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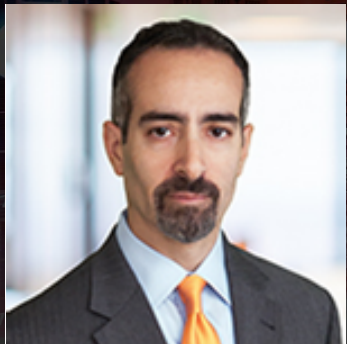
TECHNOLOGY MARATHON

**How the Government Assesses Technology for
National Security Risks when Reviewing Foreign
Investment**

David Plotinsky & Katelyn M. Hilferty

May 24, 2023 | 2:00 – 3:00 pm ET

Presenters



David Plotinsky



Katelyn M. Hilferty

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Agenda: Regulatory Regimes

- Export Controls
- Committee on Foreign Investment in the United States (CFIUS)
- Committee for the Assessment of Foreign Participation in the United States Telecommunication Services Sector (CAFPUSTSS, also known as Team Telecom)
- Executive Order 13873
- Outbound Investment (pending)
- Other Authorities...

Agenda: Technologies

- Advanced Computing
 - Artificial Intelligence
 - Quantum Computing
- Semiconductors
- Biotechnology and Biomanufacturing
- Information and Communications Technology and Services
 - Traditional Telecom Infrastructure
 - Submarine Cable Systems
 - Data Centers

Export Controls



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Export Controls

- U.S. company must understand export control status of any technology or equipment that might be exported as part of the transaction.
 - Exports can be made in the US by giving a foreign investor or its representatives access to certain technology in the US
 - So-called “deemed exports” can also occur when hiring non “U.S. person” employees.
 - Sufficient lead time should be allowed for obtaining any required export licenses.
- Export analysis is important to determine if the U.S. company has any “critical technologies” for purpose of national security reviews (CFIUS)
 - Defined currently by reference to export control regulations, but subject to expansion under an ongoing regulatory review process to add certain “emerging and foundational” technologies.
 - It may be necessary, but it is not legally required, to obtain formal classifications for export purposes of certain technology and products.

Export Controls

- As part of a due diligence background investigation, the U.S. company should have confirmed that the foreign investor is not subject to US sanctions or export restrictions by reference to various U.S. government lists (e.g., Consolidated Screening List).
- Note that China is prohibited jurisdiction for ITAR-controlled items and many EAR controlled items require an export license for China or for a deemed export to Chinese nationals in the U.S. There are also Chinese and other foreign companies/persons on the denied or blocked persons lists.
- Export control issues can arise in license and collaboration agreements, joint ventures, during due diligence and with the visit/employment in the U.S. of non-U.S. persons.
- These determinations are often confirmed with representations, warranties and covenants in the transactional documents.



Committee on Foreign Investment in the United States (CFIUS)

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CFIUS: FIRRMA

- The Foreign Risk Review Modernization Act of 2018 (FIRRMA) is the latest comprehensive amendment to national security reviews, and is embedded in the Defense Production Act (DPA), a statute that includes a range of broad national security authorities.
- The jurisdiction of the Committee on Foreign Investment in the United States (CFIUS) was previously based on ownership and control (both affirmative and negative), which is defined by CFIUS more broadly to include material influence and less-than-majority control.
- FIRRMA expanded CFIUS jurisdiction to also include certain non-controlling but non-passive investments, as well as certain real estate investments.
- FIRRMA also made filings mandatory for certain transactions, in a departure from the previous system in which all notices were voluntary.

CFIUS: New Focus on U.S. Technology, Infrastructure and Data Businesses

- Key focus of FIRRMA and the implementing regulations is on investment by foreign persons in so-called Technology, Infrastructure and Data (TID) businesses.
- It is important for companies to determine if they have “critical technology,” “critical infrastructure” or “sensitive personal data” for CFIUS purposes.
- There are separate regulations covering foreign investment in “covered real estate,” which includes certain investments in real property within defined geographical proximity to listed ports and military installations.

CFIUS: Mandatory Filing Requirements

- 1) Critical technology (i.e., export authorization would be required for the country of the foreign investor)
- 2) foreign government-controlled transactions, where a “substantial interest” is acquired in a U.S. TID business
 - If a foreign government-affiliated investor (from a single foreign state) would hold a 49% or more voting interest (direct or indirect) in the acquirer/investor.
 - And the investment involves a 25% or more acquisition of a voting interest (direct or indirect) in a U.S. TID business. In the case of an investment fund, only acquisition of interest in the general partner is considered (provided any limited partner interests do not confer control by the foreign investor).
- There are various exceptions to the mandatory filing requirements.

CFIUS: Outcomes

- Three possible outcomes for Joint Voluntary Notices:
 - Clear
 - Prohibit/Divest (or withdraw and abandon in the face of a blocking order)
 - Prohibitions and forced divestiture are very rare, and have generally involved Chinese acquisitions.
 - Clear with mitigation
 - Based on the latest CFIUS data, in 2021 mitigation was required in approximately 11% of all cases filed.

CFIUS: Declarations

- FIRRMA included a new option for short-form Declarations, rather than a full Joint Voluntary Notice.
 - No filing fee
 - Shorter review period of 30 days (as opposed to 45-90 days for a JVN)
 - Potential outcomes: 1) Clear (i.e., safe harbor); 2) CFIUS requests JVN; 3) CFIUS requires a JVN (rare); or 4) Conclude with no action (aka the “CFIUS shrug”)
- Some parties are willing to close based on a regulatory “shrug” even though it provides no protection from a later CFIUS review.
- Recent statistics suggest an increased use of the Declaration process for lower-profile, non-controversial cases, including ones for which a mandatory filing is required but the parties do not anticipate any national security concerns.

CFIUS: Non-Notified Transactions

- CFIUS has increased its resources to monitor so-called non-notified covered transactions and since 2016 the number of reviews of non-notified covered transactions has increased, particularly involving sensitive personal data as noted above or in certain industries (e.g., Chinese investment in life sciences or semiconductors).
- It is expected that CFIUS will further increase its review of non-notified covered transactions, but only time will tell as to the pattern and practice.
- CFIUS is actively reviewing non-notified, non-controlling venture capital investments by Chinese investors and investors from certain other countries of concern.
- In 2021, CFIUS made a non-notified outreach in 135 cases, but required only 8 of these to submit a full joint voluntary notice.
 - Even if CFIUS pulls in a non-notified case for a full review, that does not necessarily mean CFIUS will wind up requiring mitigation or divestiture.



**Committee for the Assessment of
Foreign Participation in the United
States Telecommunication Services
Sector
(CAFPUSTUSS a.k.a. Team Telecom)**

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Team Telecom

- Members: DOJ (Chair), DOD, DHS
- Committee Advisors
- Escalation process
- Jurisdiction derivative of FCC jurisdiction

Team Telecom

- Types of matters typically referred:
 - **New international Section 214 authorization:** Applicant seeks authority from the FCC to provide international telecommunications service to or from the United States.
 - **Transactions regarding an existing international Section 214 authorization:** Applicant seeks authority to assign or transfer control of existing license(s) that allow(s) telecommunication services to or from the United States.
 - **Submarine cable landing license application:** Applicant seeks authority to “land and operate” an international undersea cable that touches a U.S. territory.
 - **Transactions regarding an existing submarine cable landing license:** Applicant seeks authority to assign or transfer control of existing submarine cable landing license(s).
 - **Section 310(b)(4) Application/Petition for Declaratory Ruling:** Applicant seeks consent to exceed statutory foreign ownership limits for broadcast and common carrier wireless licensees, including common carrier satellite earth stations.
- FCC reserves the right to refer other types of matters as well

Team Telecom

- Similar to CFIUS:
 - Advise FCC no objection
 - Recommend denial
 - Recommend grant contingent on mitigation
- Enforcement
- Information-gathering authority

Executive Order 13873



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Executive Order on Securing the Information and Communications Technology and Services Supply Chain, No. 13873

- Declares a national emergency arising from threats to U.S. information and communications technology or services (ICTS) supply chain by foreign adversaries
- Prohibits certain transactions involving ICTS designed, developed, manufactured, or supplied by persons owned, controlled, or subject to jurisdiction of foreign adversaries that are determined to pose risks to U.S. ICTS, critical infrastructure, digital economy, or national security
 - Transaction must involve property subject to U.S. jurisdiction or activity conducted by an individual or entity subject to U.S. jurisdiction where a foreign national has an interest
 - Transaction must involve one of six categories of technology
- Department of Commerce delegated Presidential authority under IEEPA to implement the E.O.

Executive Order on Securing the Information and Communications Technology and Services Supply Chain, No. 13873

- On January 19, 2021, Commerce issued interim final rule establishing process for review of transactions involving ICTS Outcomes
 - Review process will begin with a referral to Commerce
 - After initial assessment, Commerce conducts initial review to determine risk
 - After interagency consultation, Commerce makes initial determination
 - After initial determination, Commerce issues final, written determination
 - Entire process takes 180 days
- Commerce also intends to create a licensing process to allow parties to obtain pre-approval for planned ICTS transactions
- Current use of authority
- Restrict Act (pending)

Outbound Investment



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Outbound Investment (Pending)

- Considered in FIRREA, but ultimately not included
- National Critical Capabilities Defense Act of 2021 (NCCDA 2021)
 - Included in House of Representatives bill, America COMPETES Act
 - Not included in companion Senate legislation
 - Ultimately not included in final CHIPS Act that passed Congress and was signed by the President
- National Critical Capabilities Defense Act of 2023 (NCCDA 2023)
 - Reintroduced in May 2023
- Potential next steps:
 - White House expected to implement outbound investment review through executive order.
 - Congress could also pass the NCCDA 2023, or include outbound investment in NDAA or another bill.
- Outbound investment review would likely be accompanied by efforts to persuade partner nations to adopt similar regimes



Technologies

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Technology: Semiconductors

- Export Controls
 - On October 7, 2022, Department of Commerce issued far-reaching, complex interim final rules that imposed new export controls on certain advanced computing and semiconductor manufacturing items destined for China.
- CFIUS
 - Semiconductor sector remains high-risk from a U.S. FDI perspective.
 - CFIUS Annual Report to Congress for 2021: “semiconductors are an enabling technology for a range of national security critical devices, systems, and functions.”
- CHIPS Act
 - Prohibits funding recipients from expanding semiconductor manufacturing in China and other countries posing a national security threat to the U.S.
- Outbound Investment Review

Technologies: Artificial Intelligence and Quantum Computing

- Export Controls
 - Currently not controlled, except for specified technology (software to automate geospatial imagery analysis).
 - Undersecretary for Commerce Alan Estevez said last year that he expects the U.S. will enact additional controls related to quantum computing and AI (and also biotechnology).
- CFIUS
 - Executive Order 14083 specifically calls out AI and quantum computing as technologies that are “fundamental to United States technological leadership and therefore national security”; under the E.O., CFIUS is required to consider whether a covered transaction involves AI and quantum computing as part of its risk review.
- Outbound Investment Review
- International Regulations

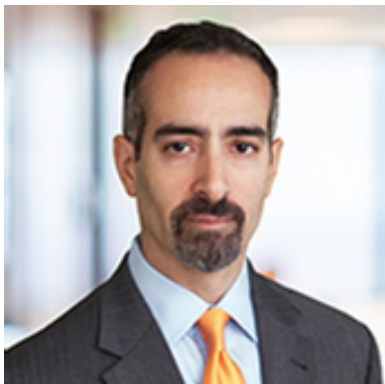
Technologies: Biotechnology and Biomanufacturing

- Export Controls
 - BIS has increased controls on biotechnology-related items in recent years (single-use cultivation chambers, software designed for nucleic acid assemblers and synthesizers; proposed rule on automated peptide synthesizers).
- CFIUS
 - FIRMMA expanded CFIUS jurisdiction to include noncontrolling investments by a foreign person in a U.S. business that maintains or collects sensitive personal data of U.S. citizens.
 - Includes U.S. businesses that collect or maintain identifiable genetic information regardless of number of U.S. individuals covered.
- Executive Order on Advancing Biotechnology and Biomanufacturing Innovation
 - Seeks to boost American biotech R&D and support the U.S. bioeconomy.
- Outbound Investment Review

Technologies: Information and Communications Technology and Services

- Risk to data and risk to infrastructure
 - Heightened risk for submarine cable systems
- Team Telecom
 - Assesses whether whether foreign ownership or control of an applicant seeking to participate in the U.S. telecommunications sector presents national security or law enforcement concerns.
- E.O. 13873
 - Prohibits certain transactions involving ICTS designed, developed, manufactured, or supplied by foreign adversaries that are determined to pose risks to U.S. ICTS, critical infrastructure, digital economy, or national security
- CFIUS
- Data Centers
- Social Media ?

Biography



David Plotinsky

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David Plotinsky, the former acting chief of the US Department of Justice's Foreign Investment Review Section, represents clients such as venture capital, private equity, and infrastructure firms. In particular, he steers clients through government national security review processes for foreign investment, including by the Committee on Foreign Investment in the United States (CFIUS) and Team Telecom. In addition, David focuses on trade, information communications technology and services, and critical and emerging technology. He maintains a security clearance and advises clients on their most sensitive matters.

Biography



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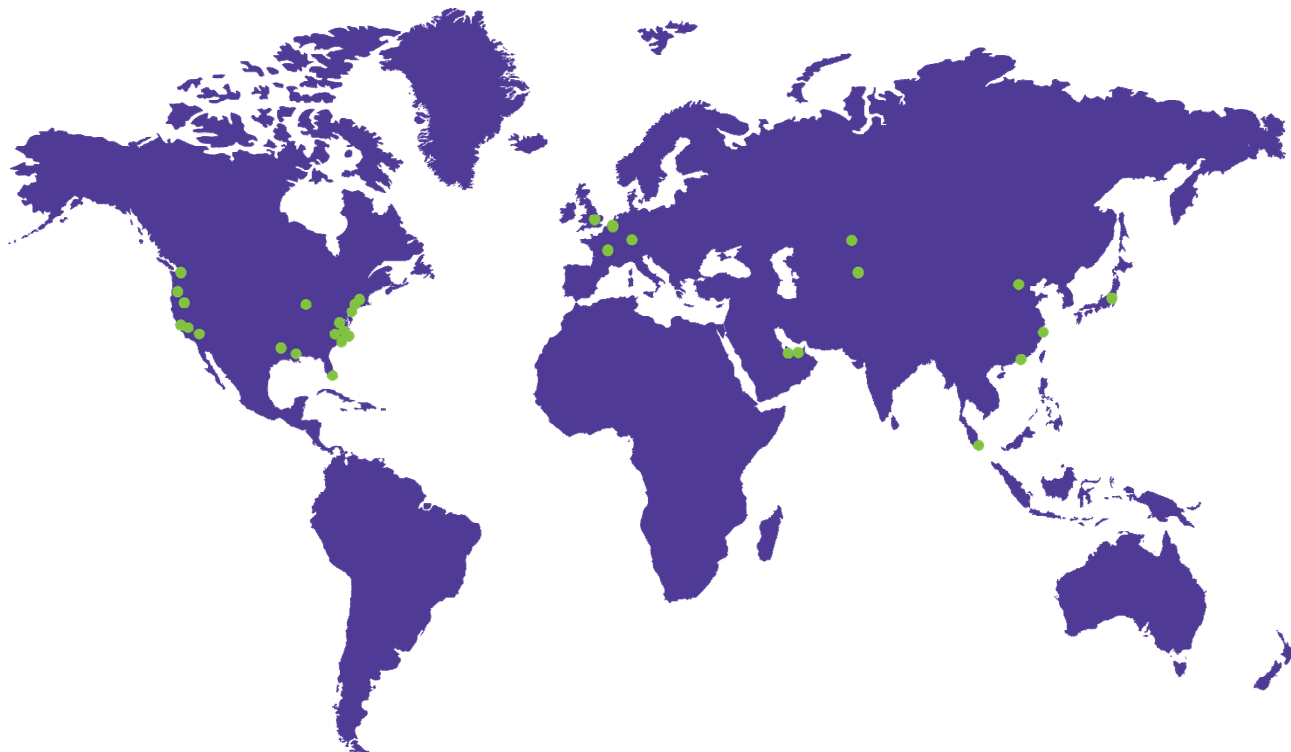
Katelyn M. Hilferty helps clients navigate US cross-border and trade compliance requirements, including export controls under the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR), economic sanctions administered by the US Department of Treasury's Office of Foreign Assets Control (OFAC), import and customs laws and regulations enforced by US Customs and Border Protection (CBP), anti-money laundering (AML)/Bank Secrecy Act (BSA) compliance matters, Bureau of Economic Analysis (BEA) international survey reporting, and national security issues before the Committee on Foreign Investment in the United States (CFIUS).

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