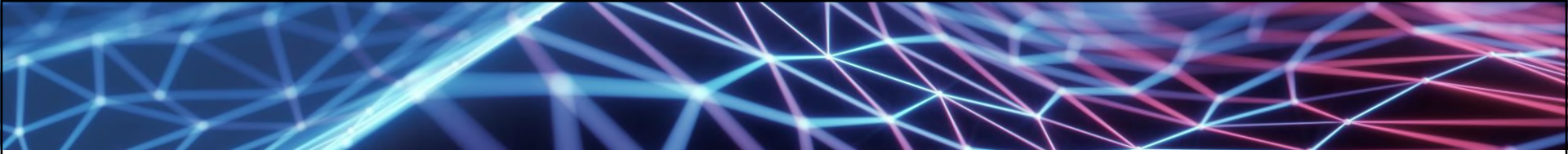


CFIUS: PROPOSED RULES UNDER FIRRMMA MANAGING THE EXPECTED AND THE UNEXPECTED

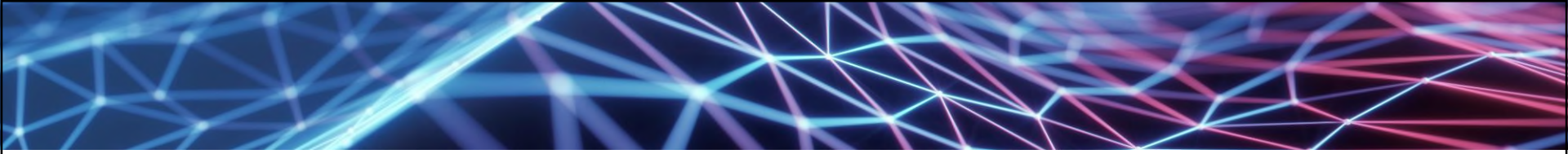
October 1, 2019

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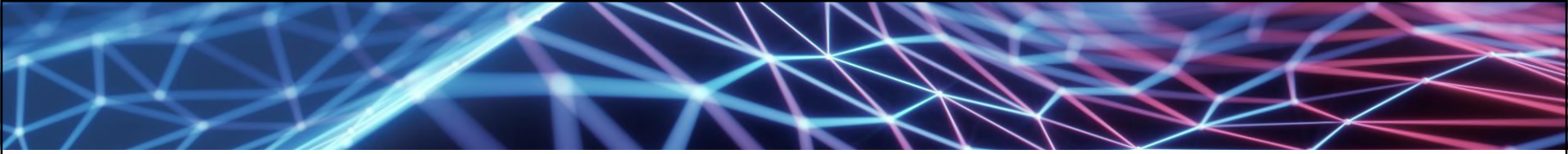
FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2018 (“FIRRMA”)

- ❖ FIRRMA signed into law in August of 2018, laid the foundation for the expansion of jurisdiction over foreign direct investments (FDI) in the United States that implicate US national security interests
- ❖ The Committee on Foreign Investment in the United States (CFIUS or “the Committee”) has reviewed FDI in the US since at least 1975 and has applied a variety of standards over that time to determine whether and what national security interests may be impacted by cross-border investments
- ❖ CFIUS’ underlying legislation, the Defense Production Act, provided the Committee the flexibility to assess what factors mattered to national security based on changes in geopolitical and related circumstances
- ❖ FIRRMA changed some of the approach by outlining with specificity areas where CFIUS retained the ability to develop and define standards that applied and areas where the Committee’s discretion was more limited



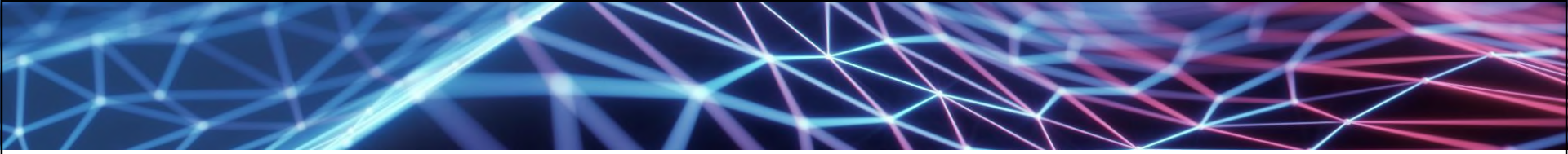
FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2018 (“FIRRMA”) TIMELINE

- ❖ FIRRMA passed in August of 2018
- ❖ Congress also passed the Export Control Reform Act of 2018 (ECRA) – which the President signed into law in August of 2018 as well
- ❖ FIRRMA identified the importance of critical technologies to the Committee’s determination of whether national security issues exist as part of FDI in the US
- ❖ This concept is not new overall



FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2018 (“FIRRMA”) TIMELINE

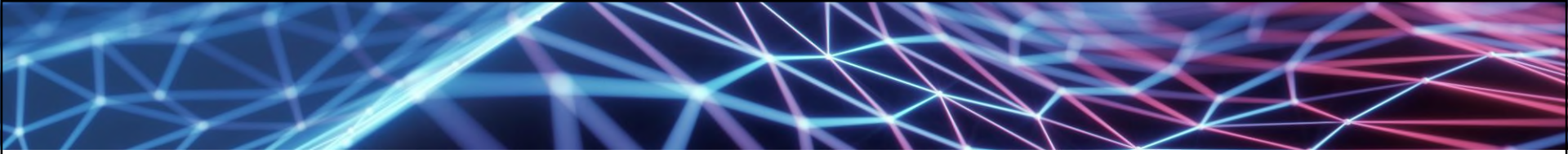
- ❖ But FIRRMA included a new category of critical technologies – *i.e.*, emerging technologies and foundational technologies – which were to be defined and managed by the Department of Commerce through ECRA
- ❖ Treasury published its first set of interim final regulations in October of 2018 (effective in November of 2018), establishing a pilot program for mandatory filings related to specific NAICS codes and critical technologies



FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2018 (“FIRRMA”) TIMELINE

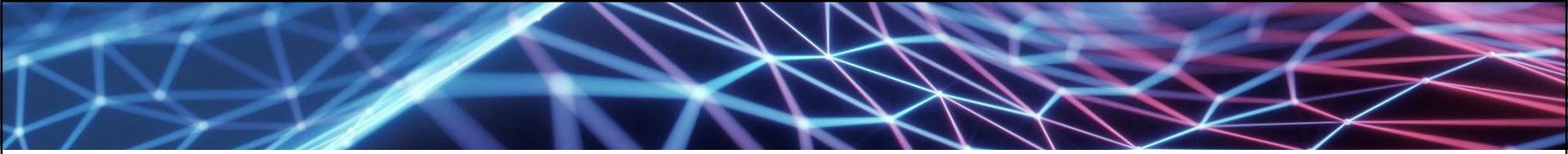
- ❖ Commerce published an Advanced Notice of Proposed Rulemaking in November of 2018 identifying 14 categories of emerging technologies that could be subject to controls by the Department of Commerce and therefore subject to review by CFIUS when cross-border investments involved these types of technologies
 - ANPR comments were originally due in December of 2018
 - Commerce extended the comment period until January of 2019
 - An updated rule – whether proposed or interim final – has yet to be published

- ❖ Until Commerce publishes the regulations related to emerging and foundational technologies, FDI in those US businesses remains outside CFIUS’ purview unless come other aspect of FIRRMA governs the transaction



FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2018 (“FIRRMA”) TIMELINE

- ❖ On September 17, 2019, Treasury announced the issuance of proposed rules to implement FIRRMA requirements related to minority (non-controlling) investments and real estate investments
 - The proposed rule was published in the Federal Register on September 24, 2019
 - Among other areas, the rule
 - ◆ Updates 31 CFR Part 800 to incorporate requirements for other investment, non-controlling investments, updates to definitions, development of a voluntary declaration process, and inclusion of the concept of ‘excepted investors’ and ‘excepted foreign governments’
 - ◆ Includes a new Part 802 to address covered real estate transactions, identification of critical infrastructure and key military/defense installations, and developed the concept of ‘excepted real estate investor’



FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2018 (“FIRRMA”) TIMELINE

- ❖ The proposed rule, however, did not address
 - Filing fees
 - Any changes to the Pilot Program regulations
 - Actual naming of ‘white’ or ‘black’ lists of countries with specificity
 - Any definitions for the terms avoiding or evading CFIUS review
 - Any changes to the voluntary CFIUS process
 - Any mandatory declarations for real estate transactions



PROPOSED RULES: THEMES

- ❖ The proposed rules – Part 800
 - Do not apply to transactions that result in control of a US business by a foreign person – these remain the same as part of the Part 800 voluntary notice for FDI reviews
 - Apply only to “investment” transactions
 - Are premised on the concept of ‘catch and release’
 - Do not include a nation or party “white list”, although the proposed rules identify criteria for defining “exempt” governments, investors, and real estate investors
 - ◆ “Excepted” foreign governments and “excepted foreign” parties (whether investors or real estate investors) will be announced by the Committee after a review process and a 2/3 vote by the CFIUS members for inclusion as an ‘excepted’ government or party



PROPOSED RULES: THEMES

- ❖ The proposed rules – Part 800
 - Will implement the voluntary declaration (short form) requirements of FIRRMA
 - Formalize and define the risk assessment analysis that CFIUS conducts
 - ◆ Threat
 - ◆ Vulnerabilities
 - ◆ Consequences to national security
 - Highlight the emphasis on transactions involving
 - ◆ Critical technologies
 - ◆ Critical infrastructure
 - ◆ Sensitive personal data, with genetic information being the most sensitive



PROPOSED RULES: THEMES

- ❖ Sensitive personal data (SPD)
 - Hones in on specific types of data and for specific persons
 - SPD must be a type that if exploited could harm US national security
 - The US business has SPD if it
 - ◆ Targets or tailors its products or services to sensitive US Government personnel or contractors
 - ◆ Maintains or collects such data on greater than one million individuals, or
 - ◆ Has a demonstrated business objective to maintain or collect such data on greater than one million individuals and such data is an integrated part of the US business's primary products or services
 - Genetic information is *always* SPD (*i.e.*, the three (3) criteria above do not need to be met)
 - Generally excludes SPD on the company's own employees when determining if the criteria are met



PROPOSED RULES: THEMES

- ❖ Sensitive Personal Data (SPD) defined to include
 - Data that could be used to analyze or determine an individual's financial distress or hardship
 - Data in a consumer report unless the data is obtained from a consumer reporting agency for permissible purposes
 - Data in an application for health insurance, long-term care insurance, professional liability insurance, mortgage insurance, or life insurance
 - Data relating to the physical, mental, or psychological health condition of an individual



PROPOSED RULES: THEMES

- ❖ Sensitive Personal Data (SPD) defined to include
 - Non-public electronic communications where a primary purpose of such product or service is to facilitate third-party user communications
 - Geolocation data collected using positioning systems, cell phone towers, or WiFi access points such as via a mobile application, vehicle GPS, other onboard mapping tool, or wearable electronic device
 - Biometric enrollment data including without limitation facial, voice, retina/iris, and palm/fingerprint templates
 - Data stored and processed for generating a state or federal government identification card
 - Data concerning US Government personnel security clearance status
 - Data in an application for a US Government personnel security clearance or an application for employment in a position of public trust



CRITICAL INFRASTRUCTURE

- ❖ FIRRMA requires a “subset” of critical infrastructure to be defined
 - Subjects non-controlling investments in this subset to CFIUS jurisdiction
 - If the US business “owns, operates, manufactures, supplies, or services critical infrastructure”
 - ◆ These are critical infrastructure “functions”
 - CFIUS creates its own definition of critical infrastructure
 - ◆ Not required to use any existing or other statute’s definition of critical infrastructure
 - Proposed regulations define critical infrastructure by providing a list – Appendix A



CRITICAL INFRASTRUCTURE

- ❖ FIRRMA requires a “subset” of critical infrastructure to be defined
 - If it is critical infrastructure as identified in Appendix A, the business must still engage in one of the relevant functions that applies to the enumerated type of critical infrastructure
 - Covered investments are determined by meeting both criteria in Appendix A
 - ◆ First, does it constitute critical infrastructure – Column 1 of Appendix A
 - ◆ If yes, does the US business own, operate, manufacture, supply, or service that critical infrastructure ***as defined in column 2***
 - “Only a US business that performs one of the specified functions listed in Column 2 of Appendix A with respect to the enumerated specific type of covered investment infrastructure listed in Column 1” is a covered US business for purposes of critical infrastructure covered investments



CRITICAL INFRASTRUCTURE

- ❖ Appendix A lists *twenty eight* categories covering more than *thirty* types of critical infrastructure, including, for example:
 - Telecommunications service
 - Submarine cable
 - Industrial resources other than OTS manufactured pursuant to a DX rating under DPAS
 - Specialty metals manufacturing facilities
 - Electric storage resource physical connected to the bulk-power system
 - Financial market utility that the financial stability oversight council has designated as systematically important under Dodd-Frank



CRITICAL INFRASTRUCTURE

- ❖ Appendix A lists *twenty eight* categories covering more than *thirty* types of critical infrastructure, including, for example
 - Rail lines
 - Interstate oil pipelines
 - Interstate gas pipelines
 - Maritime port
- ❖ Despite FIRRMA saying critical infrastructure should not be tethered to other statutes, *almost every type of critical infrastructure is defined by reference to other statutes or regulations*



CRITICAL INFRASTRUCTURE

- ❖ Other important definitions, all of which are provided “solely for purposes” of Column 2 of Appendix A
 - Own: directly possessing the applicable critical infrastructure
 - Manufacture: to produce or reproduce, whether physically or virtually
 - Service: to repair, maintain, refurbish, replace, overhaul, or update
 - Supply: to provide third-party physical or cyber security
 - Operate is not defined because that term is “commonly understood”



REAL ESTATE INVESTMENTS

- ❖ The proposed rules include new Part 802 focused on real estate investments and transactions
 - Include definitions for specific investors, the types of real estate transactions covered, and criteria for when transactions are not subject to CFIUS jurisdiction
 - As with the proposed rules to Part 800, Part 802 is premised on a ‘catch and release’ concept – identify a broad category of covered transactions (as outlined in FIRRMA) and then define the terms and scope to ‘release’ the transaction from CFIUS jurisdiction
 - FIRRMA established real estate exemptions from CFIUS jurisdiction based on whether the investment is in ‘urbanized areas’ as defined by the US Census Bureau



REAL ESTATE INVESTMENTS

- ❖ The proposed rules bring some clarity, as well as confusion, to terms that matter to real estate investments
 - “Urbanized areas” and “urban clusters” - FIRREA allows the Department of Defense to identify “urbanized areas” and “urban clusters” that include real estate that would be subject to CFIUS review. These areas are defined in terms of specific population levels
 - ‘Close proximity’ – depends upon location and type of investment and is generally defined as “one mile from the boundary of [the] military installation, facility or property”
 - Sensitive US military installations – includes a list of installations in Appendix A (parts 1 to 4) that identifies the installation and general location
 - Specific property rights as defined in 800.233 (need 3 of 4 rights to be covered)



REAL ESTATE INVESTMENTS

- ❖ Include specific criteria for limiting CFIUS review when the investment is an “excepted real estate transaction” that involves
 - A purchase or lease by, or concession to an excepted real estate investor or a change in rights of an excepted real estate investor when related to covered real estate
 - If the investment is otherwise subject to Part 800 as a covered transaction
 - If the investment involves a purchase, lease or concession of covered real estate within an urbanized area or an urban cluster – except for covered real estate that is defined as covered real estate in 802.211 which involves real estate that is located within, or will function as part of an airport or maritime port



REAL ESTATE INVESTMENTS

- ❖ Include specific criteria for limiting CFIUS review when the investment is an “excepted real estate transaction” that involves real estate that is
 - In close proximity to any military installation or “another facility or property of the US. Government” (as defined in Appendix A, parts 1 or 2)
 - Located in the ‘extended range’ of any military installation (as defined in Appendix A, part 2)
 - Located in any county or other geographic area identified in connection with any military installation (as defined in Appendix A, part 3)
 - Any part of a military installation (included in Appendix A, part 4) and is located within 12 nautical miles of the coastline of the United States



SELECT KEY TAKEAWAYS

- ❖ Due diligence – questions to ask
- ❖ Documentation – structuring deals
- ❖ Key considerations
 - Identifying property rights
 - Identifying minimum excepted ownership
 - Understand the location – review all the lists and the factors that apply (for real estate transactions as well as those subject to Part 800 on critical infrastructure)
 - Know the timelines



SELECT KEY TAKEAWAYS

- ❖ Understand the application of other than Part 802 – circumstances may exist where Part 800 and even Part 801 may still subject to the transaction to CFIUS jurisdiction
- ❖ Understand the purpose of the examples – they are not designed to provide definitive responses and a number of examples include the phrase, “assuming no other relevant facts” – there are always other relevant facts
- ❖ Understand the distinctions drawn between “covered” and “not covered” transactions – the nuances matter and circumstances exist where transactions not covered by Part 802, may still be covered for other reasons



QUESTIONS??

Biography



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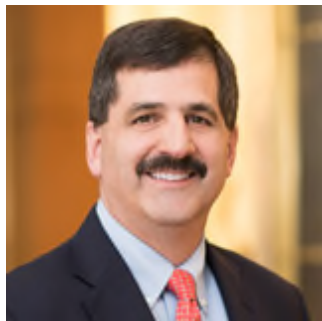
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Giovanna M. Cinelli is the Firm's leader of the International Trade and National Security Practice. Throughout a career spanning over 30 years, she has represented and counseled defense, aerospace and high technology companies on a broad range of issues affecting national security, including export investigations (civil and criminal), due diligence, post-transaction cross-border compliance, Committee on Foreign Investment in the United States (CFIUS) reviews, government contracts, export policy, and licensing. She sits on several US Government advisory committees including, the Defense Trade Advisory Group (State Department), the DSS Roundtable (DCSA) and the Virginia/DC District Export Council (Commerce). She was an 8-year member of the Regulations and Procedures Technical Advisory Committee at Commerce as well. She has conducted over 250 civil and criminal investigations (both unclassified and classified), addressed transactional due diligence matters in hundreds of investments, and counseled clients through the complexities of export control changes from 1992 through the present. She has negotiated complicated export enforcement settlements with the Department of State and successfully closed (without penalties) a range of directed and voluntary disclosures before the Departments of Commerce and Treasury (Office of Foreign Assets Control), as well as the Department of State. Congress considers her a subject matter expert on CFIUS. She testified on April 12, 2018 before the House Financial Services Committee on regulatory issues related to cross-border investments, national security and critical concerns involving the implementation of FIRRMA by the US. She is a frequent participant at workshops and conferences hosted by the Center for Strategic and International Studies, the Council on Foreign Relations and the Parliamentary Intelligence Forum hosted by the US Congress under former-Congressman Robert Pittenger's leadership. She is a member of the Firm's CFIUS Working Group, a Chambers ranked attorney and a recognized thought leader in the national security, CFIUS and export control fields.

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Kenneth J. Nunnenkamp represents buyers and sellers in transactions before the Committee on Foreign Investments in the United States (CFIUS), and counsels parties to transactions regarding CFIUS risks, applicability and solutions. His experience includes representation of buyers and sellers in public and private transactions in all value ranges, from small transactions in the millions to large matters in the billions, public and private. Ken's experience with CFIUS includes almost every industry and transactions involving entities from more than 35 countries, including Japan, China, Germany, the United Kingdom, Canada, Switzerland, Norway, Sweden, Indonesia, Australia, South Korea, Luxembourg, France, and many more. Ken chairs the Morgan Lewis CFIUS Working Group, which brings together the Firm's attorneys who practice in the area and who are interested in its developments. Ken's expertise encompasses trade and regulatory fields dealing with or implicating national security issues, including: US economic sanctions; Trade remedies (§§ 201, 232 and 301, and related matters, including exclusion requests, hearing testimony and Congressional involvement); Export controls and compliance/investigations under the ITAR, EAR and other regulations; US Customs regulations governing imports and exports; Customs and Census issues arising under the Foreign Trade Regulations, Endangered Species Act and Lacey Act issues with imports and exports of exotic and controlled items; C-TPAT; and Trade Agreements/Buy American issues. Ken also represents clients in matters relating to classified activities and before the Justice Department's Foreign Agent Registration Act (FARA) division. He brings more than 30 years of litigation and investigation experience, including time as a JAG Officer in the US Marine Corps. As an experienced entrepreneur, Ken applies business acumen to legal solutions, while assessing risk in user-friendly terms. He serves on the Wake Forest University Business School Board of Visitors, and publishes and presents frequently on topics relating to national security law, trade and business.

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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 he has worked broadly in Latin America, the Caribbean, Europe, Africa, Asia and the Middle East.

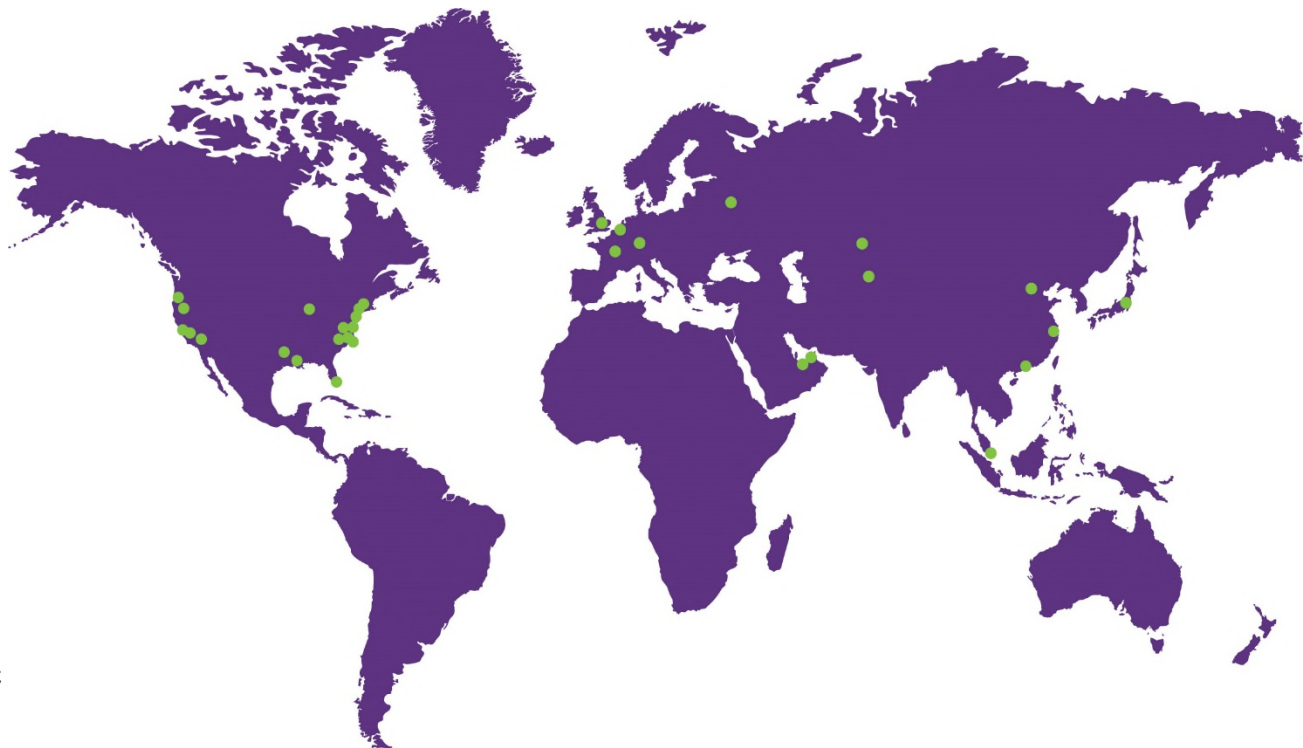
Carl advises clients on international risk management, including compliance with the foreign investment review process (Exon-Florio/CFIUS), export control and sanctions, anti-money laundering, anti-boycott, and anticorruption (FCPA) laws and regulations. He also advises on internal investigations, enforcement cases, and dispute resolution proceedings relating to his transactional and regulatory practice.

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