



U.S. Investment Considerations for Foreign Investors

Reinhart Institutional Investor Services (RIIS) is a specialized practice group at the law firm Reinhart Boerner Van Deuren s.c.

Executive Summary

- The United States imposes very few requirements for or limitations on foreign investment.
- Nevertheless, there are several areas where foreign investors like Ilmarinen might be subject to compliance or filing obligations.
- This Country Report summarizes the statutes and regulations that potentially apply to listed shares, listed bonds, exchange-traded and OTC derivatives.

Executive Summary

Overview of Relevant Statutes and Regulations:

- The Dodd-Frank Act imposes various registration, capital, margin, reporting, recordkeeping and business conduct requirements on entities that participate in enough swaps to pose a systemic risk to the United States financial systems in the event of a widespread default of swap agreements.
- The Securities Exchange Act of 1934 governs all securities transactions on the secondary market. It imposes reporting requirements for Beneficial Owners (Section 13(d)), Institutional Investment Management (Section 13(f)) and Large Traders (Section 13(h)).

Executive Summary

- The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) subjects foreign investments in certain strategically important businesses, infrastructure, and real estate to reporting requirements and review by the Committee on Foreign Investment in the United States (CFIUS).
- Commodities position limits: both the United States government and individual commodities exchanges set position limits for certain important commodities.
- National securities exchange limits: both the United States government and individual national securities exchanges set position and exercise limits for options.

Executive Summary

- Taxes: Foreign investments that constitute the conduct of a trade or business within the United States may generate “effectively connected income” (ECI).
 - ECI could trigger tax and tax filing requirements for Ilmarinen.
 - ECI may arise through direct ownership or operation of a business enterprise, or indirect ownership through a pass-through entity (such as a partnership or limited liability company), but is typically avoided through a blocker entity.
 - ECI **does not** accrue as a result of investment in publicly traded debt, equity, or swaps.

Executive Summary

- Recent guidance may affect Ilmarinen’s ability to elect tax-exemption under the Foreign Investment in Real Property Tax Act (FIRPTA).
 - Under FIRPTA, “qualified foreign pension funds” (QFPF) and their wholly owned subsidiaries are generally exempt from filing U.S. tax returns and paying taxes attributable to disposition of U.S. real property interests.
 - In December 2022, the U.S. finalized rules clarifying the criteria for QFPF status that could impact Ilmarinen’s decision to make such an election.

Executive Summary: Looking Forward

- Proposed Private Fund Regulations: Ilmarinen's holdings in private equity and other alternative investment products could be affected if proposed rules affecting private fund managers are finalized.
- Short Sale Disclosure: The U.S. Securities and Exchange Commission (SEC) has proposed rules that, if finalized, would require certain institutional investment managers to confidentially report short sale-related information.
- ESG: The SEC has also proposed climate-related disclosure requirements that, if finalized, would require public companies to provide certain climate-related financial data and greenhouse gas emissions insights in public disclosure filings.

Listed Shares

- Potentially Applicable Laws and Regulations:
 - *Sections 13(d), (f) and (h) of the Securities Exchange Act of 1934.*
 - *Foreign Investment Risk Review Modernization Act of 2018.*

Listed Shares - Securities Exchange Act

- The Securities Exchange Act of 1934 governs all securities transactions on the secondary market. Several sections of the Exchange Act may apply to Ilmarinen as a participant in the secondary market:
 - Beneficial Owners (Section 13(d))
 - Institutional Investment Management Reporting (Section 13(f))
 - Large Traders (Section 13(h))
 - Failing to make the required filings may result in civil penalties and even criminal penalties when the violation is “willful.”

Listed Shares – Securities Exchange Act

Beneficial Owners (Section 13(d))

- Section 13(d) establishes a reporting requirement for any investor that acquires direct or indirect beneficial ownership of more than 5% of an outstanding class of equity securities or becomes a beneficial owner of those securities by buying or selling security-based swaps. The regulations provide safe harbors in lieu of these tests if the entity's maximum uncollateralized exposure is capped at various amounts.
- The 5% threshold does not include equity security futures settled in cash (e.g., S&P 500 futures).

Listed Shares – Securities Exchange Act

Beneficial Owners (Section 13(d))

- “Beneficial owner” includes any entity which directly or indirectly through any contract, arrangement, understanding, relationship or either has the power to vote (or direct others to vote) the security or the power to dispose of (or direct the disposition of) the security.
- Beneficial owners must file a report with the Securities Exchange Commission (SEC) within 10 days of becoming the beneficial owner:
 - Schedule 13D; or
 - Schedule 13G (a short-form report for certain passive investors).¹

¹ Reinhart prepares and files Schedules 13D/G for certain Finnish clients and the quarterly expense is approximately \$1,000

Listed Shares – Securities Exchange Act

Amended Schedule 13D

- Schedule 13D filings must be promptly amended to reflect any material changes in the information. Material changes may include:
 - An acquisition or disposition of beneficial ownership of securities 1% of the class of securities
 - Change in the intent for acquiring the securities (i.e. to gain control over the issuer).¹

¹ Reinhart prepares and files Schedules 13D/G for certain Finnish clients and the quarterly expense is approximately \$1,000

Listed Shares – Securities Exchange Act

Amended Schedule 13G

- If the investor filed a Schedule 13G instead of a Schedule 13D, the filings must be amended depending on type of filer but typically:
 - within 45 days after the end of the calendar year if there are any changes in the information reported on the filing¹; and
 - if the investor acquires more than 10% of an outstanding class of equity securities; and then subsequently whenever ownership increases or decreases by 5%.

¹ An amended schedule need not be filed if the only change is in the percent of securities owned and that change results solely from a change in the aggregate number of securities outstanding

Listed Shares - Securities Exchange Act

Institutional Investment Management Reporting (Section 13(f))

- Section 13(f) requires institutional investment managers that exercise discretion over \$100 million or more of Section 13(f) securities to file a Form 13F.
 - Section 13(f) applies to all institutional investment managers that use the United States mail (or any instrumentality of interstate commerce) in the course of its business.
 - 13(f) securities are securities required to be reported on Form 13F. It includes all common stocks and ETFs, but excludes certain mutual funds and equity security futures settled in cash.

Listed Shares – Securities Exchange Act

Institutional Investment Management Reporting (Section 13(f))

- Filing requirements:
 - A Form 13F must be filed for each calendar year in which the entity exceeds the \$100 million threshold within 45 days after the end of the fourth quarter of the calendar year and within 45 days after the end of each of the first three quarters of the subsequent calendar year.

Listed Shares - Securities Exchange Act

Large Traders (Section 13(h))

- Rule 13h-1 under Section 13(h) establishes a registration system for “Large Traders” to help the SEC identify and obtain trading information on market participants that conduct a substantial amount of trading activity of “national market system” securities (NMS) in the U.S.

Listed Shares – Securities Exchange Act

Large Traders (Section 13(h))

- Large Traders are entities (including foreign entities) who directly or indirectly exercise investment discretion over one or more accounts and effects transactions in NMS securities that equal or exceed one of the following transaction thresholds (“Large Trader thresholds”):
 - 2 million shares or \$20 million during any calendar day; or
 - 20 million shares or \$200 million during any calendar month.
- NMS securities include all exchange-listed equity securities and standardized options but does not include exchange-listed debt securities, securities futures, or open-end mutual funds

Listed Shares – Securities Exchange Act

Large Traders (Section 13(h))

- If Ilmarinen meets the definition of Large Trader, it is required to:
 - File a Form 13H within 10 days after effecting aggregate transactions that meet one of the Large Trader thresholds.
 - File any amendments to Form 13H within 45 days after the end of each full calendar year or 10 days following the end of a calendar quarter if any of the information on Form 13H becomes inaccurate.
 - Disclose its Large Trader Identification Number (LTID) to all of its broker-dealers and highlight to each such broker-dealer all accounts to which the LTID applies.

Listed Shares - FIRRMA

Foreign Investment Risk Review and Modernization Act (FIRRMA)

- The Committee on Foreign Investment in the U.S (CFIS) requires filings under FIRRMA for foreign investments in U.S. businesses and real estate of national strategic importance.
- There are mandatory filing requirements under FIRRMA for the following transactions:
 - Investments in businesses that deal in critical technology in certain sensitive industries
 - Acquisitions of by a foreign person (in which a foreign government has a more than 49% ownership) of a 25% or greater interest in U.S. businesses that deal in critical technologies, critical infrastructure, or with sensitive personal data (e.g. financial or healthcare information) (collectively “TID U.S. Businesses”).

Listed Shares - FIRRRMA

Foreign Investment Risk Review and Modernization Act (FIRRRMA)

- Minority investments in a TID U.S. Business that affords a foreign person:
 - access to “material non-public technical information”;
 - membership or observer status on the board of directors; or
 - involvement in certain substantive decision-making
- Failure to file a mandatory declaration can result in a civil penalty ranging from \$250,000 up to the value of the transaction.

Listed Bonds

Potentially Applicable Laws and Regulations:

- Foreign Investment Risk Review Modernization Act of 2018
 - Rarely. Does not apply unless and until a default confers certain equity-like rights on the investor.
 - See “Listed Shares” for more information.

- Section 13(f) of the Exchange Act
 - Rarely. Only certain convertible debt securities.
 - See “Listed Shares” for more information.

Exchange-Traded Derivatives

Potentially Applicable Laws and Regulations:

- Sections 13(d) and (h) of the Securities Exchange Act
- Commodities Exchange Limits
- National Securities Exchange Limits

Exchange Traded Derivatives: Securities Exchange Act

Beneficial Owners (Section 13(d))

- Section 13(d) establishes a reporting requirement for any investor that acquires direct or indirect beneficial ownership of more than 5% of an outstanding class of equity securities or becomes a beneficial owner of those securities by buying or selling security-based swaps.
- Beneficial ownership includes the right to acquire beneficial ownership through the exercise of any option, warrant or right or through conversion of the security.
- See “Listed Shares” for more information.

Exchange Traded Derivatives: Securities Exchange Act

Large Traders (Section 13(h))

- Section 13(h) imposes reporting obligations on market participants that conduct a substantial amount of trading activity of “national market system” securities, including standardized options.
- See “Listed Shares” for more information.

Exchange Traded Derivatives: Commodity Position Limits

- The Commodity Futures Trading Commission (CFTC) regulates commodities exchanges under the Commodities Exchange Act. It imposes position limits on market participants for designated commodities markets to prevent excessive speculation.
- Individual commodity exchanges may also set independent position limits in any category of commodities (provided that such limits do not exceed the CFTC limits).
- Bona fide hedging transactions, spreads and arbitrage positions do not count towards position limits.

Exchange Traded Derivatives: Commodity Position Limits

- Currently, the CFTC has imposed position limits on 9 categories of agricultural commodities: corn, oats, soybeans, soybean meal, soybean oil, wheat, hard red winter wheat, hard red spring wheat, and cotton.
- In February 2020, the CFTC published new proposed rules that would overhaul the current position limits on commodities. The proposed rules contain new or amended federal speculative position limits on 25 types of physical commodity derivatives, futures, and swaps.
- The previous position limits were already very high, and the proposed rules only increase them.
- **It is unlikely that Ilmarinen will meet or exceed the existing or proposed commodity position limits.**

The current position limits and proposed changes are described in the following chart (unchanged from its adoption in 2020):

Core referenced futures contract	2020 Proposed spot month limit	Existing federal spot month limit	Existing exchange-set spot month limit
Legacy Agricultural Contracts			
CBOT Corn (C)	1,200	600	600
CBOT Oats (O)	600	600	600
CBOT Soybeans (S)	1,200	600	600
CBOT Soybean Meal (SM)	1,500	720	720
CBOT Soybean Oil (SO)	1,100	540	540
CBOT Wheat (W)	1,200	600	600/500/400/300/220
CBOT KC Hard Red Winter Wheat (KW)	1,200	600	600
MGEX Hard Red Spring Wheat (MWE)	1,200	600	600
ICE Cotton No. 2 (CT)	1,800	300	300
Other Agricultural Contracts			
CME Live Cattle (LC)	²⁰ 600/300/200	n/a	450/300/200
CBOT Rough Rice (RR)	800	n/a	600/200/250
ICE Cocoa (CC)	4,900	n/a	1,000
ICE Coffee C (KC)	1,700	n/a	500
ICE FCOJ-A (OJ)	2,200	n/a	300
ICE U.S. Sugar No. 11 (SB)	25,800	n/a	5,000
ICE U.S. Sugar No. 16 (SF)	6,400	n/a	n/a
Metals Contracts			
COMEX Gold (GC)	6,000	n/a	3,000
COMEX Silver (SI)	3,000	n/a	1,500
COMEX Copper (HG)	1,000	n/a	1,500
NYMEX Platinum (PL)	500	n/a	500
NYMEX Palladium (PA)	50	n/a	50
Energy Contracts			
NYMEX Henry Hub Natural Gas (NG)	2,000	n/a	1,000
NYMEX Light Sweet Crude Oil (CL)	²¹ 6,000/5,000/4,000	n/a	3,000
NYMEX New York Harbor ULSD Heating Oil (HO)	2,000	n/a	1,000
NYMEX New York Harbor RBOB Gasoline (RB)	2,000	n/a	1,000

Exchange Traded Derivatives: Individual Commodity Exchange Limits

- Individual exchanges are free to set independent position limits in any category of commodities on the exchange (provided that such limits do not exceed the CFTC limits).
- Like with CFTC position limits, bona fide hedging transactions, spreads, and arbitrage positions do not count towards the exchange position limits. Some exchanges also exempt certain risk management positions.
- Individual Commodities Exchange limits are available online, for example: <https://www.cmegroup.com/market-regulation/position-limits.html>

Individual Commodities Exchange Limits

- An example of the interaction of the federal and individual exchange limits is as follows:
 - The federal spot month limit on NYMEX light sweet crude oil is 6,000 (with a step down to 5,000, and then 4,000 closer to the last trading day)
 - NYMEX imposes additional limits on different types of light sweet crude oil contracts

Contract	Type	Initial Spot Month Limit
Light Sweet Crude Oil Futures	Futures	3,000
Light Sweet Crude Oil Option	Am. Option	3,000
Guernsey Light Sweet (NE2) Monthly Index Futures	Futures	1,000
Edmonton Light Sweet (NE2) Monthly Index Futures	Futures	1,000
Edmonton Light Sweet (NE2) Monthly Index Average Price Option	Eu. Option	1,000
Edmonton Light Sweet (NE2) Daily Index Futures	Futures	1,000
Light Sweet Crude Oil European Financial Option	Eu. Option	3,000

Exchange Traded Derivatives: National Securities Exchange Limits

- National securities exchanges are “self-regulatory organizations” registered with the SEC. They establish rules under which their members conduct business on the exchange, monitor the ways their members conduct business, and enforce compliance by their members with federal securities laws.
- The SEC oversees the rules and position limits established by the national securities exchanges and enforcement of federal laws. Over the years, the SEC has generally relaxed position and exercise limits for options by either increasing the limits or eliminating them entirely.

Exchange Traded Derivatives: National Securities Exchange Limits

- Some options exchanges like CBOE have delegated position limit authority to the Options Clearing Corporation (“OCC”). The OCC calculates position limits for options using formulas provided by the option exchanges. The OCC’s website includes a searchable database.²
- Position limits for options, like with commodities, are very high and it is unlikely that Ilmarinen will meet or exceed these thresholds.

² <https://www.theocc.com/Market-Data/Market-Data-Reports/Series-and-Trading-Data/Position-Limits>

Examples of OCC Option Position Limits

- The option position limits for the most active options on January 10, 2023:
 - Tesla Inc. (TSLA) – 75,000,000 equity shares
 - Intel Corp (INTC) – 25,000,000 equity shares
 - Microsoft Corp (MSFT) – 25,000,000 equity shares
 - Amazon.com Inc (AMZN) – 500,000,000 equity shares
 - Alibaba Group Holding (BABA)- 25,000,000 equity shares
 - Boeing Company (BA) - 25,000,000 equity shares

Penalties for Exceeding Position Limits

- Although Ilmarinen is very unlikely to violate these commodity position limits, violation of the CFTC position limits could incur significant civil monetary penalties, as well as restrict licensure or registration for non-compliant entities.
- Similarly, individual exchanges, such as the OCC, may also take disciplinary action against members that violate their limits, including censure, suspension, expulsion or limitation of activities for violating members.

Over-The-Counter Derivatives

- Potentially Applicable Laws and Regulations:
 - The Dodd-Frank Act (rarely)

OTC Derivatives: The Dodd-Frank Act

- The Dodd-Frank Act was enacted in response to the financial crises of 2008. Title VII of the Act regulates the over-the-counter swaps market.
- Title VII imposes various registration, capital, margin, and reporting requirements on “major swap and major securities-based swap participants” (MSPs).
- MSPs are entities that participate in enough swaps to pose a systemic risk to the U.S. financial system in the event of a widespread default of swap agreements.

OTC Derivatives: The Dodd-Frank Act

- There are three alternative statutory tests to determine if an entity is a MSP:
 - Substantial Position Test: The entity maintains a “substantial position” in swaps or security-based swaps for any of the major swap categories, excluding positions held to hedge or mitigate commercial risk and certain hedging positions held by an employee benefit plan.
 - Substantial Counterparty Exposure Test: The entity has outstanding swaps that create “substantial counterparty exposure” that could have serious adverse effects on the financial stability of the United States banking system or financial markets.

OTC Derivatives: The Dodd-Frank Act

- Highly Leveraged Test: The entity is a financial entity that is highly leveraged, is not subject to capital requirements by a U.S. Federal banking entity, and has a substantial position in one or more of the major swap categories.
- The thresholds for these tests are extremely high, involving daily average current uncollateralized exposures of \$1 billion or more. As a result, there are currently no registered MSPs.³

³ <https://www.nfa.futures.org/registration-membership/membership-and-directories.html>

OTC Derivatives: The Dodd-Frank Act

- There are three alternative statutory tests to determine if an entity is a MSP:
 - Substantial Position Test: The entity maintains a “substantial position” in swaps or security-based swaps for any of the major swap categories, excluding positions held to hedge or mitigate commercial risk and certain hedging positions held by an employee benefit plan.
 - Substantial Counterparty Exposure Test: The entity has outstanding swaps that create “substantial counterparty exposure” that could have serious adverse effects on the financial stability of the United States banking system or financial markets.

OTC Derivatives: The Dodd-Frank Act

- As a foreign entity, Ilmarinen is particularly unlikely to be subject to the Dodd-Frank Act for two reasons:
 - The thresholds are high and for foreign entities, only swap agreements with U.S. persons or entities, or guaranteed affiliates of U.S. persons or entities, are counted.
 - Even if a foreign entity is considered a MSP, it may comply with a foreign jurisdiction's law and regulations instead if the law of the foreign jurisdiction are comparably restrictive and comprehensive.

OTC Derivatives: The Dodd-Frank Act

If however, Ilmarinen was subject to Dodd-Frank, Title VII imposes the following requirements:

Entity Level Requirements

- capital adequacy
- chief compliance officer
- risk management
- swap data recordkeeping
- swap data repository reporting
- physical commodity large swaps trader reporting

Transaction-Level Requirements

- required clearing and swap processing
- margining (and segregation) for uncleared swaps
- mandatory trade execution
- swap trading relationship documentation
- portfolio reconciliation and compression
- real-time public reporting
- trade confirmation
- daily trading records
- external business conduct standards

Tax Issues: Effectively Connected Income

- Under the 2006 tax protocol, U.S. dividends and interest earned by Finnish mutual pension insurance companies are not subject to 15% tax that other Finnish investors would have to pay.
- Separately, foreign investments that constitute the conduct of a trade or business within the United States may generate taxable “effectively connected income.” ECI may be generated in the private equity context by direct or indirect investment in a pass-through entity (such as a partnership or limited liability company) or through certain fee-offsets, but is typically avoided through a blocker entity.
- However, ECI **does not** accrue as a result of investment in publicly traded debt or equity, or from swaps.

Tax Issues: Foreign Investment in U.S. Real Property

- Under the Foreign Investment in Real Property Tax Act (FIRPTA), “qualified foreign pension funds” (QFPF) or qualified controlled entities (QCEs) (i.e., organizations whose entire interests are held directly or indirectly by a QFPF) that realize gains or loss on a sale or other disposition of a U.S. real property interest are exempt from U.S. federal tax and filing requirements.
- Under final regulations released in December 2022, a QFPF is any trust, corporation, or other organization that:
 - Is created or organized under the laws of a foreign country;
 - Is established either by the foreign country or by one or more foreign employers to provide retirement or pension benefits;
 - Does not have a single participant or beneficiary with a right to 5% or more of its assets or income;
 - Is subject to government regulation and annual information about its beneficiaries is provided or available to relevant tax authorities; and
 - Either contributions to the QFPF or taxation of the QFPF’s investment income are deductible or excluded from the QFPF’s income or taxed at a reduced rate.

Tax Issues: Foreign Investment in U.S. Real Property

- Organizations that qualify as a QFPF or QCE are exempt from tax and withholding requirements under FIRPTA.
- The 2022 final regulations did not accommodate a proposed de minimis exception to the holding requirements for small economic ownership interests held by QCEs (i.e., interests awarded to management).
 - However, the 2022 final regulations declined to provide express guidance as to whether a non-economic interest held by a non-QFPF would disqualify an otherwise eligible QCE from exemption.

Developing Topics: Proposed Private Equity Regulations

- Ilmarinen's holdings in private equity and other alternative investment products could be affected if proposed rules affecting private fund managers are finalized.
 - If finalized, the rules could require that Ilmarinen's private fund advisers provide increased transparency regarding fund fees, expenses and performance and be subject to new requirements related to fund audits, books and recordkeeping.
 - Private fund advisers would also be prohibited from engaging in certain conflicted transactions and subject to heightened controls regarding clawback.

Developing Topics: Short Sale Disclosure Rules

- The SEC has proposed rules under the Securities Exchange Act of 1934 which, if finalized, would require certain institutional investment managers exercising investment discretion over short positions to report certain information relating to month-end short positions and related daily activity to the SEC on a confidential basis.
 - Under the proposed rules, managers would be required to file a monthly disclosure form with the SEC if it maintains short positions exceed one of the following thresholds:
 - Value of at least \$10 million as of any settlement date during a calendar month;
 - Average gross short positions in an equity security equal to or exceeding 2.5%.
- Once reported, the SEC will aggregate reporting data to maintain individual reporting managers' confidentiality and publish aggregate short position information regarding each security reported by managers the next month.

Developing Topics: ESG Investment and Disclosure

- The SEC has also proposed climate-related disclosure requirements that would require public companies to provide certain climate-related financial data and greenhouse gas emissions insights in public filings.
 - The proposed issuer rules would require disclosure of material climate impacts, greenhouse-gas emissions (Scope 1 and 2, as well as Scope 3 if material), and any climate-related targets or transition plans.
 - The disclosure standards are similar to recent U.K. and E.U. standards and are generally aligned with the Task Force on Climate-Related Financial Disclosures (TCFD) model.

Developing Topics: ESG Investment and Disclosure

- The SEC has also proposed rules that would require certain funds and managers to make new disclosure regarding the use and implementation of ESG factors in investment strategies in fund prospectuses and annual reporting.
- Given the current U.S. political climate, it is unclear whether either the issuer-level or fund-level rules will be finalized, but Ilmarinen may wish to consider these proposals when evaluating potential new investments and managers.

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