



July 26, 2024

**BSA Response to US Department of Treasury’s Notice of Proposed Rulemaking re
*Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products
in Countries of Concern***

I. Introduction

BSA | The Software Alliance¹ appreciates the opportunity to provide comments in response to the US Treasury Department’s (“Treasury”) Notice of Proposed Rulemaking (“NPRM”) relating to *Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern*.² BSA is the leading trade association representing the global enterprise software and technology industry. Our members provide cutting-edge cloud services, data analytics, cybersecurity solutions, manufacturing and infrastructure tools, and other digital capabilities to help businesses modernize and grow. The software industry supports nearly 16 million US jobs, including 12.5 million outside the tech sector, and contributes \$1.9 trillion to the US economy. BSA respectfully offers the following comments on the NPRM.

II. General Comments

BSA welcomes the careful and nuanced approach that Treasury has taken in its outbound investment review NPRM. BSA also is grateful for Treasury’s outreach to industry and other stakeholders.

BSA shares Treasury’s goal of restricting investment that would accelerate the development of military, intelligence, surveillance, and cyber-enabled capabilities in countries of concern. BSA offers the following preliminary observations, which are followed by several detailed recommendations.

¹ With headquarters in Washington, DC, and operations in more than 30 countries, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy. BSA’s members include: Adobe, Alteryx, Asana, Atlassian, Autodesk, Bentley Systems, Box, Cisco, CNC/Mastercam, Cohere, Databricks, DocuSign, Dropbox, Elastic, EY, Graphisoft, Hubspot, IBM, Informatica, Kyndryl, MathWorks, Microsoft, Notion, Okta, OpenAI, Oracle, PagerDuty, Palo Alto Networks, Prokon, Rubrik, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, TriNet, Twilio, Workday, Zendesk, and Zoom Video Communications, Inc.

² 89 Fed. Reg. 55846 (July 5, 2024).

First, BSA commends Treasury’s recognition that continued US leadership in emerging technologies is critical to long-term US interests. Maintaining access to global research networks and engineering talent, as well as visibility into the technology edge in countries of concern (e.g., AI-related applications in solar and wind technologies, advanced batteries, and next generation vehicles), are necessary for US enterprises to help solve pressing global challenges. Studies from the Australian Strategic Policy Institute have assessed that China already produces the most scientific research across a number of cutting-edge fields.³ When US companies are blocked from that access, it threatens their ability to remain competitive and at the forefront of technological innovation. This is just one of the reasons why Secretaries Yellen, Blinken, Raimondo, and others have repeatedly underscored that a complete and systemic “decoupling” of the US and Chinese economies would be deeply harmful to US interests. These harms would impact US economic, environmental, health, and security interests. “Strategic competition” requires engagement and offers broad-based benefits. Self-defeating isolationism does not offer such benefits – particularly where the inherent openness of the US society and economy means that China has and will continue to have more access to the United States than *vice versa*.

Second, BSA observes that the business environment in China has rapidly deteriorated, deterring new investments and prompting efforts to reduce market exposure. Beyond the worsening economic picture, foreign investors now face a less predictable environment in which business activities that were previously deemed legal (e.g., gathering accurate statistical and financial reporting information, or conducting commercial-purpose data transfers) have been suddenly declared to be illegal without reasonable explanation or warning. These transparency and due process challenges undermine the ability to ensure the safety of investments and personnel. As the Secretary of Commerce described the situation, such conditions may render a country “uninvestable.” These and other circumstances (among them, growing US trade and investment restrictions) have reduced China’s attractiveness as an investment destination relative to countries that offer a greater degree of transparency, stability, and accountability. Against this backdrop, US investment in China has fallen substantially and heavy-handed action by the Treasury is neither necessary nor appropriate.⁴

Treasury’s new outbound investment controls should be carefully calibrated to account for the foregoing circumstances and should be no more burdensome than necessary to achieve their intended aims. BSA makes the following recommendations with the aim of avoiding unintended consequences while ensuring that Treasury’s controls are effective at achieving their stated aim of limiting investment in enumerated sectors that are critical for the military, intelligence, surveillance, or cyber-enabled capabilities of countries of concern.

We offer the following detailed comments.

III. “Intent to Pivot an Existing Entity’s Operations into a New Covered Activity”

Treasury’s NPRM expands the scope of notifiable or prohibited investments to include situations in which a US person “intends to pivot an existing entity’s operations into a new covered activity.” BSA supports the objective behind this proposed language. However, BSA considers the current proposal to be unreasonably vague and overbroad – producing a potentially legally indefensible result that would be extremely difficult to administer.

BSA recommends that Treasury further refine this provision to clarify that an investor or its affiliated entity will be deemed to have demonstrated such an “intent to pivot” in situations in which the investor or

³ [China leads high-tech research in 80% of critical fields: report - Nikkei Asia](https://asia.nikkei.com/Business/China-tech/China-leads-high-tech-research-in-80-of-critical-fields-report?), <https://asia.nikkei.com/Business/China-tech/China-leads-high-tech-research-in-80-of-critical-fields-report?>

⁴ [Irrational Expectations: Long-Term Challenges of Diversification Away from China | Rhodium Group \(rhg.com\)](https://rhg.com/research/irrational-expectations-long-term-challenges-of-diversification-away-from-china/), <https://rhg.com/research/irrational-expectations-long-term-challenges-of-diversification-away-from-china/>

affiliated entity has allocated some clearly defined, beyond de minimis capital in support of such a “pivot.” Seeking to determine “intent” in the absence of *some* objective evidentiary indicia is notoriously difficult. We urge Treasury to clarify that an “allocation of capital investment” clearly substantiates the existence of such “intent.”

We urge Treasury to make this clarification for two reasons:

First, promulgating a regulation that imposes sanctions on “intent to pivot” without offering any objective means of measuring such “intent” is likely to produce results that are arbitrary, capricious, and subject to dispute. To build a defensible regulatory program that can withstand legal scrutiny, it is critical to include some objective means of measuring intent.

Second, absent a clarification regarding the circumstances under which Treasury would determine such “intent to pivot” to exist, US persons will be left with no guidance as to what activities of an affiliated entity might later be deemed to reflect such “intent to pivot.” Would an email exchange between two personnel at an overseas affiliate give rise to a finding of such “intent to pivot”? Would an Internet search or attendance at a conference demonstrate “intent to pivot”? Would a de minimis investment, such as paying for attendance at a local seminar or paying a consultant for some data on local market penetration of a particular product constitute an “intent to pivot”?

Failing to clarify any objective indicia of what constitutes an “intent to pivot” could place American companies in an untenable legal posture of having to track and manage every research project and assignment; censor and monitor email communications; prohibit online searches; restrict participation in public events, and so forth. Such comprehensive and intrusive oversight could also raise privacy and other legal concerns.

We do not believe that Treasury intends the foregoing result. We therefore recommend that Treasury include additional clarifying language that allows for an objective determination of when such an “intent to pivot into a covered activity” exists – namely where the US person or its affiliate allocates beyond some defined de minimis amount of capital to such a covered activity.

We recommend that the NPRM be modified as follows. Our recommended additions to the text are highlighted in blue:

The proposed definition of covered transaction would generally require the U.S. person to know (or in some circumstances, [as reflected in a capital allocation](#), to intend) at the time of a transaction that the transaction involves a covered foreign person, will result in the establishment of a covered foreign person (in the case of a greenfield, brownfield, or a joint venture investment), or will result in a person of a country of concern’s engagement in a new covered activity (in the case of a business pivot).⁵

§ 850.210—Covered Transaction - As discussed in greater detail below, the definition of covered transaction would include a U.S. person’s direct or indirect: ... greenfield investment or certain other corporate expansions [supported by a capital allocation](#) that either will establish a covered foreign person, or will cause an existing person of a country of concern to pivot into a new covered activity.⁶

Greenfield or Brownfield Investment – The definition of covered transaction would include a U.S. person’s ... development of operations [supported by a beyond a de minimis capital allocation](#) ... in a country of concern when the U.S. person knows that such ... [capital-backed](#) development will, or the U.S. person intends it to, ... pivot an existing entity’s operations into a new covered activity. A U.S. person’s intent (as distinct from knowledge) would be sufficient in these cases for the

⁵ 89 Fed. Reg. at 55848.

⁶ *Id.*, at p. 55852.

transaction to be a covered transaction. This is because in the greenfield and brownfield context, a U.S. person may not know at the time of the transaction that the investment will result in a covered activity, yet the Department of the Treasury nevertheless seeks to cover activities intended to bring about the establishment of a covered foreign person or a person of a country of concern's engagement in a new covered activity, since such a situation is likely to convey intangible benefits from the U.S. person to a covered foreign person. That a covered foreign person ultimately results from a greenfield or brownfield investment would not be necessary for coverage under the proposed rule, as long as the intent – as evidenced by a capital allocation – to establish a covered foreign person is present at the time of the transaction. The Department of the Treasury has assessed that requiring a greenfield or brownfield investment to result in the establishment of a covered foreign person or a person of a country of concern's engagement in a new covered activity before triggering obligations associated with covered transaction status risks undermining the national security goals of the program. For the avoidance of doubt, the Department of the Treasury does not intend to scope in a real estate transaction where the U.S. person does not have the requisite knowledge or intent.⁷

Although the definition of covered transaction in the proposed rule would not usually apply to most routine intracompany activities such as the sale or purchase of inventory or fixed assets, the provision of paid services, or the licensing of technology, the intracompany transaction exception in the proposed rule nonetheless exempts intracompany transactions that would be covered transactions but support activities that are not covered activities. To avoid use of the intracompany transaction exception to establish new covered foreign persons or to pivot existing subsidiaries into a new covered activity with the support of a capital allocation, the exception would not apply to greenfield or brownfield investments, beyond a de minimis capital-backed pivots of existing entities' operations into covered activities, and joint ventures.⁸

Finally, we encourage Treasury to adjust the proposed definition of "joint venture" as described in the footnote below.⁹

IV. Data Analytics, Image Recognition, and Location Tracking Deemed to Support "Government Intelligence" and "Mass Surveillance"

Section 850.217 of the NPRM is drafted in a manner that appears to deem any development of an AI system that involves data analytics, image recognition, or location tracking as "designed for ... mass surveillance."

We do not believe that Treasury intends such an overbroad interpretation of its draft rule. To avoid such a misinterpretation, we urge Treasury to make the following revisions to the draft rule. Our recommended additions to the text are highlighted in blue:

§ 850.217 Notifiable transaction.

The term notifiable transaction means a covered transaction (that is not a prohibited transaction) in which the relevant covered foreign person or, with respect to a covered transaction described in § 850.210(a)(5), the relevant joint venture:

(d) Develops any AI system that is not described in § 850.224(j) or (k) and that is: (1) Designed to be used for any government intelligence or mass-surveillance end use (e.g., where a software

⁷ *Id.*

⁸ *Id.*, at p. 55860.

⁹ We encourage Treasury to define Joint Venture as: "A separate, independently incorporated or formed, or otherwise publicly registered legal entity, jointly owned by two or more independent persons, established to engage in a single purpose project or an ongoing business in which the independent owners contribute certain resources and share the profits and losses associated with the legal entity."

[application is designed specifically for purposes of government intelligence or mass-surveillance using any of the following technologies:](#) ~~through~~ mining text, audio, or video; image recognition; location tracking;....”

These proposed changes are important because data analytics, image recognition, and location tracking have numerous commercial end-uses that do not implicate national security and that are not used for government intelligence or mass-surveillance. Such commercial end-uses include data analytics in word processing software (e.g., suggesting – based on context – the endings of commonly used phrases or the correct spelling or a word). They also include fingerprint or image recognition to unlock your mobile device (e.g., iPhone). They also include consensual location tracking in a motor vehicle (for safety purposes), in a map application (for normal navigational purposes), in an aircraft (for air traffic control purposes), in a shipping vessel transponder (for safety and regulatory compliance purposes). The innumerable applications of software that offers text/image data analytics, image recognition, and location tracking should not be deemed to support “government intelligence” or “mass surveillance” in commercial contexts.

V. Extension of Coverage to Include “Frontier AI Models”

The NPRM now newly requires notification of “transactions involving frontier AI models ... defined based on a set of technical parameters.” As a threshold matter, BSA observes that the phrase, “frontier AI models,” is vague and undefined as a general matter. Standing alone, this phraseology would be unreasonably vague in the context of the proposed Treasury rule.

However, Treasury overcomes this legal infirmity by effectively defining “frontier AI model” with reference to specific technical parameters – i.e., by defining such models as those trained using a certain quantity of computing power. Treasury proposes the following general computing power thresholds for a prohibited transaction– i.e., “ 10^{24} , 10^{25} , or 10^{26} computational operations (e.g., integer or floating-point operations).” While compute thresholds are not precisely correlated with risk, they do provide a clear benchmark, and therefore BSA supports their adoption in this context despite those limitations.

The White House AI Executive Order (“AI EO”) applies reporting requirements for “dual-use foundation models” to models with a computing power of 10^{26} integer or floating-point operations. Furthermore, some widely available commercial AI applications have been trained at the 10^{25} level. Finally, as stated in recent [BSA comments](#) on the Commerce Department’s proposed IAAS rule:

AI reporting requirements [should be applied] only when a foreign customer is accessing a very large, and defined, amount of training compute, for example the 10^{26} FLOPs set out in the AI EO. Focusing reporting requirements on foreign customers accessing a large and defined amount of compute would advance the Department’s goal of having visibility into where only the most highly capable models are being developed, by focusing on access to large scale training infrastructure needed to train them, while creating a more targeted and implementable rule. We recognize that use of a compute threshold is not a perfect solution. It could be overinclusive given the lack of technical ability for IaaS providers to distinguish among the purposes for using large compute capabilities, and underinclusive because it does not include powerful smaller models. However, it is a more effective approach for identifying models with the most significant capabilities and a more objective benchmark than the subjective considerations included in the Proposed Rule.

For this reason, we urge Treasury to define the “frontier” for AI model development at the 10^{26} level.

VI. Conclusion

Thank you for the opportunity to share these views. Should you have any questions or comments, please feel to contact me at josephw@bsa.org.

