

Report from Washington

New Treasury Guidance Clarifies Publicly Traded Securities Exception to Outbound Rule

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On December 23, 2025, U.S. Department of the Treasury released a new set of FAQs on the Outbound Investment Security Program (the “OIR”). The FAQs provide needed clarity in several areas including follow-on offerings, convertible bond offerings and IPO subscriptions. This new formal guidance adopts positions advocated by industry participants and adds certainty in global capital markets involving China-based issuers.

Separately, the Treasury Department also explains in the new FAQs that the current OIR remains in effect despite the passage of the National Defense Authorization Act for Fiscal Year 2026 (“NDAA”) last month. For new potential changes under the NDAA, please refer to our previous alert [here](#).

New FAQs on Publicly Traded Securities Exception:

- **Follow-On Offering Is Excepted:** The Treasury Department makes clear that a follow-on offering falls under the publicly traded security exception where the new offering of securities are of the same CUSIP as publicly traded securities or otherwise “are of the same class as the securities that are already publicly traded and, upon issuance [and] will be fungible with such publicly traded securities,” and does not afford the U.S. person rights beyond standard minority shareholder protections with respect to the issuer. The participation in such follow-on offerings by both U.S. investors and U.S. underwriters likewise qualifies under the same exception.
- **Convertible Bond Offering Is Excepted:** The acquisition of a contingent equity interest “that is convertible into, or provides the right to acquire, only a publicly traded security” also qualifies as an excepted transaction provided again that it does not convey rights beyond standard minority shareholder protections. The FAQ expressly offers as an example a convertible note issuance where the debt interest may be converted into publicly traded securities. The exception will apply equally where the security may be converted alternatively into cash or another form of consideration that is not covered by the OIR.
- **IPO Subscription Is Excepted:** The publicly traded securities exception also applies to acquisition of IPO shares by U.S. investors pursuant to a subscription agreement (or other agreement such as a standby underwriting agreement) even if entered into prior to such listing, so long as “at the time of such acquisition the equity interest is publicly traded.” This clarification will be helpful to cornerstone investors who typically sign subscription agreements prior to the occurrence of an IPO.

- **Director Nomination Right Is A Standard Minority Shareholder Protection:** Because the publicly traded securities exception and other passive investment exceptions apply only where the U.S. person will not be afforded rights beyond standard minority shareholder protections, exactly what rights are considered standard minority protection is crucial and has been subject to different views. The Treasury Department here makes clear that a shareholder’s “right to nominate (that is, *propose* for election) an entity’s directors” would be considered a standard minority shareholder protection for purposes of publicly traded securities and passive investments exceptions “if that right is generally available to similarly situated shareholders of that entity solely by virtue of their minority shareholding.” By contrast, the Treasury Department warned that the right to *appoint* a director does not constitute a minority shareholder protection. That is so regardless of whether such a right is accorded to similarly situated shareholders.
- **Treasury Reverses Its Prior Position Regarding PRC Statute:** Further to the last point on standard minority shareholder protections, the Treasury Department explains that, upon further consideration, it “has determined that *proposal* rights generally available to similarly situated shareholders (such as shareholders meeting a certain low ownership threshold set in PRC statute) would qualify as standard minority shareholder protections.”

Looking Ahead

The Treasury Department’s new guidance on publicly traded securities will be welcomed by global capital markets. However, it is worth noting that none of the new FAQs exempts U.S. underwriters in connection with a new IPO where the underwriters would acquire shares before they become publicly traded (ancillary services by underwriters that do not involve the acquisition of non-publicly traded shares are permitted). As we discussed in our earlier [alert](#), that is not the case with the NDAA, which explicitly excepts “the temporary acquisition of an equity interest for the sole purpose of facilitating underwriting services.” Until and unless the Treasury issues new regulations, parties should continue to act in full compliance with the OIR, including restrictions on U.S. underwriters in connection with IPOs.

Simpson Thacher & Bartlett LLP is experienced in navigating international regulatory and compliance issues, including with respect to sanctions, export controls, and foreign investment, and continues to follow developments of this new outbound investment review regime closely. We are available to discuss further questions on request.

For further information regarding this Report, please contact one of the following authors:

WASHINGTON, D.C.

Abram J. Ellis
+1-202-636-5579
aellis@stblaw.com

Mark B. Skerry
+1-202-636-5523
mark.skerry@stblaw.com

Malcolm J. (Mick) Tuesley
+1-202-636-5561
mick.tuesley@stblaw.com

Jim Perry
+1-202-636-5717
james.perry@stblaw.com

Claire Cahoon
+1-202-636-5828
claire.cahoon@stblaw.com

Austin Lowe
+1-202-636-5862
austin.lowe@stblaw.com

Christine Tillema
+1-202-636-5559
christine.tillema@stblaw.com

NEW YORK CITY

George S. Wang
+1-212-455-2228
gwang@stblaw.com

David H. Caldwell
+1-212-455-2612
dcaldwell@stblaw.com

Daniel S. Levien
+1-212-455-7092
daniel.levien@stblaw.com

Shuhao Fan
+1-212-455-3036
shuhao.fan@stblaw.com

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