Navigating the U.S. Outbound Investment Security Program

A Practical Guide to Scope, Risk and Market Practice

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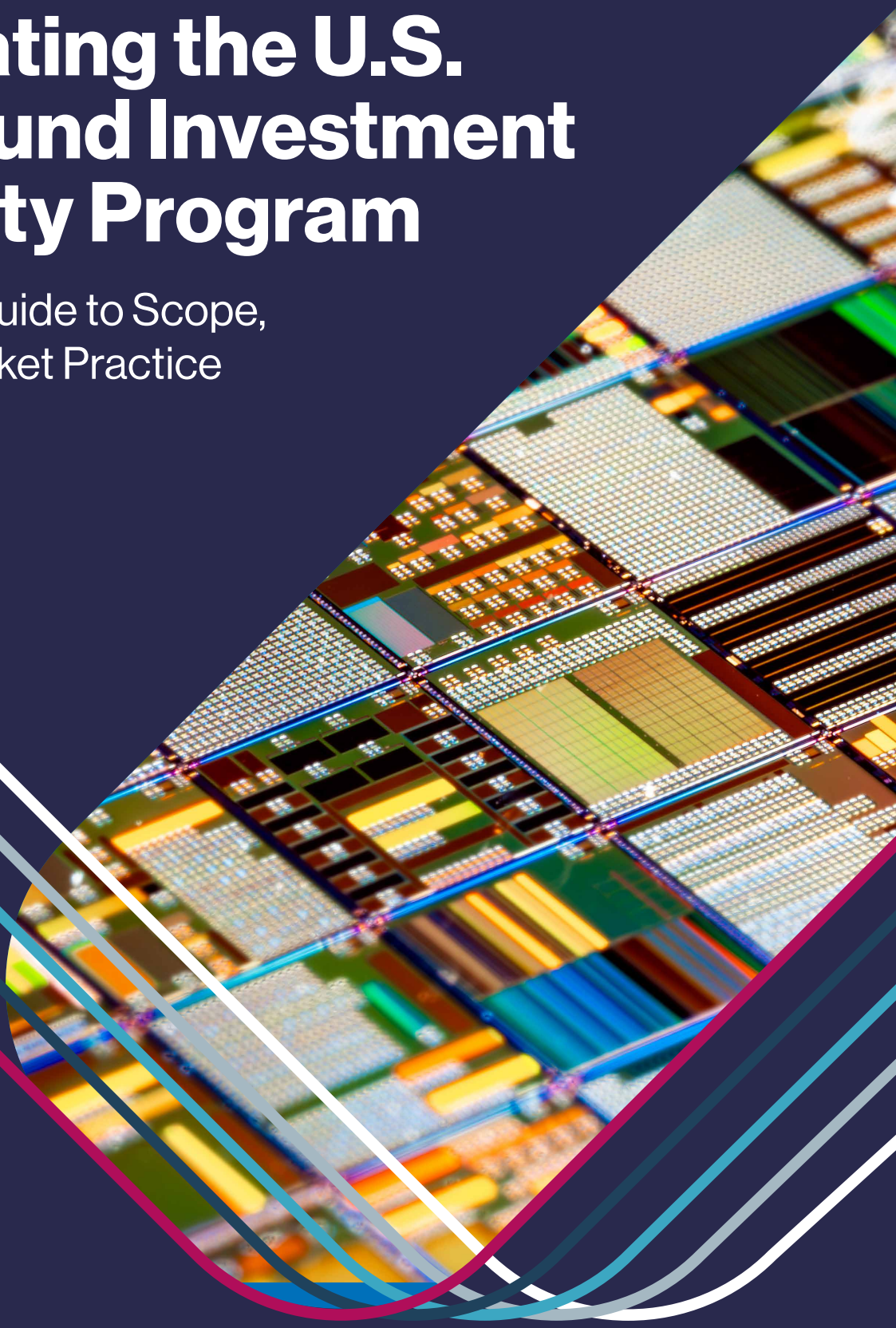

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The Outbound Investment Regulations ("**OIR**" or the "**Rules**"), codified at 31 C.F.R. Part 850, implement Executive Order 14105 of August 9, 2023, "Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern" and in the main restricts U.S. person investments into certain China-related companies involved in the artificial intelligence, semiconductor, and quantum computing sectors ("**Covered Sectors**"). The OIR bifurcate requirements based on the specific nature and intended use of the technologies, requiring U.S. persons to *notify* the Treasury Department of certain transactions, while *prohibiting* U.S. persons from engaging in other transactions. The U.S. Department of the Treasury (the "**Treasury Department**") administers the OIR through Outbound Investment Security Program ("**OISP**").

Frequently Asked Questions about the OIR

A. General Scope and Jurisdiction

1. Who has to comply with the OIR?

The Outbound Investment Regulations apply to U.S. persons only. The term "**U.S. person**" is defined as "any United States citizen, lawful permanent resident, entity organized under the laws of the United States or any jurisdiction within the United States, including any foreign branch of any such entity, or any person in the United States."

2. What actions of U.S. persons are covered by the Rules?

The OIR operate to restrict the activities of U.S. persons when engaging directly or indirectly in "**covered transactions**." An indirect transaction includes a U.S. person's use of an intermediary to engage in a transaction that would be a covered transaction if engaged in directly by the U.S. person.

The OIR also prohibit U.S. persons from "**knowingly directing**" a transaction by a non-U.S. person that the U.S. person knows at the time of the transaction would be a prohibited transaction if engaged in by a U.S. person.

Finally, the Rules also impose duties on U.S. persons to take action to ensure compliance with the OIR by any "**controlled foreign entity**" of which the U.S. person is a "**parent**."

3. What is a controlled foreign entity? How do the Rules define parent?

A "**controlled foreign entity**" means any entity incorporated in, or otherwise organized under the laws of, a country other than the United States of which a U.S. person is a "**parent**."

A parent includes: (a) A person who or which directly or indirectly holds more than 50 percent of: (i) the outstanding voting interest in the entity; or (ii) The voting power of the board of the entity; (b) the general partner, managing member, or equivalent of the entity; or (c) the investment adviser to any entity that is a pooled investment fund, with "investment adviser" as defined in the Investment Advisers Act of 1940.

4. What is a covered transaction under the OIR?

A "**covered transaction**" includes the following activities when a U.S. person knows at the time the activity will involve a "**covered foreign person**" or "**covered activity**":

- acquisition in a covered foreign person of an equity interest or contingent equity interest, or the conversion of a contingent equity interest that was acquired after January 2, 2025;
- acquisition of a limited partner or equivalent interest in a non-U.S. person fund that:
  - the U.S. person knows at the time of the acquisition likely will invest in a "**person of a country of concern**" that is in a Covered Sector; and
  - such fund undertakes a transaction that would be a covered transaction if undertaken by a U.S. person;
- provision of loan or other debt financing which affords the U.S. person an interest in profits or other financial or governance rights comparable to an equity investment;
- certain acquisitions or development of operations or assets that will result in or are intended to result in the establishment of, or engagement with, a covered foreign person; or
- establishments of joint ventures with a person of a country of concern that will or has plans to engage in covered activity.

5. How do I determine who is a covered foreign person?

Under the Rules, a "**covered foreign person**" is:

a. a "**person of a country of concern**" that engages in a "**covered activity**," or

b. a person (located or organized anywhere in the world) that has a voting or equity interest, board seat, or certain powers with respect to a person of a country of concern engaged in covered activity through which that person derives more than 50% of its revenues or net income or incurs more than 50% of its capital expenditure or operating expenses.

Currently, the term "**country of concern**" is restricted to China (including Hong Kong and Macau), but the regulations leave open the possibility of adding additional countries to this list.

A "**person of a country of concern**" includes any citizen or permanent resident of China (who is not also a citizen or permanent resident of the U.S.); an entity with a principal place of business in, headquartered in, or incorporated in or otherwise organized under the laws of China; the government or governmental department of, or related political party, instrumentality, or agent acting on behalf of the government of China; or any entity in a which any of the above hold, directly or indirectly, 50 percent or more of any of the following interests of such entity: outstanding voting interest, voting power of the board, or equity interest.

6. What is a "covered activity"? What are the covered technologies and sectors currently in scope?

"**Covered activity**" refers to specified types of activities undertaken by the covered foreign person in the Covered Sectors. Whether a covered activity would be prohibited or notifiable will depend on the technology level involved and intended end use. The analysis can be very complex in application, but briefly the relevant and technologies are as follows:

Sector	Prohibited Activity	Notifiable Activity
Semiconductors and Microelectronics	Covered transactions related to certain electronic design automation software; certain fabrication or advanced packaging tools; the design or fabrication of certain advanced integrated circuits; advanced packaging techniques for integrated circuits; and supercomputers.	Covered transactions related to the design, fabrication, or packaging of integrated circuits not otherwise covered by the prohibited transaction definition.
Quantum Information Technology	Covered transactions related to the development or production of (i) quantum computers or critical components required to produce a quantum computer; (ii) any quantum sensing platform designed for, or which the relevant covered foreign person intends to be used for, any military, government intelligence, or mass-surveillance end use; and (iii) any quantum network or quantum communication system designed for, or which the relevant covered foreign person intends to be used for networking to scale up the capabilities of quantum computers, such as for the purposes of breaking or compromising encryption, secure communications (such as quantum key distribution), or any other application that has any military, government intelligence, or mass-surveillance end use.	N/A
AI Systems	Covered transactions related to the development of any AI system: (i) designed to be exclusively used for, or intended to be used for, certain end uses (such as military or intelligence end use), (ii) that is trained using a quantity of computing power greater than 10^25 computational operations, or (iii) trained using primarily biological sequence data and a quantity of computing power greater than 10^24 computational operations.	Covered transactions related to the development of any AI system not otherwise covered by the prohibited transaction definition, where such AI system is (i) designed to be used for any military end use (e.g., for weapons targeting, target identification, combat simulation, military vehicle or weapons control, military decision-making, weapons design (including chemical, biological, radiological, or nuclear weapons), or combat system logistics and maintenance); or government intelligence or mass-surveillance end use (e.g., through incorporation of features such as mining text, audio, or video; image recognition; location tracking; or surreptitious listening devices); or (ii) intended to be used for cybersecurity applications, digital forensics tools, penetration testing tools, or the control of robotics systems; or (iii) trained using a quantity of computing power greater than 10^23 computational operations.

B. Liability Standard and Mitigation – Knowledge and Reasonable Diligence

7. What is the standard for U.S. Person liability?

Whether a transaction constitutes a covered transaction under the OIR is contingent on whether the relevant U.S. person acts with *knowledge* of the relevant facts or circumstances *at the time of the transaction*. That is, in order for liability to attach under the Rules, the U.S. person is required to have "knowledge" that the transaction involves a covered foreign person or otherwise involves activity that would result in a covered transaction.

8. What constitutes knowledge under the OIR?

"**Knowledge**" is defined to include actual knowledge as well as constructive knowledge – i.e., either an awareness of a high probability of a fact or circumstance's existence or future occurrence, or reason to know of a fact or circumstance's existence.

The definition of covered transaction requires that the U.S. person have such knowledge at the time of a transaction.

9. What are the due diligence requirements/standards for establishing "knowledge" under the OIR?

The assessment by the Treasury Department, as to whether a U.S. person has or had knowledge of a given fact or circumstance, will be made based on information a U.S. person had or could have had through a "**reasonable and diligent inquiry**." A U.S. person that has failed to conduct a reasonable and diligent inquiry by the time of a given transaction may be assessed to have had reason to know of a given fact or circumstance, including facts or circumstances that would cause the transaction to be a covered transaction. Wilful blindness or conscious avoidance of facts may be deemed to satisfy a reason to know standard.

10. What is a "reasonable and diligent inquiry"?

While all U.S. person investors are expected to conduct a "reasonable and diligent inquiry," the type of conduct that would satisfy this standard will differ based on the type of the investor and the particular circumstances at hand. An assessment by the Treasury Department as to whether an investor has undertaken a "reasonable and diligent inquiry" will be made based on a consideration of the "totality of relevant facts and circumstances."

The Treasury Department noted that this was intended to account for any obstacles encountered by the U.S. person investor in conducting due diligence. In determining whether an investor has conducted a "reasonable and diligent inquiry" regarding a transaction, the Regulations specify that the Treasury Department will consider, among other factors, (i) the inquiries made by the investor regarding the company, (ii) efforts by the investor to obtain and consider available non-public information relevant to determining a transaction's status as a covered transaction, (iii) available public information, the efforts undertaken by the investor to obtain and consider such information, and the degree to which other information available to the investor as of the time of the transaction is consistent or inconsistent with such publicly available information, (iv) use of available public and commercial databases to identify and verify relevant information and (v) whether the investor purposefully avoids learning or seeking relevant information.

11. Are there safe harbors/bright line tests applicable to the "reasonable and diligent inquiry" standard?

While the Treasury Department did provide an illustrative list of factors that it would consider in its assessment of "**reasonable and diligent inquiry**" (some of which we list above), it has emphasized that this is not an exhaustive list. Accordingly, the scope of "reasonable and diligent inquiry" and consideration of the "totality of relevant facts and circumstances" remain subject to the Treasury Department's significant interpretive discretion. There are no bright line tests or clear standards for investors; rather, assessments regarding the feasibility of proceeding with a transaction require working within the hazy due diligence framework under the OIR.

In effect, the *availability* of information as well as *efforts* to obtain and consider relevant information will impact the Treasury Department's

assessment as to whether an inquiry was "reasonable and diligent." Information asymmetry, including disparities in the ability to obtain and consider information, will therefore impose different expectations on different types of investors.

12. What does it mean for a U.S. person to knowingly direct a transaction?

A U.S. person "**knowingly directs**" a transaction when the U.S. person has authority, individually or as part of a group, to *make or substantially participate in decisions on behalf of a non-U.S. person*, and exercises that authority to direct, order, decide upon, or approve a transaction. Such authority exists when a U.S. person is an officer, director, or otherwise possesses executive responsibilities at a non-U.S. person.

However, note the Rules allow for a U.S. person to recuse themselves taking action in regarding to covered transactions to avoid knowingly directing such activity.

Note the "**knowingly directing**" prohibition applies only in the context of a *prohibited transaction*. That is, U.S. persons are not prohibited from knowingly directing a transaction by a non-U.S. person that the U.S. person knows at the time of the transaction would be a notifiable transaction if engaged in by a U.S. person.

13. What are the penalties for OIR violations?

The OIR authorize the Treasury Department to investigate violations of the regulations, including pursuing civil penalties available under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) and referring criminal violations to the Department of Justice. The maximum civil penalty for a violation is the greater of $250,000 or twice the value of the transaction that is the basis for the violation. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, the maximum civil penalty continues to be adjusted annually for inflation and as of the time of this document is set at $377,700.

Violations include (i) engaging in any activity prohibited under the OIR (e.g., engaging in a prohibited transaction), (ii) failing to fulfill any requirements articulated under the OIR (e.g., failure to notify in case of a notifiable transaction), (iii) misrepresenting, concealing, falsifying, or omitting facts, and (iv) evading, attempting to evade, causing a violation of, or conspiring to violate the prohibitions of the OIR.

A person who wilfully commits, wilfully attempts to commit, wilfully conspires to commit, or aids or abets in the commission of a violation, attempt to violate, conspiracy to violate, or causing of a violation of any order, regulation, or prohibition issued under the OIR, is subject to a fine of not more than $1,000,000, or imprisonment for not more than 20 years, or both.

The Treasury Department also, as appropriate, may take action to nullify, void, or otherwise compel the divestment of any prohibited transaction.

Any person who has engaged in conduct that may constitute a violation of the OIR may submit a voluntary self-disclosure of that conduct to the Treasury Department.

C. Notification Requirements and Process

14. When is a notification required to be filed? What is the deadline?

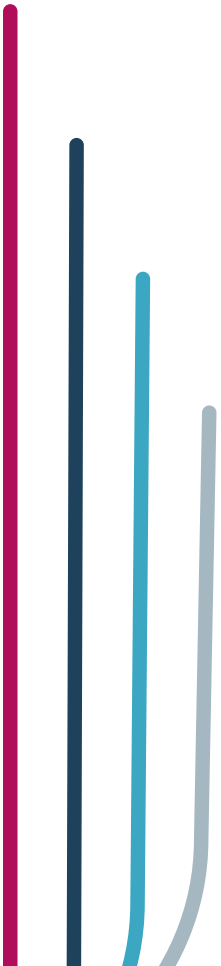
A U.S. person is required to file a notification with respect to any notifiable transaction it or its controlled foreign entity undertakes within 30 days after the completion of the transaction.

A U.S. person that acquires actual knowledge after the completion date of a transaction of a fact or circumstance such that the transaction would have been a covered transaction if such knowledge had been possessed by the relevant U.S. person at the time of the transaction is required to file a notification within 30 days following the acquisition of such knowledge.

15. What is the process for filing a notification?

Notifications are filed online through the Treasury Department's Online Notification System. The Treasury Department has provided notice form templates to assist in preparing the notification. Notifications must be accompanied by a certification as well as post-transaction organizational chart of the U.S. person.

Treasury reserves the right to respond to a notification and seek further information, although it is not required to respond under the Rules.



D. Key Exceptions to Covered Transactions[1]

16. What is the publicly traded security exception?

The publicly traded securities exception ("**PTSE**") provides an exception for U.S. persons (and consequently, any controlled foreign entities) to invest in publicly traded securities of a covered foreign person, which includes securities traded on a securities exchange or "over-the-counter."

17. How does the PTSE work in the context of IPOs?

While the full scope and availability of the PTSE in the context of IPOs may yet be slightly unclear from a regulatory and enforcement standpoint, recent FAQ guidance issued by the Treasury Department on Dec. 23, 2025, appears to clarify that a wider array of investment activities in the IPO context may be able to use the PTSE.

As background, the plain language of the OIR does not specifically address whether or not an IPO is covered by the PTSE, or to what extent. However, the commentary to the Final Rules states that a "U.S. person's acquisition of an equity interest in a covered foreign person that is *not yet publicly traded for the purpose of facilitating an IPO, such as a purchase with the intent to create a market for the security or to resell the security on a secondary market (e.g., as part of an underwriting arrangement*), is a covered transaction." Consistent with policy stated throughout the commentary to the Rules, the Treasury Department stated that it views such activity in the context of an IPO as much more likely to convey the types of intangible benefits to a covered foreign person which the Rules are generally designed to limit, including providing such things as enhanced standing and prominence, managerial assistance, access to investment and talent networks, market access, and enhanced access to additional financing.

This had led to some divergence of interpretation in the market, with a conservative view having been that the Treasury Department may consider any investment participation in an IPO as categorically excluded from the PTSE because the shares would not be considered publicly traded *until after* the IPO has fully concluded (i.e., that only trading on the secondary market will be deemed to be within scope of the PTSE).

[1] Although we discuss in detail in this guide a few of the more widely used exceptions, below is a summary of the full set of exceptions available under the Rules (please refer to 31 C.F.R. § 850.501 and 502 for complete and accurate regulatory language):

(A) the following investments by a U.S. person, so long as such investment does not afford the U.S. person rights beyond standard minority shareholder protections with respect to the covered foreign person:

  (i) publicly traded securities;

  (ii) securities issued by an "investment company" or any company that has elected to be regulated or is regulated as a business development company, as are set forth in the Investment Company Act of 1940;

  (iii) LP interests in a fund where the LP's capital invested is not more than $2,000,000 or where the LP has secured binding contractual assurance that its capital in the fund will not be used to engage in a transaction that would be a covered transaction;

  (iv) in a derivative, so long as such derivative does not confer the right to acquire equity, any rights associated with equity, or any assets in or of a covered foreign person;

(B) 100% acquisitions such that, following such acquisition, the entity is no longer a covered foreign person;

(C) a transaction between a U.S. person and its controlled foreign entity that supports operations that are not covered activities or that maintains covered activities that the controlled foreign entity was engaged in prior to January 2, 2025;

(D) A transaction made after January 2, 2025, pursuant to a binding, uncalled capital commitment entered into before January 2, 2025;

(E) acquisition of a voting interest upon default or other condition involving a loan or a similar financing arrangement, where the loan was made by a syndicate of banks in a loan participation where the U.S. person lender(s) is not the syndication agent *and* cannot on its initiate any action vis-à-vis the debtor;

(F) receipt of employment compensation by an individual in the form of an award of equity or the grant of an option to purchase equity in a covered foreign person, or the exercise of such option;

(G) specific transactions approved by the Treasury Secretary including transactions deemed to be in national interest of the United States.

The more moderate view had been that, because the Treasury Department's language in the commentary to the Final Rules appeared to focus on actions that facilitate or otherwise enhance the IPO's entrance to the market (such as through market making activity), the OIR should not capture those IPO transactions where the purchases are "proprietary" in nature – i.e., where the purchaser is purchasing the shares for their own investment purposes and benefit, and not with the primary intent to immediately redistribute to the secondary market or otherwise provide any intangible benefits to the covered foreign person's IPO.

Recent guidance provided by the Treasury Department in the form of FAQs on Dec. 23, 2025, supports this latter view by indicating that there are certain investment activities which will fall under the PTSE in an IPO context.

Specifically, Q.4 under Section X (*Publicly Traded Securities*) of the Dec. 23 FAQs, asks whether the "acquisition of a publicly traded security by a U.S. person following the occurrence of a public listing and pursuant to a subscription agreement (or other agreement such as a standby underwriting agreement) entered into prior to such listing" would constitute a covered transaction. The response states: "when a U.S. person acquires an equity interest in a covered foreign person, and at the time of such acquisition the equity interest is publicly traded, such security falls under the description of a 'publicly traded security.'"

While the question and the response do not exactly line up—the response does not directly answer the question, nor does it, for example, define how or when the Treasury Department would consider the public listing to have "occurred"—there is broad consensus in the market, as well as indications from policy makers at the Treasury Department, that the Treasury Department will consider the IPO to have occurred, and the shares to be considered "publicly traded", at the moment the shares are listed on the exchange as part of the IPO process.

While the policy intent and direction of travel behind FAQ X.4 clarifies a more expansive use of the PTSE in the IPO context, some ambiguity may remain due to operational and technical vagaries in the IPO settlement mechanics and practices from jurisdiction to jurisdiction – i.e., it is possible in certain jurisdictions that some investors may acquire the securities near to, but slightly before the shares technically go onto the exchange. While the Treasury Department may not be thinking at this level of granularity, it may be prudent to consult in-house or external compliance or legal counsel prior to relying on the PTSE.

Note also that the Treasury Department included a blanket catch-all statement in FAQ X.4 indicating that this use of the PTSE in the IPO context is available "[a]bsent additional facts." Again, without any prescriptive guidance as to what such "additional facts" might qualify or entail, consulting compliance or legal personnel may be advisable.

18. How are cornerstone investments likely to be treated pursuant to this interpretation of the PTSE and FAQ X.4?

Although FAQ X.4 does not explicitly identify cornerstone investments as covered by the PTSE, there is fairly broad and growing market consensus that such investments are likely to be considered by the Treasury Department to fall within the scope of the PTSE. However, note the caution above that there may still exist some uncertainty in certain markets to the extent practice is for cornerstone investors to acquire the shares somewhat before they are technically listed on the exchange. Investors are encouraged to conduct a risk appetite assessment before relying on the PTSE for cornerstone investments, particularly in the context of an ordinarily prohibited transaction.

19. What other services are covered by the PTSE in an IPO context?

The commentary to the OIR also notes that providing services ancillary to IPOs that do not involve the acquisition of an equity interest, including underwriting services that do not entail acquiring such an interest, are not covered transactions and thus do not require an exception. The Treasury Department has further clarified in the Dec. 23, 2025, FAQ X.3 that assistance provided by a U.S. financial institution for a covered foreign person, where such assistance does not include the financial institution's acquisition of any non-publicly traded securities in the covered foreign person, would not constitute a covered transaction under the OIR.

20. How else is the availability of the PTSE potentially limited?

The PTSE may also be unavailable if the investment in the securities affords the U.S. person rights beyond "standard minority shareholder protections" with respect to the covered foreign person.

21. What are standard minority shareholder protections?

While the OIR do not define a "standard" minority shareholder protection right, they include six rights as examples. The Treasury Department has indicated that standard minority shareholder protection rights are (i) typically defensive in nature and (ii) aimed at protecting minority shareholders' investments from actions taken by majority investors. The Treasury Department has further indicated that it views such rights as "negative" and not "positive," but does not explain these concepts further, and declines to provide more descriptive lists of which rights may or may not undercut the PTSE.

Analyzing rights granted to shareholders under this framework is susceptible to *significant* interpretive ambiguity and will be case dependent in application. As a general guideline, a general market view currently is that the OIR intend to focus on rights which convey a "positive" governance or control aspects – i.e., rights which grant the ability to direct Company operations, or which provide governance privileges, run a higher risk of being considered rights that go "beyond" standard minority shareholder protections.

Pursuant to Q.5 under Section X of the OISP FAQs, the Treasury Department clarified that a shareholder's right to nominate (i.e., *propose* for election) an entity's directors would be considered a standard minority shareholder protection if that right is generally available to similarly situated shareholders of that entity solely by virtue of their minority shareholding. This clarification is intended to assuage concerns among investors emanating from the Treasury Department's previous view, as presented in the commentary to the Final Rules, that it did not view such rights under PRC corporate law as standard minority protection rights. The Treasury Department indicated that this change in its position is intended to reflect updates to the relevant PRC statute (though it appears that the applicability of the clarification is broader than just PRC law). Importantly, the Treasury Department stated that the right to *appoint* a director, regardless of whether such a right is accorded to similarly situated shareholders, does not constitute a minority shareholder protection.

22. Can follow-on offerings avail of the PTSE?

Pursuant to Treasury FAQ X.1, as long as (i) an issuer's securities are already publicly traded and (ii) a follow-on offering is made of the same class of securities as those that are publicly traded and (iii) such follow-on securities will be fungible with the already existing publicly traded securities (e.g., they will have the same identification number upon issuance, provides identical material rights and privileges, such as with respect to voting and dividends), acquisition of such securities by a U.S. person would be an excepted transaction, so long as the acquisition does not provide the U.S. person rights beyond standard minority shareholder protections.

Notably, acquisition of such follow-on securities as part of underwriting services provided in connection with the follow-on offering would also be an excepted transaction, subject to the standard minority shareholder protections caveat.

23. How are contingent equity interests treated under the PTSE?

An acquisition by a U.S. person of a contingent equity interest that is convertible into, or provides the right to acquire, only a publicly traded security is considered an excepted transaction, so long as it does not afford the U.S. person rights beyond standard minority shareholder protections. The Treasury Department has further clarified that acquisitions of contingent equity interests convertible into or which provide the right to acquire a publicly traded security and cash (or another form of consideration not covered by the OIR) would still be excepted transactions.

24. What is the LP/pooled investment exception?

The OIR exempt from the definition of covered transactions certain investments as a limited partner or equivalent in a non-U.S. person pooled investment fund. Specifically, investments made by a U.S. person as a limited partner-equivalent in a venture capital fund, private equity fund, fund of funds, or other pooled investment fund are not subject to the OIR if: (i) the committed capital does not exceed US $2,000,000 (aggregated across any investment and co-investment vehicles of the fund) *or* (ii) if the U.S. person has secured a binding contractual assurance that its capital in the fund will not be used to engage in a prohibited transaction or a notifiable transaction.

Timely obtaining the binding contractual assurance (i.e., *prior* to U.S. person investment into the pooled investment fund) would mean that the LP/pooled investment exception would apply regardless of the overall dollar amount of the U.S. person's investment—that is, the test for an excepted transaction is disjunctive such that either an investment of $2,000,000 or less, or an investment with the foregoing contractual assurance, is sufficient to trigger the exception.

25. What is the rationale for the committed capital threshold?

The Treasury Department believes that LP/pooled investment transactions above a certain threshold are more likely to involve the transfer of intangible benefits such as those often associated with larger institutional investors, including standing and prominence, managerial assistance, and enhanced access to additional financing. Importantly, as part of the Final Rules, the Treasury Department declined to eliminate the pooled investment exception because, the OIR are scoped out to prevent the transfer of capital that is accompanied by intangible benefits, and certain *de minimis* U.S. person investments into pooled investment funds likely do not provide sufficient incentive or opportunity for the U.S. person to transfer such intangibles to a covered foreign person.

E. Current Treasury and Market Practice

26. How has the Treasury Department administered the OIR so far?

Industry and external legal counsel report that the Treasury Department has started issuing RFIs on a proactive basis, indicating that the OISP staff is beginning to conduct and act on its own market research and/or potential information received from market participants and "whistleblowers." Additionally, the Treasury Department has been responding to at least some notifications with further inquiries.

Although it is possible that the Treasury Department may be resorting to its legal subpoena authority as well, such action would be confidential at this point, and it is not commonly known whether any such actions have in fact been taken.

27. Have there been any enforcement actions under the OIR?

No enforcement actions under the OIR have yet been made public.

28. What is the future of the OIR/OISP? Will the Treasury Department be providing additional guidance?

The Trump administration indicated in its American First Investment Policy that the federal government would be undertaking a fulsome review of the OISP (a Biden era initiative), and would be recommending potential amendment to the regulations. It is unclear at this point what such amendments might be, but comments from the White House and regulators seem to indicate at least a possible expansion of Covered Sectors into areas such as biotech and hypersonics.

The Treasury Department has released several tranches of FAQs beginning in December 2024 before the Rules went into effect. The latest release was issued in December 2025, which, in part, provided some further clarity on the scope of the PTSE, which we discuss below.

29. What is the COINS Act? How does it impact the OISP?

The Comprehensive Outbound Investment National Security Act of 2025 ("COINS Act") was enacted into law in December 2025 as part of the FY 2026 National Defense Authorization Act. Broadly, it provides statutory authority—as opposed to the current executive order—for an outbound investment screening program, and will result in various amendments to the regulations which we highlight below. However, the Treasury Department has 450 days to issue regulations to carry out the provisions of the COINS Act. In the meantime, the Treasury Department has stated that "parties should continue to act in full compliance" with the current OIR. Practically, this means that the COINS Act may not be fully implemented until 2027, and industry participants should continue to base their risk assessments and notification filing decisions under the current OIR, at least for IPOs expected in 2026.

The COINS Act expands the current OIR by targeting additional countries (to include Cuba, Iran, North Korea, Russia, and Venezuela "under the Maduro regime") and by adding high-performance computing/supercomputing and hypersonic systems to the list of covered sectors. While the expansion of the covered sectors may have significant impact, the expansion of the list of covered countries may be of lesser impact for many market participants, as the Treasury Department, through its Office of Foreign Assets Control, already maintains comprehensive sanctions against Cuba, Iran, and North Korea, very significant sanctions against Russia, including on any new investment, and Venezuela (noting, of course, that with Maduro ousted from Venezuela, Treasury is going to need to decide in its implementing regulations whether Venezuela is still covered).

The COINS Act also materially expands the definition of a "covered foreign person." Covered foreign persons under the COINS Act include entities incorporated or having their principal place of business countries of concern, members of the political leadership of a country of concern, entities subject to the direction or control of such entities or persons, and entities that are 50% or more owned by such entities or persons. The COINS Act definition of "covered foreign persons" represents a meaningful expansion from the OIR in certain respects: it classifies all counterparties as "covered foreign persons" regardless of their specific technological activities; and it adopts a broad "direction or control" standard without imposing any minimum voting, equity or financial thresholds. This could be particularly consequential as it raises the possibility that a minority ownership stake by a Chinese company could render a company, even if headquartered in an allied jurisdiction, a covered foreign person.

The Act includes a number of new exceptions and exemptions. It authorizes the Treasury Department to establish a de minimis investment threshold below which certain investments that would otherwise be prohibited or notifiable would be exempted. As of the date of this document, there is no clear indication from the Treasury Department of where the de minimis bar would be set.

The Act exempts underwriting services from the OISP. If implemented without amendment or other qualification, this exemption presages a potential significant change to the Treasury Department's guidance on "intangible benefits."

Lastly, the Act also requires the creation of a mechanism for parties to request non-binding guidance on a confidential basis, or provision of anonymized guidance to the public, as to whether a transaction would constitute a covered transaction. The OIR currently do not include a formalized process for seeking the Treasury Department's views on potential transactions, and any feedback is generally requested on a no-name, confidential basis, and it not always the case that the Treasury Department elects to offer guidance

30. How is the market approaching OIR risk to date?

For the first six to nine months following the implementation of the OIR, industry participants, for the most part, appeared to avoid any transactions that would implicate the OIR, even transactions that were legal but notifiable. In effect, industry adopted a policy of aggressive overcompliance. Among other things, we saw:

- Counterparties operating squarely outside of what is covered under the OIR (e.g., U.S. real estate landlords) including extensive OIR reps in agreements;
- Various counterparties treating transactions subject solely to post-closing notification as equivalent to prohibited transactions;
- Foreign LPs demanding aggressive OIR compliance reps and covenants; and
- Refusal to lend to any "covered foreign person" regardless of whether the loan or the entities' activities implicated OIR prohibitions.

However, there appears to be a shift in attitudes and risk assessments as industry becomes more comfortable with the Rules and no doubt in some significant part due to the major rebound in Hong Kong IPO market. As a result, advisors are seeing a greater willingness of U.S. persons and their controlled foreign entities to participate in potentially notifiable IPOs and to file notifications, including major U.S. financial institutions playing a role in notifiable IPOs.

31. What are some contractual protections parties are seeking in their agreements to mitigate OIR risk?

U.S. and even some non-U.S. investors and institutions are generally seeking broad reps in transaction documentation from their counterparties. Depending on the context, one or more of the following may be sought, with slightly varying permutations:

- the counterparty is not a covered foreign person and will not engage in activities to become a covered foreign person;
- the counterparty is and will remain in full compliance with the OIR;
- the counterparty will not use monies provided by the investment, loan, etc. to engage in any covered transaction as if the counterparty were a U.S. person, or in any other manner to cause a violation of the OIR by any party. Increasingly parties are pushing back to try and allow for engaging in notifiable transactions; and
- in the fund context, the representation may be structured as an excuse right to ensure a U.S. investor's interests are automatically walled off from any investments in a covered foreign person, or provide the investor with the option to review and elect whether or not to participate (in notifiable transactions).

32. What sort of diligence activities are market participants engaging in?

We have seen no "one-size fits all" diligence activities. Responses have been highly dependent on the role, the availability of information and access the investor has to target. In the IPO context, for instance, US institutions who may be serving as underwriting or sponsoring institutions are baking in OIR diligence questions and controls into the standard due diligence process ordinarily commensurate with such roles in the securities offering process, which generally also include external counsel legal review and export opinion. Cornerstone and other institutional investors may be relying in part on the representations in the offering documentation, press releases and other securities filings as a result of this primary level diligence, but verifying with some degree of independent public research, red flag assessment, and in some cases, additional legal counsel support.

In the fund context, we are seeing a bit of push-pull negotiation between LPs and the Fund entities. Whereas some LPs may seek to push the primary responsibility to diligence investment targets on to the Fund, its General Partner and/or Investment Manager, and seek strong reps from the latter, non-U.S. fund entities in particular may also seek to employ a notice and "buyer beware" approach whereby LPs are informed that the fund does or may invest in covered foreign persons from time and time, and, with an LP excuse right, it will be up to the LP to assess its legal ability to participate in each portfolio investment.

In general, where a person has direct access to the target, we are seeing stronger and more direct diligence efforts to uncover potential OIR risks and connections, and representations form the target to mitigate those risks.

For additional information, please refer to Gibson Dunn's client alerts on the OIR, available here, here, and here.

About us

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THE ALTERNATIVE INVESTMENT MANAGEMENT ASSOCIATION

AIMA is the world's largest membership association for alternative investment managers. Its membership has more firms, managing more assets than any other industry body, and through our 10 offices located around the world, we serve over 2,000 members in 60 different countries.

AIMA's mission, which includes that of its private credit affiliate, the Alternative Credit Council (ACC), is to ensure that our industry of hedge funds, private market funds and digital asset funds is always best positioned for success.

Success in our industry is defined by its contribution to capital formation, economic growth, and positive outcomes for investors while being able to operate efficiently within appropriate and proportionate regulatory frameworks.

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- Export controls including with respect to high technology and other sensitive goods
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We have helped clients manage the most consequential trade enforcement actions in history and have led some of the only successful judicial challenges to trade regulations. We also help clients navigate complex landscapes and secure difficult-to-obtain export controls and sanctions authorizations.

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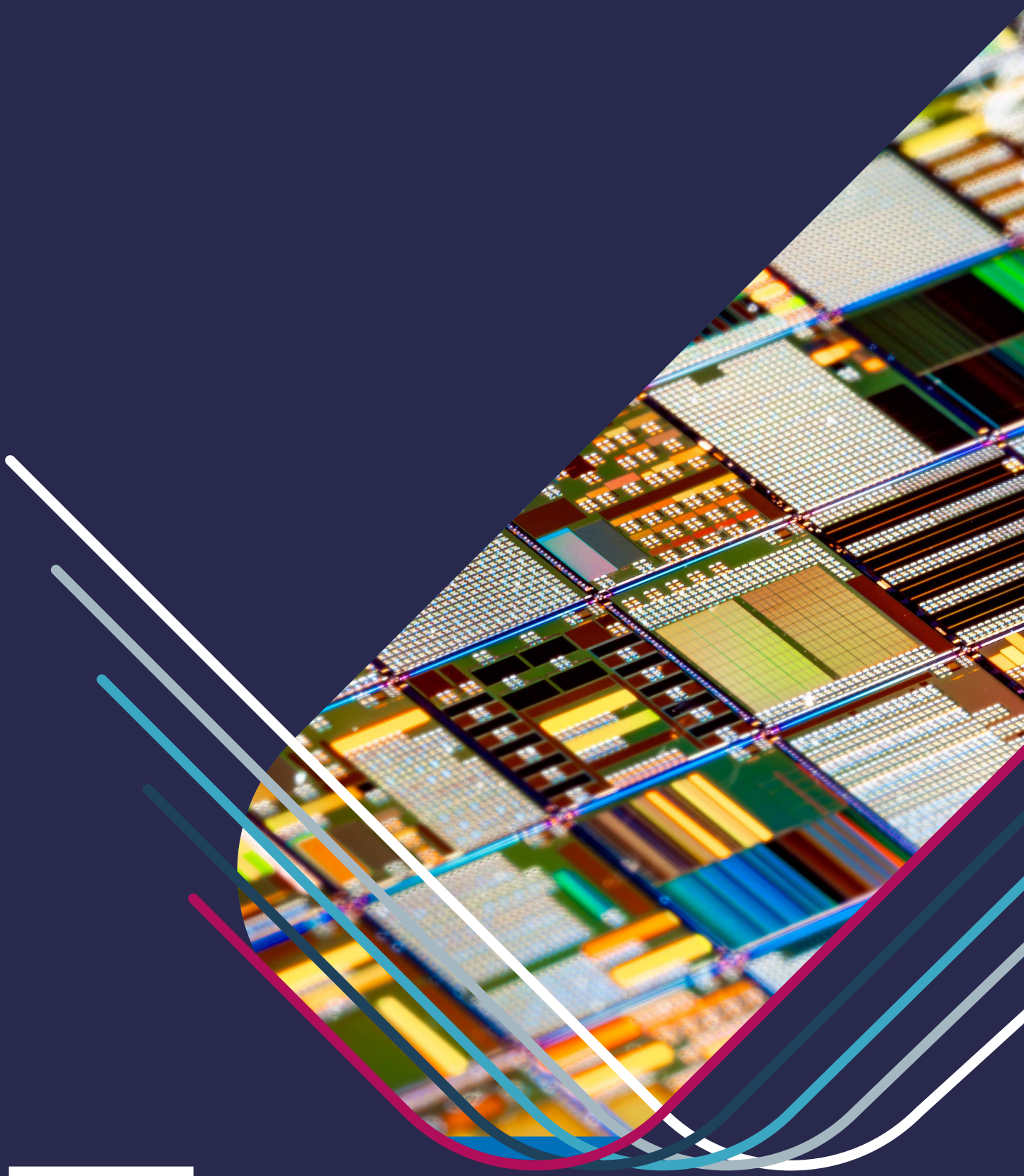

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