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CONTINUING EVOLUTION OF  
**US-CHINA**  
**RELATIONS**  
**2023 AND BEYOND**

Your Checklist for Risk Factor Disclosures Amid US-China Tensions

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# Presenters



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# Introduction and Agenda

- Geopolitical, trade, and investment tensions between the United States and China continue due to differences on such issues as
  - the Russia-Ukraine conflict, Taiwan, Xinjiang, Hong Kong, Tibet, the South China Sea, human rights, and more.
- US issuers should review their current exposure to the China market and adjust their risk factor disclosures in upcoming annual (10K) and quarterly (10Q) reports, as appropriate, to take into account recent developments. Depending upon the materiality of the development a current report (8K) disclosure may be warranted.
- We will discuss today recent US-China trade tensions that may warrant disclosures, the SEC guidance on such disclosures and specific US and China regulatory actions and initiatives to consider that may be material to the US issuer.

# Recent US Actions

- United States has taken a series of trade, international treaty, tax, and sanctions actions against China.
  - imposition of tariffs on a substantial quantity of Chinese imports;
  - the imposition of sanctions on an expanded number of Chinese companies for their support of China's military industrial complex or alleged human rights violations;
  - enhanced reviews by CFIUS of foreign direct investments in the United States by Chinese companies;
  - the detention by US Customs and Border Protection of products made in Xinjiang involving alleged human rights violations;
  - the enhancement of extensive export controls on the semiconductor industry designed to impede Chinese semiconductor companies' access to advanced technology and national security guardrails directed at China adopted as part of the Chips Act

# China and Taiwan

- The US government, which has maintained a longstanding policy of “strategic ambiguity” on whether to defend Taiwan in case of a military conflict, has steadily increased its support of Taiwan’s own defense capabilities and deterrence of China’s military actions against Taiwan.
- The newly passed Taiwan Policy Act of 2022, among other things, provides almost \$4.5 billion in security assistance over the next four years.
- As countermeasures, China has significantly increased its air patrol and military exercises near the Taiwan Strait and imposed sanctions on US officials visiting Taiwan and US defense companies selling arms to Taiwan.

# China and Taiwan

- In case of a military conflict between China and Taiwan, global manufacturers would likely lose access to advanced semiconductor chips and other products that are sourced from Taiwan.
- Such a conflict would also likely limit access to key Chinese ports and exporters due to both military actions and potential international sanctions, which would create significant disruption for industries that rely on supply chain in China.

# China and Russia

- US watching carefully what actions China takes in support of Russia following recent China-Russia summit in Russia – the first visit by Xi to Russia following the invasion of Ukraine.



# What Additional US Actions to Expect in 2023

- Further action on China is expected from the Biden administration and Congress this year.
- House Committee on China is actively holding hearings on different topics of potential legislation
- Legislation relating to China is one of the few areas of potential consensus between Republicans and Democrats.
- Areas of potential future action include:
  - supply chain security,
  - unfair trade practices,
  - intellectual property protection,
  - data privacy,
  - defense and national security,
  - China's inbound investments into the US and US outbound investment flows to China,
  - Taiwan,
  - human rights/forced labor,
  - higher education

# Risk Factor Disclosure

- Public companies must disclose the material factors that make an investment in the company speculative or risky
- What is material?
  - Information is material if there is a substantial likelihood that a reasonable investor would consider information important in deciding how to vote or make an investment decision
  - Information is material if there is a substantial likelihood that disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information available.

# Risk Factor Disclosure

- Item 105 of Regulation S-K
  - Applicable to registration statements and periodic reports
- Principles-based rule
- Disclosure should be concise and organized logically
- Boilerplate, generic risks that could apply to any offering or registrant are generally discouraged

# Risk Factor Disclosures

- The SEC has not to date provided any tailored guidance on how US companies should consider disclosing risks related to doing business in China
- The SEC's Division of Corporation Finance's Disclosure Guidance Topics pertaining to COVID-19 disclosure considerations and, in particular, the sample letter issued by the staff May 2022 in response to Russia's invasion of Ukraine and related supply chain issues provide a useful analytical framework for considering the disclosure of China-related trade risk.

# Risk Factor Disclosures

- Applying the frameworks articulated in the Division's guidance, companies should consider detailed risk factor disclosure, to the extent material or otherwise required, regarding the following:
  - Direct or indirect exposure to China through operations, employee base, investments in China, securities traded in China, sanctions against China or Chinese individuals or entities, or legal or regulatory uncertainty associated with operating in or exiting China
  - Direct or indirect reliance on goods or services sourced in China
  - Actual or potential disruptions in the applicable supply chain
  - Business relationships in, connections to, or assets in China
- Many companies have experienced heightened cybersecurity risks, increased or ongoing supply chain challenges, and volatility related to the trading prices of commodities, regardless of whether they have operations in China that likely warrant disclosure.

# Outbound Risks

Specific outbound risks to consider include the following:

- China’s recent relaxation of its zero-COVID policy and reopening of the economy, and the impact on the issuer’s current and future operations and supply chains
- The effects of a potential military conflict between mainland China and Taiwan, possible international intervention and sanctions, and the resulting potential disruption to the issuer’s regional supply chain, and sales and operations in the impacted region
- Compliance with increased export controls on certain technologies, such as semiconductors and supercomputers
- Compliance with sanctions and risks of doing business with Chinese companies given the increasing designation of Chinese companies on various US government lists, including the Blocked or Specially Designated National (SDN) list, the Entity List, the Denied Parties list, the Unverified List, the Military End User List, and the Non-SDN Chinese Military-Industrial Complex Companies List
- Restrictions imposed by the US government on the transfer of technology or manufacturing to China derived from US government funding, including the Chips Act or Bayh-Dole Act
- Potential restrictions under consideration by the US government on outbound investment in China
- Protection of intellectual property in China
- Dispute resolution and enforcement of court judgments and arbitral awards in China
- Compliance with the Foreign Corrupt Practices Act (FCPA) given that employees of state-owned enterprises (SOEs) are considered foreign government officials for FCPA purposes, and the dominant roles of SOEs in China’s economy
- Compliance with Chinese legal and regulatory requirements, including compliance with China’s new privacy and data protection regime
- Conflict of law risks created by the conflict between compliance with US obligations and Chinese countermeasures/sanctions

# Inbound Risks

- Specific inbound risks to consider include the following:
  - Supply chain disruptions relating to trade remedy laws, including Section 337 cases involving exclusions of infringing goods imported from China, and anti-dumping and countervailing duty cases against China, including anti-circumvention cases relating to imports from third countries using Chinese inputs
  - Maintenance of increased Trump-era tariffs (subject to certain exceptions) on products imported from China
  - Increased risk of the ban on the importation into the United States from China of products under alleged human rights violations following the adoption of the Uyghur Forced Labor Prevention Act
  - Heightened scrutiny by CFIUS of Chinese investment in the United States and increased restrictions on Chinese participation in the US supply chain in certain sectors, such as telecommunications, life science, and renewable energy

# Next Steps

- US issuers with China exposure and US-listed Chinese companies should work with outside legal counsel with both US and China expertise to review comprehensively the risk factors in their upcoming SEC filings.
- Companies should ensure the filings adequately reflect the risks they face from heightened US–China tensions with specific, tailored disclosures in order to satisfy applicable disclosure requirements, mitigate private civil litigation risks, and withstand potential regulatory scrutiny.



# Resources

- [The US-China trade war: A timeline](#), China Briefing News (2022).
- [Sample Letter to China-Based Companies](#) (2021).
- [Sample Letter to Companies Regarding Disclosures Pertaining to Russia's Invasion of Ukraine and Related Supply Chain Issues](#) (2022).
- [CF Disclosure Guidance Topic No. 9: Coronavirus \(COVID-19\)](#) (Mar. 25, 2020)
- [Sweeping US Export Controls on Semiconductor, Supercomputer Manufacturing in China Raise Compliance Questions](#) (October 2022)
- [Biden Issues CFIUS Executive Order: What Has Changed and What Remains the Same](#) (September 2022)
- [National Security-Related Considerations When Investing in US Companies](#) (September 2022)
- [DOJ Deputy Attorney General Announces Changes to Corporate Crime Policy](#) (September 2022)
- [Uyghur Forced Labor Prevention Act Takes Effect in United States](#) (June 2022)
- [US National Security Review for Outbound Investment: Domestic and Global Impact](#) (May 2022)
- [What China's New Data Security Law Means for Multinational Corporations](#) (June 2021)
- [China's New Blocking Statutes – MNCs Beware!](#) (January 2021)
- [China: Examining the Implications for Global Companies of New Export Control Law and 'Unreliable Entities List'](#) (November 2020)

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# Biography



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Carl Valenstein focuses his practice on domestic and international corporate and securities matters, mergers and acquisitions, project development, and transactional finance. He counsels extensively in the life science, telecom/electronics, and maritime industries, and has worked broadly in Latin America, the Caribbean, Europe, Africa, Asia, and the Middle East. He previously served as co-chair of the International Section of the Boston Bar Association and co-chairs the firm's environmental, social, and governance (ESG) and sustainable business and Cuba initiatives. Carl is the leader of the Boston office corporate and business transactions practice.

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Erin Martin counsels public companies and their boards with respect to securities regulation, capital markets transactions, and corporate governance matters, drawing on her long tenure at the US Securities and Exchange Commission (SEC) in the Division of Corporation Finance. Erin regularly advises on complex SEC disclosure and compliance issues, including environmental, social, and governance (ESG) considerations and crypto asset matters.

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Todd Liao works with clients on a wide range of financial transactions and legal issues involving China. He frequently works with multinational corporations on cross-border mergers and acquisitions, foreign direct investment and investment financing, disposal of Sino-foreign joint ventures and assets, and the structuring of complex commercial transactions. Todd also handles intellectual property (IP) work, specifically assisting clients with managing their trademark portfolios. He is admitted in New York only.

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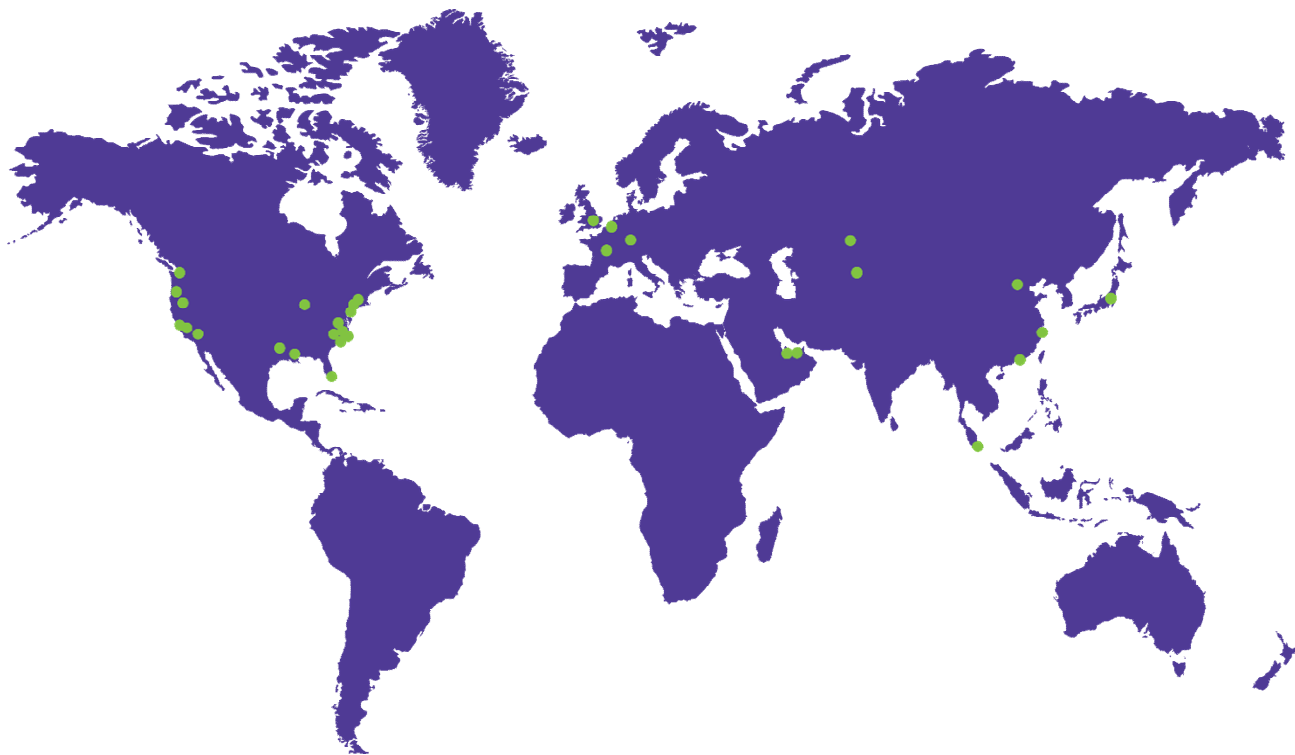
Christian J. Kozlowski represents clients on national security matters, including on issues concerning compliance with, and investigations relating to export controls, import controls, sanctions, anti-boycott, and anti-bribery/anti-corruption. Christian also assists both US and foreign entities with questions and appearances before the Committee on Foreign Investment in the United States (CFIUS), including counseling on the CFIUS process, appearances before CFIUS, considerations of when a transaction must be notified to CFIUS, and a voluntary notification may strategically benefit the transaction parties.

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