuse. Detailed guidance from Treasury on best-practice implementation of § 850.303 (b) would give UK-based, non-US firms the confidence to navigate these scenarios particularly when employing senior US staff.

Knowledge standard

7. We would request additional clarity regarding due diligence requirements in light of the specific facts and circumstances of a transaction. Although the NPRM suggests that “efforts to obtain information and contractual assurances that should be obtainable through a reasonable transactional due diligence process” are likely sufficient, the ability to conduct due diligence will vary depending on the nature and type of transaction involved.
8. For example, with respect to investments made as a limited partner (LP), the NPRM states that “it is possible for an LP to know, through a reasonable and diligent inquiry, where a pooled fund is likely to invest”. The NPRM cites an example where “a *U.S. person could know* that a pooled fund is likely to invest in PRC AI companies based on researching past investments made by a pooled fund's manager, engaging with the pooled investment fund's general partner, or reviewing such fund's prospectus or other documentation.” We would welcome greater clarity and guidance about the types of assurances an LP might seek from the managers of pooled funds to satisfy this knowledge threshold.

Limited Partner exception

9. The threshold for exception for LP investments in private equity, venture capital, and other pooled funds is low. We strongly favour Alternative 1, which more closely aligns with the objectives of the program and would provide greater predictability and reduce compliance burdens for most LPs and pooled fund managers.

IPOs

10. We welcome the additional clarity on the exception for investments into publicly traded securities and broadening of the definition to include securities traded on non-US exchanges. But we would suggest additional clarity in the final rule concerning initial public offerings (“IPOs”) and related transactions. It would be helpful to add clarity that initial purchasers, underwriters, and advisers participating in or assisting with an IPO of covered foreign persons would qualify as an excepted transaction.

TheCityUK
August 2024