Important Changes to the Committee of Foreign Investment in the United States and US Export Controls

September 5, 2019
Overview

- Export Control Reform Act
  - Notice and Comment
- CFIUS Background
  - Conforming Amendments
  - Pilot Program
  - Final Regulations
- New Supply Chain Regulations
- Questions?
Export Control Reform Act

- Establishes an interagency process to identify emerging and foundational technologies
- Broadly to track “Made in China 2025” plan
- The November 2018 Advanced Notice of Proposed Rulemaking (ANPRM) solicited comments by January 10, 2019
What are Emerging and Foundational Technologies?

- Interagency Process as provided for in the Export Control Reform Act of 2018
- Generally, to capture technologies not currently listed on either the Commerce Control List (CCL) or the U.S. Munitions List (USML)
- CFIUS Chairperson may recommend technologies to be considered “emerging and foundational”
Emerging and Foundational Technologies: Made in China 2025 Industries

- Chinese policies are aimed at advancing specific industrial sectors:

<table>
<thead>
<tr>
<th>New advanced information technology</th>
<th>New-energy vehicles and equipment</th>
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<tbody>
<tr>
<td>Automated machine tools &amp; robotics</td>
<td>Power equipment</td>
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<tr>
<td>Aerospace and aeronautical equipment</td>
<td>Agricultural equipment</td>
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<tr>
<td>Maritime equipment / high-tech shipping</td>
<td>New materials</td>
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<td>Modern rail transport equipment</td>
<td>Biopharma / advanced medical products</td>
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Emerging Technologies Under the ANPRM

- The ANPRM seeks public comment on criteria for identifying emerging technologies. BIS plans to issue a separate ANPRM regarding identification of foundational technologies.

- The ANPRM lists the following general categories of technology:

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<tr>
<th>Biotechnology</th>
<th>Artificial intelligence (AI) and machine learning technology</th>
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<tr>
<td>Position, Navigation, and Timing (PNT) technology</td>
<td>Microprocessor technology</td>
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<td>Advanced computing technology</td>
<td>Data analytics technology</td>
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<td>Quantum information and sensing technology</td>
<td>Logistics technology such as <a href="#">Mobile Electric Power</a></td>
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<td>Additive manufacturing</td>
<td>Robotics</td>
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<td>Brain-computer interfaces</td>
<td>Hypersonics</td>
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<td>Advanced materials</td>
<td>Advanced surveillance technologies</td>
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The Committee on Foreign Investment in the United States (CFIUS)

- CFIUS is a federal interagency committee authorized to review certain transactions involving foreign investment in the United States to determine the effect of such transactions on U.S. national security.
Recent CFIUS Amendments

- Expand the scope of transactions reviewable by CFIUS to address current national security concerns
  - Including a focus on investments from countries with the demonstrated or declared strategic goal of acquiring critical technology that would affect United States leadership in areas related to national security
- Create a mandatory process to review certain transactions
Specific National Security Considerations

- Supply Chain of the United States Government
- “Third Party” Concerns
- Sensitive Personal Data
- Cybersecurity Vulnerabilities
- Information Regarding Sensitive Government Matters
- Corporate Culture
CFIUS Process

▪ CFIUS reviews transactions and identifies national security concerns
  • Approximately 90% clear with no action by CFIUS*
▪ CFIUS can negotiate or impose mitigation to address national security concerns
  • Approximately 10% of notified transactions
▪ CFIUS can recommend that the President prohibit a transaction
  • While only five have been blocked (publicly available information), dozens have been abandoned

*Statistics are approximations because the CFIUS process is confidential unless President takes action
Overview of New FIRRMA Regulations

- **Pilot Program** regulations took effect November 10, 2018
- Other provisions take effect February 2020 or 30 days after Federal Register publication
Pilot Program Facts

- **Context** – USG concerns about predatory investment
- **Temporary** program to assess CFIUS’s ability to protect key U.S. industries under 27 NAICS codes
- **Mandatory** reporting for investments, even non-controlling, in critical technology (CT) companies in certain industries
- **Civil Penalties** for failure to file certain transactions
  - Strict liability
  - **Up to full value of the transaction**
Assessing Whether a Transaction is a Covered Foreign Investment in a Pilot Program U.S. Business

- Foreign investor?
- U.S. Pilot Program Business?
  - Critical Technology Involved?
  - NAICS-Identified Industry?
- Non-passive investment?
New Pilot Program Analysis (Critical Technology?)

- U.S. business produces, designs, tests, manufactures, fabricates, or develops
  - Defense articles or services covered under the International Traffic in Arms Regulations (ITAR) (22 CFR Parts 120-130)
  - Items covered under the Export Administration Regulations (EAR) (15 CFR Parts 730-774) and controlled
    - Pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or
    - For reasons relating to regional stability or surreptitious listening.
  - Civilian nuclear facilities, equipment, material, and technology under the Atomic Energy Act (AEA) (10 CFR Parts 110 & 810)
  - Select agents and toxins covered by bioterrorism regimes (7 CFR Part 331, 9 CFR Part 121, and 42 CFR Part 73)
  - Emerging and foundational technologies controlled pursuant to the Export Control Reform Act of 2018 (Not yet determined)
New Pilot Program Analysis (Protected Industry?)

- Critical Technology is utilized in or designed specifically for use in:
  - Aircraft Manufacturing
  - Aircraft Engine and Engine Parts Manufacturing
  - Alumina Refining and Primary Aluminum Production
  - Ball and Roller Bearing Manufacturing
  - Computer Storage Device Manufacturing
  - Electronic Computer Manufacturing
  - Guided Missile and Space Vehicle Manufacturing
  - Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing
  - Military Armored Vehicle, Tank, and Tank Component Manufacturing
  - Nuclear Electric Power Generation
  - Optical Instrument and Lens Manufacturing
  - Other Basic Inorganic Chemical Manufacturing
  - Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing
  - Petrochemical Manufacturing
  - Powder Metallurgy Part Manufacturing
  - Power, Distribution, and Specialty Transformer Manufacturing
  - Primary Battery Manufacturing
  - Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing
  - Research and Development in Nanotechnology
  - Research and Development in Biotechnology (except Nanobiotechnology)
  - Secondary Smelting and Alloying of Aluminum
  - Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing
  - Semiconductor and Related Device Manufacturing
  - Semiconductor Machinery Manufacturing
  - Storage Battery Manufacturing
  - Telephone Apparatus Manufacturing
  - Turbine and Turbine Generator Set Units Manufacturing
Full CFIUS Covered Transaction Analysis Effective November 10, 2018
Supply Chain Developments

- Effective August 13, 2019, the 2019 National Defense Authorization Act imposes new restrictions on procurements for telecommunications equipment or services based on ties to certain Chinese entities.
- Executive Order grants the Department of Commerce the authority to prohibit communications providers from using particular products (including Huawei products) in their networks.
- Huawei designated as a “Denied Entity” prohibited from receiving U.S. exports.
Key Takeaways

- Stay abreast of the development of Emerging and Foundational Technology Regulations
- Be aware that any foreign investment in a U.S. business has the potential to trigger a mandatory CFIUS review under certain circumstances
  - We have seen circumstances where even an internal corporate reorganization has triggered a CFIUS review
Your questions, please.

Rick Sofield
202.719.4500
rsfield@wileyrein.com
View Bio

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