

Outbound Investment Security Program: Final Rule

November 19, 2024

On October 28, 2024, the US Department of the Treasury issued final regulations implementing the Executive Order on Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern (August 9, 2023). As expected, the regulations – the Outbound Investment Security Program (OISP) – prohibit or subject to notification requirements certain transactions involving US persons and specified foreign technology sectors. The OISP is aimed primarily at US-person investments in the semiconductor and microelectronics, quantum information technology, and artificial intelligence (AI) sectors of a designated country of concern – currently China, including Hong Kong and Macau (for ease of reference, collectively “China”). The OISP will take effect on January 2, 2025.

Deriving authority from the International Emergency Economic Powers Act, the OISP prohibits or subjects to notification requirements certain transactions made by “US persons” in “covered foreign persons” engaged in “covered activity.” In large part, the OISP tracks Treasury’s advanced notice of proposed rulemaking issued on June 21, 2024. The OISP appears to be aimed at limiting certain foreign actors from obtaining access to US capital and associated intangible benefits (e.g., access to technology and talent networks, enhanced standing or prominence, market access, and additional financing) in furtherance of activities identified as contrary to US national security or foreign policy interests.

For purposes of the OISP:

- **A US person is:**
 1. A US citizen or lawful permanent resident, wherever located.
 2. An entity organized under the laws of the US and its foreign branches.
 3. Any person in the US, regardless of nationality (31 CFR § 850.229).
- **A covered foreign person (CFPs) is:**
 1. A “person of a country of concern” (PCC) that engages in a “covered activity.”
 2. A person that directly or indirectly holds any voting interest, board seat or equity interest in, or holds any power to direct or cause the direction of the management or policies of, a person defined in (1), when such person derives more than 50% of its revenue or net income individually, or as aggregated across such persons from each of which it derives at least \$50,000 (or equivalent) of its revenue or net income, on an annual basis, or incurs more than 50% of its capital expenditure or operating expenses, individually or as aggregated across such persons from each of which it incurs at least \$50,000 (or equivalent) of its capital expenditure or operating expenses, on an annual basis (31 CFR § 850.209).
- **Covered transactions**, with certain limited exceptions, involve a US person’s direct or indirect:
 1. Acquisition of an equity interest or contingent equity interest in a person that the US person knows at the time of the acquisition is a CFP.
 2. Provision of a loan or a similar debt financing arrangement to a person that the US person knows at the time of the provision is a CFP, where such debt financing affords or will afford the US person an interest in profits of the CFP, the right to appoint members of the board of directors (or equivalent) of the CFP, or other comparable financial or governance rights characteristic of an equity investment but not typical of a loan.
 3. Conversion of a contingent equity interest into an equity interest in a person that the US person knows at the time of the conversion is a CFP, where the contingent equity interest was acquired by the US person on or after January 2, 2025.
 4. Acquisition, leasing or other development of operations, land, property or other assets in a country of concern that the US person knows at the time of such acquisition, leasing or other development will result in, or that the US person plans to result in, the establishment of a CFP or the engagement of a PCC in a covered activity.
 5. Entrance into a joint venture, wherever located, that is formed with a PCC, and that the subject US person knows at the time of entrance into the joint venture that the joint venture will engage, or plans to engage, in a covered activity.

6. Acquisition of a limited partner (LP) or equivalent interest in a venture capital fund, private equity fund, fund of funds or other pooled investment fund (in each case, where the fund is not a US person) that a US person knows at the time of the acquisition likely will invest in a PCC that is in the semiconductor and microelectronics, quantum information technology, or AI sectors, and such fund undertakes a transaction that would be a covered transaction if undertaken by a US person (31 CFR § 850.210).
- **PCCs** are any of the following:
 1. Citizens or lawful permanent residents of China, **provided such persons are not also US citizens**.
 2. Entities incorporated or headquartered in or with a principal place of business in China.
 3. The government of China (including instrumentalities thereof) or persons acting on behalf thereof.
 4. An entity in which persons identified in (1) through (3), individually or in the aggregate, directly or indirectly, hold at least a 50% outstanding voting interest, voting power of the board or equity interest.
 5. Any entity in which one or more persons identified in (4), individually or in the aggregate, directly or indirectly, hold at least a 50% outstanding voting interest, voting power of the board or equity interest (31 CFR § 850.221).
 - **Covered activities** comprise:
 1. Certain semiconductors and microelectronics.
 2. Quantum information technologies.
 3. Certain AI technologies, described in further detail below (31 CFR § 850.208, 31 CFR § 850.224, 31 CFR § 850.217).
 - **Knowledge** includes actual knowledge and constructive knowledge – i.e., reason to know based on reasonably available information and appropriate investment due diligence (31 CFR § 850.216).

In furtherance of its apparent policy objectives, the OISP **prohibits** US persons from engaging in a covered transaction with a CFP or covered joint venture that:

Semiconductors	Quantum	AI
<ul style="list-style-type: none"> • Develops or produces specified electronic design automation software for the design of integrated circuits or advanced packaging. • Develops or produces certain front-end semiconductor fabrication equipment, equipment for performing volume advanced packaging, or commodity, material, software, or technology designed exclusively for use in or with extreme ultraviolet lithography fabrication equipment. • Designs integrated circuits meeting or exceeding specified performance parameters. • Fabricates certain logic-integrated circuits meeting specified criteria. 	<ul style="list-style-type: none"> • Develops, installs, sells or produces supercomputers enabled by advanced integrated circuits and meeting specified criteria. • Develops a quantum computer or produces critical components required to produce a quantum computer. • Develops or produces quantum-sensing platforms designed or intended for military, government intelligence or mass surveillance end use. • Develops or produces certain quantum networks or quantum communication systems. 	<ul style="list-style-type: none"> • Develops any AI system designed exclusively to be used for or intended to be used for military, government intelligence or mass surveillance end uses. • Develops any AI system trained using a quantity of computing power greater than 10^{25} computational operations (e.g., integer or floating-point operations). • Develops any AI system trained using a quantity of computing power greater than 10^{24} computational operations (e.g., integer or floating-point operations) using primarily biological sequence data.

In addition, the OISP prohibits US persons from engaging in covered transactions with specified restricted parties – including those designated on the US Department of Commerce’s Entity List and Treasury’s Specially Designated Nationals and Blocked Persons List.

The OISP requires **notification** to Treasury of US-person engagement in transactions with CFPs or covered joint ventures that design, fabricate or package integrated circuits not subject to prohibitions, or develop AI systems

not subject to prohibitions, and that are:

- Designed for any military, government intelligence or mass surveillance end use.
- Intended for use in a cybersecurity, digital forensics, penetration testing tool or control of robotics systems application.
- Trained using a quantity of computing power greater than 10^{23} computational operations (e.g., integer or floating-point operations).

Importantly, the OISP prohibits US persons from knowingly directing a transaction by a non-US person that the US person knows at the time of the transaction would be a prohibited transaction if engaged in by a US person. A US person “knowingly directs” a transaction when the US person has authority to make or substantially participate in decisions on behalf of a non-US person entity and exercises that authority to direct, order, decide upon or approve a transaction that would be prohibited if engaged in by a US person (31 CFR § 850.303). Notably, such US persons who recuse themselves from the following activities will not be considered to have exercised their authority to direct, order, decide upon or approve a transaction:

- Participating in formal approval and decision-making processes.
- Reviewing, editing, commenting on, approving and signing relevant transaction documents.
- Engaging in negotiations with the investment target or other transaction counterparty (e.g., joint venture).

Importantly, a US person must take all reasonable steps to prohibit and prevent any transactions by a controlled foreign entity that would be prohibited if engaged in directly by a US person. As a practical matter, this means that foreign subsidiaries of US parents must comply with the OISP’s prohibitions or notification requirements.

This also means that individual US persons who exercise control over foreign persons must act to cause their controlled foreign entities to comply.

The OISP excepts from prohibition or notification requirements the following transactions:

1. Investments by US persons:

- In a publicly traded security that trades on a securities exchange or through “over-the-counter” trading.
- In a security issued by a defined investment company that is registered with the US Securities and Exchange Commission (e.g., index funds, mutual funds or exchange traded funds), or a company that has elected to be or is regulated as a business development company.
- Made as an LP or equivalent in a venture capital fund, private equity fund, fund of funds or other pooled investment fund, where the LP’s committed capital is not more than \$2,000,000 aggregated across any investment or co-investment vehicles of the fund, or the LP or equivalent has secured binding contractual assurance that its capital in the fund will not be used to engage in a transaction that would be a prohibited or notifiable transaction.
- In a derivative, provided the derivative does not confer the right to acquire the entity, any rights associated with equity, or any assets in or of a CFP.

Importantly, notwithstanding the above, an investment is not excepted if it affords the US person rights with respect to CFPs beyond standard minority ;shareholder protections enumerated in the OISP.

2. A US person’s acquisition of equity or other interests in an entity held by one or more PCCs, **provided that** the US person is acquiring **all** equity or other interests of the PCCs and, following such acquisition, the entity does not constitute a CFP.
3. A transaction between a US 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.
4. A transaction made after January 2, 2025, pursuant to a binding, uncalled capital commitment entered into before January 2, 2025.
5. The acquisition of a voting interest in a CFP by a US person upon default or other condition involving a loan or a similar financing arrangement, subject to certain conditions.
6. The receipt of employment compensation by an individual in the form of an award of equity or grant of an option to purchase equity in a CFP, or the exercise of such option.
7. Certain transactions with or involving persons that Treasury has determined is addressing national security risks in a way substantially similar to the US.

In addition, transactions that the US government has determined are in the national interest of the US are exempt from the OISP's prohibition or notification requirements, as are transactions undertaken by or on behalf of the US government for the conduct of official business.

US persons undertaking covered transactions under the OISP regime must file a notice with Treasury within 30 days of the transaction's completion if the transaction is notifiable, or within 30 days of obtaining actual knowledge that a transaction was covered and either notifiable or prohibited. The OISP contemplates that filers may receive follow-up questions, requests for additional information or no communication in return other than an acknowledgment of receipt.

Knowing violations of the OISP – including failure to submit required notifications – can result in civil or criminal liability (including individual liability).

Material misrepresentation, concealment or omission of facts submitted to Treasury constitute a violation. Further, actions to evade or avoid the OISP are prohibited.

Civil penalties will not exceed the greater of \$368,136 (as adjusted for inflation annually) or twice the amount of the violative transaction. A person who willfully violates the OISP may face fines of up to \$1 million and/or imprisonment of up to 20 years.

Treasury has the authority to nullify, void or otherwise require divestment of any prohibited covered transaction. In addition, Treasury may undertake investigations related to the regime.

Persons who violate the OISP may submit voluntary self-disclosures to Treasury.

As a new and complex program, the OISP's application, impact and enforcement remain to be seen. Nonetheless, persons with known exposure – such as US-person funds that invest in China-affiliated advanced technology sectors or US-person entities that contemplate acquisitions of the same – are on notice that their activities may be affected as of January 2, 2025. Such parties promptly should take steps to achieve compliance with the OISP's requirements.

If you have any questions about the above, please reach out to [Kevin King](#), [Chris Kimball](#), [Annie Froehlich](#) or [Dillon Martinson](#).

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Key Contacts

Annie Froehlich Washington, DC	afroehlich@cooley.com +1 202 776 2019
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Kevin King Washington, DC	kking@cooley.com +1 202 842 7823
Christopher Kimball Washington, DC	ckimball@cooley.com +1 202 842 7892
Dillon Martinson Washington, DC	dmartinson@cooley.com +1 202 728 7092

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