

OFAC Releases Guidance Regarding Prohibition on New Investment in Russia and Provides Further Clarifications Regarding Investments in Chinese Military-Industrial Complex Companies

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Key Takeaways:

- Recent OFAC guidance continues to emphasize the importance of sanctions compliance for investment funds
- OFAC provides definitions of “investment” and “new investment” in connection with the ban on new investments in Russia by U.S. persons, and clarifies that certain maintenance activities are exempt from the ban
- U.S. persons who hold securities of Chinese Military-Industrial Complex (“CMIC”) Companies can receive cash dividends and stock splits from CMICs and are not obligated to divest CMIC securities

I. OFAC Publishes FAQs Addressing Ban on New Investment in Russia

On April 6, 2022, President Biden signed [Executive Order \(“EO”\) 14071](#), which prohibits all “new investment in the Russian Federation by a United States person.” As [Foley Hoag discussed in a prior alert](#), at that time, there was no guidance provided as to the scope of the investment prohibition. On June 6, 2022, the U.S. Department of the Treasury’s Office of Foreign Assets Control (“OFAC”) released much-awaited guidance on the ban, including definitions of the terms “investment” and “new investment.” A summary of the key aspects of that guidance is provided below:

What is an “Investment”?

OFAC has [defined “investment”](#) as “a commitment of capital or other assets for the purpose of generating returns or appreciation.”

What is a “New Investment”?

For purposes of EO 14071, new investments are commitments made on or after April 6, 2022, the date of the issuance of EO 14071, and can include commitments made pursuant to an agreement entered into prior to that date if such commitment occurs after that date.

OFAC has provided the following examples of new investment:

- The purchase or acquisition of real estate in the Russian Federation, other than for noncommercial, personal use.
- Entry into an agreement requiring the commitment of capital or other assets for the establishment or expansion of projects or operations in the Russian Federation, including the formation of joint ventures or other corporate entities in the Russian Federation.
- Entry into an agreement providing for the participation in royalties or ongoing profits in the Russian Federation.
- The lending of funds to persons located in the Russian Federation for commercial purposes, including when such funds are intended to be used to fund a new or expanded project or operations in the Russian Federation.
- The purchase of an equity interest in an entity located in the Russian Federation.

- The purchase or acquisition of rights to natural resources or exploitation thereof in the Russian Federation.
- The purchase of both new and existing debt and equity securities issued by an entity in the Russian Federation.

OFAC has also provided examples of certain activities that would **not** be considered new investment:

- Entry into, performance of, or financing of a contract, pursuant to ordinary commercial sales terms, to sell or purchase goods, services, or technology to or from an entity in the Russian Federation.
 - ▶ E.g., a payment of an invoice for goods, where payment is made within the contracted time period and such payment does not involve participation in royalties or ongoing profits.
- The export or import of goods, services, or technology, or related sales or purchases, to or from the Russian Federation, provided that such transaction is made pursuant to ordinary commercial sales terms.
- Maintenance of a pre-existing investment in the Russian Federation, which includes:
 - ▶ Transactions to ensure continuity of pre-existing projects or operations located in the Russian Federation, including payments to employees, suppliers, landlords, lenders, and partners;
 - ▶ The preservation and upkeep of pre-existing tangible property in the Russian Federation; and
 - ▶ Activities associated with maintaining pre-existing capital investments or equity investments.
- Wind down or divestment of a pre-existing investment, such as a pre-existing investment in an entity, project, or operation, including any associated tangible property, located in the Russian Federation.

What are Maintenance Activities?

As set forth above, maintenance activities are [exempt from the ban on new investments into Russia](#). OFAC has stated that maintenance “includes all transactions ordinarily incident to performing under an agreement in effect prior to the [E]ffective [D]ate [i.e. April 6, 2022], provided that such transactions are consistent with previously established practices and support pre-existing projects or operations.”

OFAC has also clarified that, in connection with maintenance activity, agreements entered into prior to April 6, 2022, may also be modified or altered, and new contracts or agreements may be entered into, provided that the underlying transactions are consistent with previously established practices and support pre-existing projects or operations (such as modifications to substitute suppliers, conduct maintenance or repairs, or comply with new environmental or safety standards.)

However, OFAC has made clear that “maintenance” does **not** include:

- The expansion of pre-existing projects/operations beyond those projects/operations already in effect prior to April 6, 2022, even if pursuant to an agreement entered into before that date; and
- Commitments made on or after April 6, 2022, pursuant to the exercise of rights under an agreement entered into before that date.

The above guidance regarding maintenance also applies to payments made by U.S. persons to subsidiaries or affiliates located in Russia.

Guidance for Investment Funds Related to the New Investment Ban

Pursuant to [OFAC guidance](#), the purchase of shares by a U.S. person in a U.S. fund with existing investments in debt or equity securities issued by entities in the Russian Federation generally would not be considered a prohibited “new investment” so long as these holdings represent less than a predominant share by value of the debt or equity securities issued by the Russian entity. As a result, U.S. persons may generally continue to invest in the fund, and the fund may continue to operate.

U.S. persons (including U.S. funds) are permitted to engage in transactions related to the divestment of a pre-existing investment, provided that the divestment is to a non-U.S. person. However, U.S. persons are not required to divest debt or equity securities issued by an entity in the Russian Federation and may continue to hold such previously acquired securities. U.S. persons can also facilitate the wind down or divestment of an existing investment in the Russian Federation, provided that such facilitation is on behalf of the selling party only. Note, however, that U.S. persons may not be the purchaser of securities issued by a Russian entity.

II. OFAC Guidance Regarding Prohibition on Investment in Chinese Military-Industrial Complex (“CMIC”) Companies

Pursuant to Executive Order 13959 (which was amended and superseded on June 3, 2021 by [Executive Order 14032](#)), U.S. persons are

prohibited from purchasing or selling publicly traded securities of identified CMIC companies. OFAC places such entities on the [Non-SDN Chinese Military-Industrial Complex Companies List](#) (“CMIC List”), and U.S. persons have a 365-day period to divest after an entity is added to the CMIC List. On June 1, 2022, OFAC released [additional guidance](#) regarding the CMIC ban. Specifically, OFAC clarified that:

U.S. persons who hold securities of CMICs . . . may continue to receive cash dividends and stock splits related to such covered securities, and U.S. financial institutions may continue to process such transactions.

However, purchases of CMIC securities effected through dividend reinvestments constitute purchases that are prohibited . . . U.S. persons may, however, continue to facilitate the distribution of dividend reinvestments for non-U.S. persons after the relevant divestment period.

Additionally, while U.S. persons who hold CMIC securities have a 365-day period after the CMIC designation in which they can engage in purchases or sales made solely to effect the divestment of such securities, U.S. persons are not obligated to divest. U.S. persons may continue to hold CMIC securities after the divestment period ends, but may not purchase or sell CMIC securities after the end of the divestment period. That is, once the 365-day divestment window closes, a U.S. person may not sell those CMIC securities and is required to continue to hold the securities indefinitely, unless authorized by OFAC to divest.

Given the multiple sanctions programs that place restrictions on investment activity, it is important that investment funds engage with sanctions counsel to ensure they are meeting their compliance obligations. Companies with questions about the new guidance or how to ensure compliance with U.S. sanctions and export control regulations should contact a member of Foley Hoag’s [Trade Sanctions & Export Controls](#) practice.

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