

**Alert | International Trade**



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## US Outbound Investment Security Program Takes Effect January 2025

### Go-To Guide

- Starting January 2025, the U.S. Outbound Investment Security Program (OISP) will require U.S. investors to report or avoid certain technology investments in China, Hong Kong, and Macau.
- U.S. citizens, permanent residents, and U.S.-registered entities must comply with the OISP, and prevent their foreign branches and subsidiaries from engaging in prohibited transactions.
- The OISP targets specific investment types, including acquisitions, loans, joint ventures, and certain fund interests, especially if they involve critical technologies.
- U.S. investors must submit notifications for relevant transactions within 30 days of completion, detailing transaction parties, rationale, and post-transaction plans.
- Violations can lead to civil and criminal penalties, including fines and potential transaction nullification.
- Because the OISP program is new, as is the Treasury office responsible for implementing and enforcing the regulations, we expect iterative and changing guidance and interpretations as the program matures and evolves. Accordingly, it is important for investors and targets of investment to seek current and refreshed advice for any proposed transactions they may wish to undertake.

On Oct. 28, 2024, the U.S. Department of the Treasury issued a **final rule** implementing President Biden's **Executive Order 14105**, "Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern." Effective Jan. 2, 2025, the Outbound Investment Security Program (OISP) imposes new notification requirements and prohibitions on U.S. persons making certain types of investments in "countries of concern" (currently defined to include China, Hong Kong, and Macau). The OISP covers investments in three categories of technologies:

- semiconductors and microelectronics;
- quantum information technologies; and
- artificial intelligence.

Treasury's Office of Investment Security will administer the OISP. While the United States has long regulated inbound foreign investment through the Committee on Foreign Investment in the United States (CFIUS) process, the OISP is the first time the United States has established a broad framework to regulate U.S. investment in other countries.

### **Transactions Subject to the OISP**

The OISP covers investments that are 1) made by a "U.S. person"; 2) involve a "covered foreign person" counterparty; 3) take the form of a "covered transaction" type; and 4) involve "covered activities" and a "covered technology."

#### *U.S. Person Investor*

Under the OISP, "U.S. persons" include U.S. citizens and lawful permanent residents, as well as U.S.-registered entities and their foreign branches and subsidiaries. While the final rule does not directly apply to non-U.S. subsidiaries of U.S. companies, it requires U.S. persons to take "all reasonable steps" to prevent "foreign controlled entities" from engaging in prohibited transactions.

#### *Covered Foreign Person*

For a transaction to be subject to the OISP, the target must be a "covered foreign person," defined as a person of a country of concern engaged in certain activities in the covered technology industries. At this time, a "country of concern" is defined as the People's Republic of China, Hong Kong, and Macau, although this list could change.

Under the OISP, the term "person of a country of concern" includes not only individuals and entities in China, but also entities with significant financial connections to, or who are controlled or owned by, Chinese entities. For example, a third-country company majority owned by a Chinese company would be a "person of a country of concern."

#### *Covered Transactions*

Transaction types subject to the OISP include a U.S. person's

- acquisition of an entity interest or contingent equity interest in a covered foreign person;
- provision of a loan or a similar debt financing arrangement to a covered foreign person in which the U.S. person obtains financial or governance rights characteristic of an equity investment;

- conversion of a contingent equity interest into an equity interest in a covered foreign person;
- Greenfield investments in cases where the investment would contribute to creating a covered foreign person's engagement in covered activities;
- entrance into a joint venture with a covered foreign person when the joint venture will engage, or plans to engage, in a covered activity; or
- acquisition of a limited partner (LP) or equivalent interest in certain investment funds that likely will invest in covered activities.

OISP's scope specifically excludes several investment types, including acquisitions of publicly traded securities, derivatives, full buyouts, certain intracompany transactions, fulfilling binding capital commitments entered into before the rule's effective date, certain syndicated debt financings, and equity-based employment compensation. In addition, certain investments by U.S. LPs in pooled investment funds may be exempt if the total investment is below \$2 million, or where the U.S. person has received binding contractual assurances that its capital will not be used for investments subject to the OISP.

The Treasury secretary may also exempt any transaction if the secretary determines, in consultation with the heads of relevant agencies, that such exemption is in U.S. national security interests. Since publishing the final rule, Treasury has indicated that when deciding whether to grant such an exception, it will consider the transaction's effect on the U.S. supply chain, domestic production needs, U.S. technological leadership in the area affecting national security, and the impact of prohibiting a given transaction on U.S. national security (among other factors). [See guidelines on requesting a national interest exception](#), including details regarding the contents of the request.

### *Covered Technologies*

As noted above, the OISP applies to three technology categories: 1) semiconductors and microelectronics; 2) quantum information technologies; and 3) artificial intelligence (collectively, covered technologies). Treasury's final rule enumerates certain "covered activities" in each of these three categories. Depending on the nature of the covered activity and technology, transactions are either prohibited or notifiable.

- Semiconductors and Microelectronics.

Covered transactions involving the following covered technologies are **prohibited**:

- certain electronic design automatic software, including software used to design integrated circuits or advanced packaging;
- certain fabrication or advanced packaging tools;
- certain advanced integrated circuit design or fabrication;
- advanced packaging techniques for integrated circuits; and
- supercomputers.

Covered transactions involving integrated circuit design, fabrication, or packaging not otherwise covered by the prohibited transaction definition are **notifiable**.

- Quantum Information Technologies.

Covered transactions involving the following covered technologies are **prohibited**:

- development of quantum computers or the production of any critical components required to produce a quantum computer;
- development or production of certain quantum sensing platforms; and
- development or production of certain quantum networks or quantum communication systems.

In contrast to the other categories of covered technologies, all enumerated quantum information technologies activities are **prohibited**; none are notifiable.

- Artificial Intelligence.

Covered transactions involving the following covered technologies are **prohibited**:

- development of any AI system designed to be exclusively used for, or intended to be used for, certain end uses, including military, government intelligence, or mass surveillance;
- development of any AI system trained using a quantity of computing power greater than  $10^{25}$  computational operations; and
- development of any AI system that is trained using primarily biological sequence data and a quantity of computing power greater than  $10^{24}$  computational operations.

Covered transactions involving the following covered technologies are **notifiable**:

- development of any AI system not otherwise covered by the prohibited transaction definition, where such AI system is
  - designed or intended to be used for certain end uses or applications; or
  - trained using a quantity of computing power greater than  $10^{23}$  computational operations.

### **Knowledge Standard and Diligence Expectations**

The OISP imposes obligations on U.S. persons who have “knowledge” of relevant facts or circumstances related to a covered transaction. A U.S. person is deemed to have knowledge if it possesses actual knowledge or awareness of a “high probability” or “reason to know” of a relevant fact or circumstance.

U.S. persons should undertake a “reasonable and diligent inquiry” to obtain information relating to whether a proposed investment is within the OISP’s scope. The final rule specifies several factors Treasury will consider when evaluating whether a U.S. person has engaged in a “reasonable and diligent inquiry,” including efforts to obtain information from the target, review publicly available information, and obtain representations and warranties relating to the OISP’s applicability. Recognizing that a U.S. person may face obstacles to conducting due diligence, Treasury will assess a “reasonable and diligent inquiry” based on the totality of relevant facts and circumstances and may include, in part, reliance on representations the non-U.S. target makes.

The knowledge standard and notification requirements can extend after completion of a covered transaction. If a U.S. person subsequently obtains knowledge that a previous transaction was a covered transaction at the time it took place, it must notify Treasury within 30 days of acquiring such knowledge.

## Notification Requirements

If a transaction is notifiable, the U.S. person must submit a notification through Treasury's online filing portal within 30 days of the completion date. Notification filings will require similar information to CFIUS investment review filings, including:

- details about both transaction parties, including contact information, party descriptions, and organizational charts describing the parties' structures;
- descriptions of the transaction rationale, transaction status, transaction value, and the relevant national security technologies and products that put this transaction within scope of the regime; and
- information regarding the parties' post-transaction plans, including any equity interest, voting interest, board seat, or other control changes following the transaction.

Following submission of the notification, Treasury may engage with the U.S. person and seek follow-up information. However, it is also possible that the U.S. person will not receive any follow up questions, and communication with Treasury will be limited to electronic acknowledgement of receipt. Treasury has clarified that the OISP notification process is not a substantive review process like the CFIUS regime. It remains to be seen whether and how Treasury will utilize the data collected through OISP notifications.

## Violations and Penalties

Violations will be subject to the civil and criminal penalties outlined in the International Emergency Economic Powers Act, including civil monetary penalties of up to the greater of \$368,136 or twice the transaction's value. Treasury may also refer criminal violations to the attorney general for willful violations.

The Treasury secretary may also nullify, void, or otherwise compel divestment of the prohibited transaction.

## Key Takeaways

1. Unlike existing CFIUS and sanctions regimes, the OISP does not establish a pre-closing review or licensing process. Rather, covered transactions are either notifiable (without being subject to substantive national security review) or prohibited (unless Treasury permits a national interest exception). Many aspects of the OISP represent new areas of regulation for Treasury, potentially requiring additional time and guidance for regulated parties to understand the OISP's impact on their investment processes and compliance obligations. In addition, there appears to be bipartisan interest in codifying and expanding upon several elements of the OISP, but it remains to be seen how or when such legislation would impact Treasury's implementation of the OISP.
2. The final rule's broad definitions of "covered transaction," "person of a country of concern," and "covered foreign person" mean the OISP could potentially impact investments in third countries, not just between U.S. and Chinese companies. For example, a U.S. entity's entry into a joint venture in a third country with a third-country company that is owned 50% or more by a Chinese parent could be a "covered transaction" if it involves covered technologies. Accordingly, U.S. persons should consider OISP requirements in any international investment activity, not just investments directly in China.
3. Because the OISP program is new, as is the Treasury office responsible for implementing and enforcing the regulations, we expect iterative and changing guidance and interpretations as the

program matures and evolves. Accordingly, it is important for investors and targets of investment to seek current and refreshed advice for any proposed transactions they may wish to undertake.

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