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TABLE OF CONTENTS

It's Time to Take a Second Look at Your Products' Countries of Origin

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Alongside the plethora of changes to daily life and business that we've grown accustomed to during the coronavirus ("COVID-19") pandemic, supply chains likewise appear to be facing a new normal—one filled with delays, shortages, and sourcing challenges. Supply chain interruptions are ubiquitous. Ninety-four percent of Fortune 1000 companies faced supply chain disruptions resulting from COVID-19, according to a report by Accenture.[1] As a result, many businesses have changed sourcing or suppliers for certain components, and the need for supply chain flexibility persists as economic activity rebounds and pandemic-related challenges remain uneven across major exporting countries.[2] A survey of small businesses performed by the U.S. Census Bureau showed that, as of July 2021, domestic and foreign supplier delays, as well as delivery and shipping delays, had all *increased* since April 2021.[3] As supply chains continue to face global disruptions, stable sourcing of product inputs is a thing of the past and ongoing compliance will require that companies develop systems for real-time monitoring of their declared and marked countries of origin.

Given the turbulent nature of supply chains in this new normal, we suggest that our clients and friends confirm the accuracy of declared and marked countries of origin of finished products, and promptly remediate any needed changes in declarations, certifications, marking, labeling, or duties, as discussed below.

Overview of Country of Origin Requirements

Country of origin analyses are fact intensive. The sourcing of a single component or the movement of a single production process of a good could change its country of origin.[4] Although a complete discussion of all rule of origin schemes is outside the scope of this article, generally, the country of origin which must be declared and marked for a product containing components of more than one country is the country in which the product was last "substantially transformed."[5]

Whether a product has been substantially transformed can be an extremely complex and fact-intensive question. Moving production processes or component suppliers can quickly change the analysis. To create a modern example based on a common substantial transformation scenario, similar to that described in U.S. Customs and Border Protection ("CBP") Headquarters Ruling HQ 560115,[6] if a major component of a product is manufactured in Vietnam, such that the Vietnamese component serves as the "essence" or "essential character" of the finished good, then the substantial transformation may be deemed to occur in Vietnam, despite the addition of components manufactured in other countries and the ultimate assembly taking place in the United States. However, changing the sourcing of the single Vietnamese component to China as a result of supply chain modifications would change the outcome of the country of origin analysis—likely requiring that China be declared and marked as the country of origin (and, pursuant to the Section 301 action against China, that additional 7.5% to 25% tariffs be paid on the goods at the time of import).[7]

Ensuring that the proper country of origin is determined for all products is far from a clerical requirement. On the contrary, different country of origin analyses are critical to:

- Defining the rates of duty and safeguard actions that may apply to goods;[8]
- Determining the country that should be marked on a product pursuant to marking rules;[9]
- Determining labeling requirements, such as under the Federal Trade Commission's ("FTC") "Made in USA" standard ("Made in USA");[10] and
- Compliance with government procurement regulations, such as the Buy American Act ("BAA").[11]

Each of the above regulatory schemes is distinct, and not all use the substantial transformation test. Under each of the schemes, however, small changes as to the sourcing of inputs into finished products may result in analyses leading to different country of origin determinations. Furthermore, the country of origin for purposes of one regulatory analysis may not be the country of origin for another due to their different tests and standards. Consequently, the risk is high that a sourcing change may alter a prior country of origin determination and result in errors in your declarations, certifications, marking, labeling, or duties.

Businesses must be aware of the potential fines and penalties for incorrectly determining a product's country of origin. For imported products with country of origin declaration errors, depending on the level of culpability of the error, penalties per violation could range from 20% of the dutiable value of the merchandise, to two to four times the underpaid lawful duties, taxes, and fees, up to even the domestic value of the merchandise.[12] And, as discussed below, there are additional collateral consequences to inaccurate country of origin determinations, including tariff over- or underpayment, violations of Made in USA or other consumer protection labeling requirements, and additional avenues of liability for government contractors, such as under the BAA or Buy America statutes.

Small Sourcing Changes Can Dramatically Impact Tariff Calculations

Changes to supply chains or component sourcing due to supply chain disruptions also affect country of origin determinations under trade preference programs and free trade agreements, which may impact tariff calculations. Although this risk has always been present when dealing with cost-sensitive rules of origin, the dramatic increase in supply chain disruptions has heightened the possibility of errors in this area. Many of these programs and agreements use one or more of the below types of rules of origin:[13]

- Minimum local value content requirements
- Tariff-shift rules
- Regional value content requirements
- A de minimis test

Under these methods, the origin and value of certain components are critical. Any changes in the sourcing of components may upset a previously determined country of origin. In fact, *even without any changes to suppliers*, changes in value alone of certain inputs into finished products may alter the country of origin. For example, where there is a minimum local value content or regional value content requirement, *any* valuation changes must be accounted for in the final determination of what percentage of the value of a product is "local" or "regional."

Consider the simplified case of a widget produced in and imported from Mexico under the U.S.-Mexico-Canada Agreement ("USMCA"), which operates primarily through tariff-shift rules, but allows for a "de minimis" amount of non-originating content up to 10% of the total cost or transaction value of the finished good.[14] If the total cost of the widget is $10, and it has a single non-originating component that did not meet the widget's tariff-shift rule with a cost of $0.95, that widget qualifies for USMCA treatment (given that the percentage of non-originating content is 9.5%) and could enter duty-free and be marked as a product of Mexico. However, if a supplier cost increase due to supply shortages or a sourcing change bumps that non-originating component cost to $1.05, resulting in an increased total cost by $0.10 to $10.10, the percentage of the total cost of the non-originating component now exceeds 10% of the total cost of the good (at 10.40%), despite only a $0.10 increase in the component cost. The finished product would no longer qualify for USMCA duty-free treatment, and may even need to be marked with a different country of origin pursuant to the substantial transformation test.

Alternatively, there are circumstances in which failing to regularly update country of origin analyses could lead to an overpayment of duties. To elaborate on the widget example, if the widget did not already qualify for USMCA duty-free treatment due to a single non-USMCA originating component that exceeded the 10% de minimis threshold, changing the supply chain to instead source that component from Mexico, the United States or Canada could qualify that product for USMCA duty-free treatment, resulting in an overpayment of duties.

Failing to identify these critical changes to small supply chain shifts could therefore lead to improper duty-free treatment claims, resulting in significant duty calculation errors and/or stiff penalties. In both scenarios, importers with systems in place to regularly review and evaluate their countries of origin will not only remain compliant with U.S. laws and regulations, but will also benefit from the ability to make critical changes to the advantage of their bottom lines.

Made in USA Labeling Requires Careful Attention

Aside from declared and marked countries of origin in the import context, sourcing changes due to supply chain disruptions could also implicate Made in USA labeling. The FTC has been increasingly focused on combatting false Made in USA claims over the past few years. In March 2020, the FTC announced a $1 million settlement with Williams-Sonoma, Inc. for what it described as "false, misleading, or unsubstantiated" Made in USA claims on various product lines, a breach of commitments made by Williams-Sonoma stemming from an earlier investigation into its improper use of Made in USA labels.[15] The final FTC order restricts Williams-Sonoma's ability to make unqualified and qualified Made in USA claims on a going-forward basis, requiring that it be able to fully substantiate the claims under FTC standards.[16]

Just this year, the FTC codified its longstanding Made in USA labeling policies and incorporated civil penalty amounts for violations.[17] To label a product as being made in the United States, "the final assembly or processing of the product" must occur in the United States, "all significant processing" must occur in the United States, and "all or virtually all ingredients or components of the product" must be made in the United States.[18] The FTC has interpreted this to mean that only negligible, if any, foreign content is present in the end product.[19] Under the "all or virtually all" standard, therefore, labeling could be impacted by even small sourcing changes. Under the new rule, making an improper Made in USA claim on a label qualifies as an "unfair or deceptive act or practice," exposing improper labelers to civil penalties up to $43,792 per violation.[20]

Outside of labeling, the FTC has also been actively enforcing the use of Made in USA claims in advertising, including statements on company websites. The FTC imposed a $146,249.24 monetary judgment and restrictions on future use of Made in USA claims against Gennex Media LLC and its owner for "claiming on their…website that the products they sell are made in the United States, when in fact in numerous instances they are wholly imported from China"[21] in an April 2021 final consent order. Changes to supply chains, therefore, will likely require a review of any advertising or website-based Made in USA claims, as well, in order to ensure that all claims remain proper.

Producers of products bearing any variations, qualified or unqualified, of Made in USA labels or advertising should take steps to ensure their continued review and compliance with the "all or virtually all" standard, or include proper qualification language where appropriate to prevent the imposition of large civil penalties.

Tougher Domestic End Product Rules in the Pipeline for Government Contractors

Lastly, country of origin analyses for purposes of government procurement may also be affected by sourcing changes due to supply chain disruptions, opening contractors up to possible penalties, debarment, or prosecution under the False Claims Act.[22]

Pending regulations pursuant to the BAA will require even greater domestic content for certain products, which will require even closer attention to sourcing changes. President Biden issued Executive Order 14005 on January 25, 2021, focused on strengthening and increasing the procurement of U.S. goods and services.[23] On July 30, 2021, proposed rules were issued under the BAA which would, among other things, modify certain origin calculations performed by government contractors pertaining to many manufactured products.[24] Currently, in order for most[25] items manufactured in accordance with government specifications to qualify as domestic end products under the BAA, the products must:

1) be manufactured in the United States and 2) include at least 55% domestic components, measured by the cost of domestic components compared to the cost of all components (subject to certain exceptions and waivers).[26] The proposed rule would modify the 55% domestic content threshold, increasing it initially to 60%, with subsequent increases within two and five years to 65% and 75% respectively.[27] These more stringent criteria will restrict supply chain flexibility and require close monitoring.

Moreover, active enforcement of government procurement regulations is a clear focus of the Biden Administration. In September 2021, a defense contractor entered into a settlement with the Department of Justice, agreeing to pay $900,000 to resolve allegations that it violated the False Claims Act when it "provided unapproved substitute parts through the U.S. Army's Simplified Nonstandard Acquisition Program (SNAP) and violated the Buy American Act by providing parts manufactured in a non-qualifying country."[28] The settlement clearly highlights the compliance issues that can arise when companies switch out parts and components used in their supply chains. Ensuring that such changes are accounted for under the relevant regulations is critical.

To prevent the incorrect certification of a product as a domestic end product, businesses should ensure that they are properly measuring the domestic content for items made to government specifications, and updating this analysis regularly in the event of any supply chain changes.

Conclusion

The confluence of regulatory attention to country of origin issues with supply chain disruptions due to the pandemic has dramatically increased the risk that import issues could become a distraction or serious liability. If an updated analysis on products' countries of origin has not been performed recently, now is the time.

SPOTLIGHT

Mexico, China, and Hong Kong Origin Issues in the Trade Spotlight

The criteria for a country of origin analysis often are specified in trade preference programs and free trade agreements. As the U.S.-**Mexico**-Canada Agreement ("USMCA") replaced the North American Free Trade Agreement ("NAFTA"), effective July 1, 2020, new rules of origin were introduced for many products from Mexico, including changes to tariff-shift rules, regional value content, de minimis requirements, and more.[29] Final implementing regulations were published by U.S. Customs and Border Protection ("CBP") on July 6, 2021.[30] As a result of this change, importers were required to transition from NAFTA to the new agreement, overhauling established processes to incorporate the revised procedural requirements, in addition to re-analyzing products under the new rules of origin.[31]

Section 301 tariffs on goods of Chinese origin are an ever-present concern for many importers, but importers could face some relief soon through the reintegration of an exclusion process by the Office of the U.S. Trade Representative ("USTR").

The escalating trade war between the United States and **China** has skyrocketed the financial risk associated with incorrectly determining that a product is not Chinese due to the potential penalties for underpayment of tariffs. In 2017, a review was initiated by USTR into China's practices with respect to the transfer of technologies and intellectual property from U.S. entities to China pursuant to Section 301 of the Trade Act of 1974.[32] After finding that "the acts, policies, and practices of the Government of China…are unreasonable or discriminatory and burden or restrict U.S. commerce," USTR announced the imposition of 25% tariffs on $34 billion worth of goods from China.[33] The actions escalated from there, with most products of China now subject to additional tariffs ranging from 7.5% to 25%.[34]

Incorrectly determining that a product *is* or is *not* a product of China could therefore result in significant duty under- or overpayments. Furthermore, because penalties issued by CBP for improper declarations of country of origin are often tied to the amount of underpaid duties,[35] an error with respect to the country of origin could skyrocket any associated penalties.

However, in a long-awaited action, USTR recently requested comments on the reinstatement of a number of previously granted exclusions from the Section 301 tariffs, which could provide some relief for importers of the 549 products covered by the notice.[36]

Finally, due to the deteriorating geopolitical situation with respect to **Hong Kong**, goods can no longer be marked as products of Hong Kong as of November 9, 2020.[37] On July 14, 2020, President Trump issued Executive Order 13936, suspending Hong Kong's previously recognized special status as separate from China.[38] Although CBP has determined that products of Hong Kong will not be subject to the Section 301 action discussed above,[39] the goods must now be marked pursuant to 19 U.S.C. § 1304 as products of China, as opposed to products of Hong Kong.[40]

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Anti-Corruption Hot Topic: Corporate Transparency Emerges as Cornerstone of Financial Integrity Regulatory Reforms

Elizabeth G. Silver and Catherine A. Johnson

Against the backdrop of the Pandora Papers, increasing corporate transparency has become a cornerstone for improving financial integrity by pulling back the veil on illicit money flows that facilitate bribery, money laundering, tax evasion, terrorism financing, human trafficking, and other human rights abuses.[41] In October 2021, the Pandora Papers dropped like a bombshell, revealing previously confidential financial information regarding more than 29,000 beneficial owners of offshore assets worth billions of dollars.[42] The data, released by a group of investigative journalists, reveals information regarding the corporate vehicles used by heads of state, politicians, ambassadors, generals, and more than 130 billionaires from forty-five countries to hide such information.[43] Although shielding assets offshore does not necessarily constitute a crime or indicate that one has been committed, global enforcement authorities point to opaque corporate structures as a significant obstacle to investigating and prosecuting crime.[44] While there remain a series of jurisdictions that are perceived to be tax havens, impending regulatory changes in the United States will chip away at the anonymity that enables illicit finances to flow untraceably.

Following decades of criticism from the global anti-money laundering community for not being tough enough on anonymous shell companies,[45] and recognizing the patchwork of state and local requirements on corporate formation and reporting, the United States has taken a significant step toward reform. New regulations in the pipeline will introduce nationwide standards and increase transparency into the ownership of certain categories of corporations registered or operating in the United States. As acknowledged in the legislation, the new procedures have "the purpose of preventing money laundering, the financing of terrorism, proliferation financing, serious tax fraud, and other financial crime by requiring nonpublic registration of business entities formed or registered to do business in the United States." [46] Importantly for entities that will need to begin disclosing ownership information, the beneficial ownership information generally will not be publicly available, which will help protect confidentiality for legitimate businesses and alleviate security concerns for individuals whose assets may be listed in the database. However, these regulations will have the effect of giving U.S. law enforcement access to the true owners behind entities formed or registered in the United States to suss out illicit activity.

In this article, we provide an overview of the key provisions of the Corporate Transparency Act ("CTA"), which, through the Anti-Money Laundering Act of 2020, became law on January 1, 2021, as part of the National Defense Authorization Act for Fiscal Year 2021. We also identify key implications for our clients and friends, and we provide some insights regarding conducting due diligence surrounding the Pandora Papers.

Regulatory Backdrop

Anti-money laundering regulation and enforcement is carried out by a complex web of domestic and international players. In practice, a significant component of anti-money laundering and anti-terrorist financing work is carried out by the private sector, and particularly financial institutions, which are under rigorous requirements to conduct due diligence on their customers and report certain categories of suspicious transactions to the government.[47] The CTA will require that certain categories of businesses file reports with the U.S. government regarding their beneficial owners. This information will be available not only to financial institutions subject to customer due diligence requirements, but also to U.S. and, under certain circumstances, foreign law enforcement.[48] The new reporting carried out under the CTA will be overseen by the Financial Crimes Enforcement Network ("FinCEN"), which is part of the U.S. Treasury Department.[49]

The CTA will not impact all businesses equally. Following an overview of the key provisions of the new regime, we address the impacts on three categories of our readers: (1) companies that will be considered "reporting companies" and required to file; (2) financial institutions that will access the registry; and (3) other businesses, which will not have direct reporting obligations or access to the ownership information collected under the CTA.

Key Provisions

The CTA will create a new category of regulated entities called reporting companies.[50] A reporting company is defined as a corporation, LLC, or other similar entity that is (i) created by the filing of a document with a secretary of state or a similar office under the law of a state or Indian tribe, or (ii) formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a state or Indian tribe.[51] Certain categories of entities are exempt from the reporting requirement: certain types of issuers; certain registered entities; banks; credit unions; public utility companies; certain tax exempt entities; entities with more than twenty full-time employees, revenue greater than $5 million, and a physical operating presence in the United States; entities owned or controlled by other entities that qualify for one of several other specified exemptions; and certain dormant entities, among others.[52] Implementing regulations are due out in late 2021 to provide additional details regarding which entities will qualify for exemptions from the reporting requirements.

Under the CTA, reporting companies will be required to submit to FinCEN certain information regarding (1) their beneficial owners and (2) the person who registered or filed an application to register the reporting company in the United States.[53] The CTA defines a beneficial owner of an entity as an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise (i) exercises substantial control over the entity, or

(ii) owns or controls not less than twenty-five percent of the ownership interests of the entity.[54] The information that will be required to be reported includes (i) full legal name, (ii) date of birth, (iii) current residential or business street address, and (iv) a unique identifying number from an acceptable identification document or the individual's FinCEN identifier.[55]

The new reporting requirements have not yet taken effect, and in fact may still be years away for some regulated entities. Implementing regulations for the new reporting system are due out no later than January 1, 2022.[56] The date they will take effect, which will trigger when reporting obligations will begin, has not yet been set.[57] However, the general timelines have been specified. Once the final regulations have been issued and take effect, newly formed entities will be required to file their reports upon formation.[58] Existing entities will have a period of two years from the new effective date, which has not yet been determined, to submit their reports.[59] From then on, once reporting companies are registered with FinCEN, subsequent changes in beneficial ownership will have to be reported within one year.[60]

Recognizing legitimate concerns about divulging ownership information, the regulations include significant restrictions on how the information is to be stored and when it can be disclosed. FinCEN is required to maintain the information in a confidential, secure, and non-public database.[61] FinCEN will be authorized to disclose the information to financial institutions to assist in meeting their customer due diligence ("CDD") obligations, and also to certain government agencies for certain purposes specified in the CTA.[62] FinCEN will be permitted to disclose beneficial ownership information upon receipt of (i) a request from a federal agency engaged in national security, intelligence, or law enforcement activity, (ii) a request from a non-federal law enforcement agency with court authorization, (iii) a request from a federal agency on behalf of certain foreign requestors under specified conditions, (iv) a request by a financial institution subject to CDD requirements with the consent of the reporting company, and (v) a request by a Federal functional regulator or regulatory agency under certain circumstances.[63] Of note, the authorized law enforcement activities are not limited to those carried out by U.S. authorities. Information in the registry may, under certain circumstances, be obtained by law enforcement authorities outside the United States for use in criminal and civil proceedings.

Impact on Our Clients

For our clients that will face filing requirements as reporting companies, many of the details regarding the procedural aspects of the filings will be forthcoming with FinCEN's implementing regulations. In the meantime, assigning responsibility for FinCEN regulatory compliance and ensuring adequate resources will be available to satisfy the obligations is advisable, as non-compliance accrues daily penalties and potential civil and criminal exposure.[64]

Financial institutions that are subject to customer due diligence requirements will be able to request beneficial ownership information from the FinCEN registry as part of the CDD process with the consent of the reporting company.[65] One challenge for financial institutions will be developing appropriate guidelines for CDD on established clients that become reporting companies under the CTA, but that are not required to file their information for up to two years. The period while the CTA is affecting certain swaths of customers will present unique challenges for administering and complying with CDD requirements.

For the rest of our clients, on its face, the CTA will have little impact on your due diligence programs. However, it bears mention that financial institutions will gain a significant information advantage on reporting companies that have a potential nexus to corruption, money laundering, proliferation, terrorist financing, and other financial crimes. Therefore, your diligence process should be mindful of red flags indicating that a potential counterparty is having trouble gaining access to the U.S. financial system or may be the subject of law enforcement inquiries. Any such red flags should be fully resolved before proceeding with the counterparty.

Due Diligence Regarding the Pandora Papers

The International Consortium of Investigative Journalists ("ICIJ") reports that 30,000 companies are implicated in the Pandora Papers records,[66] suggesting there is a significant likelihood our clients may encounter implicated parties through their due diligence processes. At this time, it is not possible to fully conduct due diligence for potential links to the Pandora Papers because the complete data from the Pandora Papers has not yet been published. Rather, reports of investigation results are being periodically released by the ICIJ and more than 150 media partners.[67] For the time being, open source research, including in local languages, should be performed for publicly available information regarding links to the Pandora Papers. Eventually, it will be possible to search the underlying data. The ICIJ reportedly[68] will be incorporating the data into its Offshore Leaks Database, and will likely publish Excel files detailing the names of entities, subsidiaries, officers, and addresses included in the data, as it has with prior investigations.[69] The Database currently contains the data associated with prior investigations, which can be searched by the public.

Once populated, the Database can be searched, and will further serve as a useful tool for clients to perform due diligence on third parties with which they do business. The Database allows searches for entity names, officer names, intermediaries, and even addresses. However, ICIJ does not publicly release the underlying records it obtained. In this way, the Database is only a first step to determine whether additional diligence may be required to investigate why the party was named.

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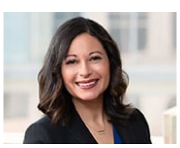

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FCPA Compliance Practice Pointer: Using Data Analytics for Risk Assessment, Monitoring, and Testing

As fluidity in the way we do business becomes the norm, adept compliance professionals capitalize on data analytics to gain a continuous view of FCPA risks rather than relying on an outdated snapshot that is increasingly disconnected from how the business works today. Analyzing data for trends and red flags helps you stay close to the business and monitor shifting risks.

Key Sources of Data:

- Compliance Data: Third-Party Due Diligence, Inquiries and Approvals, Surveys and Questionnaires
- Financial Data: High-Risk Expenditures
- Historical Issues: Hotline Reports, Audit Findings, Investigations

If your organization is still developing its monitoring, testing, and risk assessment processes, consider launching a pilot program before rolling them out enterprise-wide. And remember that your processes must be individualized to match the risk profile of your business.

Common Regulatory Hurdles to Foreign Investment in the United States—HSR and CFIUS Explained

Brent Connor, Brian K. McCalmon, Elizabeth G. Silver and Catherine A. Johnson

Several U.S. regulatory schemes can affect the ability of foreign investors to acquire an interest in or control of U.S.-based companies. Parties considering cross-border investments should think early and often about how to steer their deal through relevant agencies and how to allocate the risk of regulatory delay or challenge. In this article, we focus on Hart-Scott-Rodino ("HSR") and Committee on Foreign Investment in the United States ("CFIUS") filing requirements, and examine how they can impact the risks and timelines of investment transactions.

Overview of HSR Antitrust Filing Requirements

HSR antitrust merger reviews, which are conducted by the Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended,[70] require parties to large acquisitions or mergers (currently, those valued above $90 million) to notify the DOJ and FTC of the transaction so that the agencies can assess—prior to closing—whether the transaction may lessen competition in a line of commerce within the United States.[71] Many other countries have a similar requirement that is triggered by some combination of party size, deal size or sales turnover.[72]

In the United States, the transaction cannot close until at least 30 days after all required HSR filings have been made.[73] If the reviewing agency has significant concerns prior to the expiration of the waiting period, it will request that the parties provide information voluntarily and will work to resolve its concerns quickly. If serious issues remain as the waiting period nears expiration, the agency can issue a large document request colloquially known as a "Second Request," which tolls the expiration of the waiting period until 30 days after the parties have certified substantial compliance with it.[74] The agency can then let the waiting period expire or can sue in federal court to enjoin the transaction.[75]

As a practical matter, parties facing a substantive investigation from FTC or DOJ staff —especially in transactions with significant competitive overlaps between the parties—can face an uphill climb to resolve significant competitive concerns within the initial 30-day waiting period. When a Second Request issues, it requires at least several weeks, if not months, just to certify substantial compliance. Parties hoping for a negotiated settlement to avoid protracted litigation can face closing delays ranging from five or six months to more than a year.

Overview of CFIUS National Security Filing Requirements

CFIUS review can be a similarly lengthy process. CFIUS is a U.S. federal interagency body that is authorized to review certain foreign investment transactions in the United States that pose a threat to national security under section 721 of the Defense Production Act of 1950, as amended, and Regulations Pertaining to Certain Investments in the United States by Foreign Persons.[76] Transactions that may trigger CFIUS review include, for example, those in which the United States target deals in certain critical technology, critical infrastructure or sensitive personal data.[77]

There are several mechanisms by which a transaction may be brought before CFIUS for consideration of potential national security implications. In some instances, the parties to a transaction are required to notify CFIUS via a "short-form" declaration,[78] and obtain approval before the transaction may proceed. In other instances, notifying CFIUS is voluntary, either through a short-form declaration or a longer submission called a notice.[79]

The timeline for a CFIUS review varies depending on the type of filing. Whether a proposed transaction is subject to the mandatory declaration requirements or the parties opt to submit a declaration or notice voluntarily, the submission must be filed before the transaction closes, and in the case of a declaration, no later than 30 days before the completion date of the transaction.[80] For notices, CFIUS is entitled to a 45-day review period,[81] and if CFIUS identifies a national security threat, it must conduct an investigation, which can last an additional 45 days.[82] If there are "extraordinary circumstances," CFIUS can add another 15 days to a notice's review period, for a total of 105 days.[83] However, there is no guarantee that a review will be completed within the statutory period. In fact, the process can take much longer if CFIUS rejects a declaration, allows parties to withdraw and re-file (restarting the clock), requires a resubmission, or requires parties that submitted a declaration to subsequently file a full notice. In the worst case scenario, if parties initially file a declaration and then are ordered to file a notice, then the notice is ordered to be withdrawn and refiled, *another* 105 days could be added. Thus, for particularly complicated CFIUS reviews that require multiple submissions, a CFIUS review can last longer than 270 days, or nine months.

Key Implications for Your Transaction

Notwithstanding the distinct regulatory concerns underlying HSR and CFIUS, U.S. regulators are aligned in deepening their regulatory oversight of foreign investment in the United States. Recent enforcement trends make clear that parties to foreign investment transactions must be mindful of antitrust and national security regulatory requirements, or risk substantial delays or lost business opportunities. Promptly identifying potential regulatory hurdles, negotiating risk allocation and mitigating risks through transaction terms, deal structuring and business structuring are key strategies to protect your transaction.

HSR Risk and Mitigation Strategies

A number of recent and pending developments have increased the risk that antitrust issues will complicate cross-border investment into the United States, and may add time to any transaction investigation. The FTC recently announced a significant expansion of the information it will require parties to provide in order to comply with Second Requests, and it has begun an aggressive push to expand antitrust review of acquisitions beyond the traditional scope of consumer price and quality effects.[84] According to the FTC, Second Requests will cover a broader range of information from the parties than previously, including "how a proposed merger will affect labor markets, the cross-market effects of a transaction, and how the involvement of investment firms may affect market incentives to compete."[85] Filing parties whose transactions are reviewed by the FTC may find themselves in the unprecedented position of defending their post-transaction labor and ESG practices and plans in order to obtain the FTC's consent to proceed.

In addition, the FTC recently withdrew its approval of the Vertical Merger Guidelines ("VMGs") issued jointly with the DOJ in 2020. Citing concerns that "vertical mergers" (mergers of companies at different levels of the distribution chain, or that make complementary products) may foreclose one party's competitors from obtaining or selling competitively important component products, the FTC announced that it would begin more heavily scrutinizing transactions that—although they do not directly combine competing companies—could raise rivals' costs of operation or entry. The FTC also criticized the use of information firewalls and other conduct remedies to alleviate competitive concerns, stating that it would focus on divestiture as the preferred remedy in vertical as well as horizontal mergers.[86] Cross-border acquisitions or mergers involving companies at different levels of a distribution chain, or that make complementary inputs for another industry (even if not competing products), may face greater scrutiny going forward, the transactions may take longer to clear and covered transactions may face an increased risk of divestiture as the price of approval.[87]

HSR risk generally falls into two categories: Second Requests and challenges to the agreed transaction. The first risk is that a reviewing agency will issue a burdensome Second Request, derailing the parties' hopes for a quick review and possibly causing them to miss negotiated financing dates or agreement termination dates. Not all HSR-reported transactions carry significant risk for deal timing. Because HSR filings are triggered by the sizes of the parties and the transaction, most HSR waiting periods expire without, or with only minimal, investigation because the parties are not competitors. In FY 2019, only 61, or three percent, of the 2,089 filed transactions received a Second Request.[88] However, 38 of those 61 transactions were challenged by the investigating agency and either abandoned, enjoined or allowed to proceed once restructured or with agreed divestitures.[89] Accordingly, whether a transaction is at significant risk of delay or an agency challenge depends in large part on whether a Second Request is likely. This is a primary focus of the parties when determining "HSR risk."

The second category of risk is a challenge to the agreed transaction. The threat of a challenge carries four possible outcomes: abandonment in the face of delay and mounting expense with the prospect of an uncertain outcome; restructuring to remove assets or lines of business from the transaction to alleviate alleged competitive concerns (colloquially called a "fix-it-first" remedy); an agreement to divest assets or lines of business as a remedy to a buyer approved by the investigating agency; or a successful or failed attempt by the agency to obtain injunctive relief barring the transaction entirely (usually in federal district court).[90]

Accordingly, parties must plan and allocate between them the risk of delay as well as the risk that substantial amounts of expected earnings—or even the entire deal—may be forfeited through divestitures or injunction. For an acquiring party, divestitures may threaten the economic benefit that made the deal attractive. For an acquired party, a challenge would send it back to square one with a reduced number of suitors, perceived by the market as weakened. For both parties, significant delay can deteriorate the competitiveness and value of the acquired company as morale declines and personnel begin to leave in the face of uncertainty. For any of these events as may occur, one of the parties will bear at least some portion of the cost. Allocating these risks is key to any transaction that may result in a Second Request.

One of the most effective ways to address HSR risk is to set a termination date far enough out that an extended investigation and negotiated settlement process is possible without triggering termination rights. This assures both parties—and any investigating agency—of their mutual commitment to the transaction even in the face of a protracted investigation. Beyond this, various deal terms can assign and mitigate risk. These include, among other options, efforts clauses, by which the parties agree on how committed the buyer must be to consummate the transaction even in the face of a challenge (with maximum commitment colloquially known as a "hell or high water" commitment to close no matter what divestitures may be required); specific divestiture commitments, defined by a ceiling on divestiture asset earnings or by specific assets to be divested if necessary; litigation and appeal commitments in case of agency challenge; and break fees and reverse break fees paid by one party to the other for backing out of the transaction early.

CFIUS Risk and Mitigation Strategies

The transaction risks arising from CFIUS reviews have some similarities and some distinctions from those arising from HSR. The first major distinction from HSR is that the complex determination of whether a CFIUS filing is needed presents a risk. At the outset, unlike the clear threshold for filing under HSR, parties must initially account for the risks associated with determining whether or not to file with CFIUS. Whereas the HSR threshold is a relatively straightforward valuation exercise, in the context of CFIUS, the parties must make a legal determination whether the target is a regulated business that deals in critical technology, critical infrastructure or sensitive personal data, and then whether the intended foreign investment satisfies the criteria that trigger CFIUS filing requirements, which is a multi-factor test requiring the assistance of counsel.

Although the volume of CFIUS filings has grown substantially in recent years, many transactions with national security implications are proceeding without the proper CFIUS filings. Due to the complex and changing regulations, parties are often unaware their transaction should be reported to CFIUS. FIRRMA significantly expanded CFIUS's authority to review transactions to include even certain non-controlling transactions and investments by foreign persons,[91] and the regulations reach up the supply chain in their consideration of which businesses manufacture critical technologies.[92]

CFIUS has the authority to identify non-notified transactions and assert jurisdiction over them. The passage of FIRRMA resulted in increased attention to the ongoing identification of non-notified transactions by requiring that CFIUS establish a process to identify them.[93] CFIUS has built a team that scours the trade press, databases and other sources to identify non-notified transactions that potentially pose a national security threat.[94] In 2020, Thomas Feddo, then the Assistant Secretary for Investment Security at the U.S. Department of the Treasury, stated that "Treasury, with help from our interagency partners, is actively monitoring investment activity and contacting parties when we identify a non-notified transaction that may raise national security considerations. This work is important—particularly now—and we remain vigilant."[95] In 2020, CFIUS identified 117 non-notified transactions, and requested a complete CFIUS filing for 17 of them.[96] Failing to file when required under the regulations may result in not only a post-closing review, but also penalties of up to $250,000 per violation,[97] and, in extreme circumstances, a forced divestiture.[98]

Even if parties are certain that no mandatory declaration will be required, there are circumstances where they might consider the filing of a voluntary declaration or notice to obtain greater certainty. Even where a filing is not required, the risk remains that CFIUS could assert jurisdiction over the transaction, find a national security risk and force a divestiture.[99] To complicate matters further, there is no statute of limitations on CFIUS's ability to review a transaction, leaving the deal open to CFIUS risk after its completion.

Aside from the clear risks associated with a possible post-closing review by CFIUS, there are risks associated with the timing and possible delays in the CFIUS review process that parties must account for, similar to those in the HSR process. As detailed above, a standard CFIUS review could take only 30 days, or extend to a period exceeding nine months, with the ability to hold up a transaction. For transactions subject to mandatory filing requirements that have clear national security implications, one strategy to shorten this process is filing a long-form notice and skipping the mandatory declaration altogether.[100] Parties considering a voluntary filing can likewise evaluate the risk that CFIUS may request a complete notice and choose to file a long-form notice in the first instance instead of a short-form declaration.

In all cases where a filing is submitted to CFIUS, parties must be prepared to negotiate with CFIUS where it identifies national security threats and requires measures to mitigate them. Understanding the potential national security implications early on in the deal will allow the negotiation process with CFIUS to proceed more smoothly. Mitigation measures might include structuring the transaction to avoid foreign control of a nature that triggers CFIUS concerns, where possible, assurances that only authorized individuals will have access to certain technology, removal of sensitive assets from the transaction, or the implementation of business procedures or oversight measures designed to minimize access to the sensitive aspects of the target business. To minimize CFIUS-related delays and complications, parties therefore must plan early to carefully assess the national security implications of their transaction, account for the potential delays from CFIUS regulatory approval in the deal timeline, and devote the necessary resources to mitigate any concerns identified by CFIUS.

Conclusion

As the regulatory and enforcement arena is expected to remain active, parties contemplating a transaction that includes foreign investment will be well served by considering the potential regulatory requirements early in the process and engaging in careful planning to minimize risks and transaction delays.

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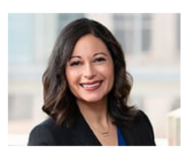

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International Coalition Takes Shape to Coordinate Economic Sanctions on Human Rights Violators

Elizabeth G. Silver, Henrietta Worthington and Catherine A. Johnson

Following a series of high-profile, widely condemned human rights violations, including the torture and killing of Sergei Magnitsky and the killing of Jamal Khashoggi, a coalition of western nations have developed global human rights ("GHR") sanctions regimes. The aim of this action is to coordinate—and thereby compound the impact of—coercive economic measures to deter and punish grave human rights violations. As discussed below, the European Union and United Kingdom recently joined the United States, Canada, Estonia, Latvia, and Lithuania in establishing a mechanism to shut off designated persons' and entities' access to key financial markets.

Following a discussion of the U.S., EU, and UK sanctions programs, we share insights for our clients and friends in navigating burgeoning global sanctions compliance obligations.

United States GHR Sanctions Framework

The United States was the first nation to develop a human rights sanctions regime with the passing of the Global Magnitsky Human Rights Accountability Act (the "Global Magnitsky Act") [101] in 2016. The United States introduced human rights sanctions initially under the Sergei Magnitsky Rule of Law Accountability Act of 2012,[102] in response to the detention, mistreatment, and death of Sergei Magnitsky, a tax attorney in Russia who exposed Russian government corruption.[103] The Global Magnitsky Act followed shortly thereafter.

The Global Magnitsky Act authorizes the President to impose sanctions (now commonly known as "Magnitsky Sanctions") on "foreign persons"[104] (including individuals and entities) responsible for or participating in certain "extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals in any foreign country," as well as those responsible for, or complicit in, forms of significant corruption.[105] For individuals, sanctions pursuant to the Global Magnitsky Act include "ineligibility to receive a visa … or to be admitted" to the United States and revocation of previously issued visas.[106] Sanctions on individuals and entities also may include blocking of "all transactions in all property and interests" in accordance with the International Emergency Economic Powers Act ("IEEPA").[107]

The Global Magnitsky Act was passed on December 23, 2016, and implemented by President Trump in Executive Order 13818 on December 20, 2017, with the imposition of Magnitsky Sanctions on 13 "serious human rights abusers and corrupt actors."[108]

While the initial targets were the Russian officials deemed responsible for the acts against Sergei Magnitsky, the regime has now been used to target numerous individuals and entities involved in human rights abuses across the globe.

In 2018, for example, the United States imposed Magnitsky Sanctions on 17 Saudi private actors found to be involved in the killing of dissident journalist Jamal Khashoggi.[109] Magnitsky Sanctions have also been used to target corruption, such as in the October 2019 actions against private actors in South Africa for the corrupt use of government contracts and bribery to influence politicians[110] and individuals of South Sudan for "bribery, kickbacks and procurement fraud with senior government officials," draining money necessary to support South Sudanese people.[111]

More recently, 2020 saw significant use of Magnitsky Sanctions as part of a coordinated effort across the U.S. Departments of State, Treasury, Commerce, and Homeland Security to address human rights abuses occurring in the Xinjiang Uyghur Autonomous Region of China.[112] Following closely on the heels of this landmark step in the crackdown on human rights offences, Canada introduced its own Magnitsky-style laws in 2017.[113]

United Kingdom GHR Sanctions Framework

While there was significant pressure on the European Union to take a similar stance, it seemingly eluded the (then) 28 member states to legislate on the issue. However, following Brexit, the United Kingdom was able to use its new autonomous sanctions regime to enact a GHR framework, with the European Union following shortly thereafter.

The UK human rights sanctions regime came into force on July 6, 2020, pursuant to the Global Human Rights Sanctions Regulations 2020[114] "to champion human rights, good governance and the rule of law."[115] Under the new UK laws, individuals or entities can be sanctioned where they are responsible for or involved in "serious violations"[116] of the following human rights:

- the right to life;
- the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; and
- the right to be free from slavery, not to be held in servitude or required to perform forced or compulsory labour.[117]

The restrictions apply to companies and individuals in the United Kingdom, in addition to "UK persons outside the UK, and … by any person in the territorial sea adjacent to the UK." [118] The measures impose financial sanctions on designated individuals and entities, which include "an asset-freeze, ensuring a designated person's funds and economic resources (non-monetary assets, such as property or vehicles) are not dealt with, and ensuring that funds and economic resources are not made available to or for the benefit of a designated person, either directly or indirectly."[119]

The regime was launched with 49 designations (47 individuals and 2 entities), comprising:

- 25 Russian officials who were reported to be involved in the mistreatment and death of Magnitsky;
- 20 Saudi Arabian officials linked to the 2018 unlawful killing of Jamal Khashoggi at the Saudi Consulate in Istanbul;
- 2 high-ranking commanders of the Myanmar Armed Forces linked to atrocities and serious human rights violations against the Rohingya population; and
- 2 North Korean entities involved in running prison camps and serious human rights violations.[120]

The United Kingdom has followed these initial listings with six additional waves of designations relating to:

- violence against protesters following the allegedly rigged elections in Belarus;[121]
- torture against the LGBT community in Chechnya (Russia);[122]
- police encounter deaths in Pakistan;[123]
- "historic human rights violations including extrajudicial killings of protestors and minority groups" in The Gambia;[124]
- extrajudicial killings and torture in Venezuela;[125]
- violence used to "suppress the Maidan protest movement" in Ukraine;[126] and
- torture or cruel, inhuman or degrading treatment against Uyghurs and other minorities in Xinjiang. These designations were made alongside the European union, Canada and the United States.[127]

As at the date of writing, there are currently 72 individuals and 6 entities on the UK's global human rights sanctions list. The sanctions relate to 11 different events which violated the human rights of others (most commonly either the right to life or the right not to be subjected to torture, as discussed above).

European Union GHR Sanctions Framework

The European Union quickly followed the United Kingdom in formally unveiling its analogous human rights regime, which came into force in December 2020 by way of Council Regulation (EU) 2020/1998.[128] Like the UK measures, the EU regime allows the European Union to impose asset freezes and travel bans, and to restrict regulated persons from making funds available to designated individuals and entities. This was seen as significant in the crackdown on human rights abuses as it excludes offenders from entering the markets, or the territory, of all 27 member states.

The EU measures are wider in scope than their UK counterparts and cover additional human rights violations "including, but not limited to"[129] human trafficking, sexual or gender-based violence and freedom of opinion, assembly, and religion. President of the European Commission Ursula von der Leyen welcomed the implementation of the new regime, noting that "an EU sanctions regime that holds to account those responsible for abuses and violations of human rights is long overdue."[130]

Despite encompassing a greater range of sanctionable offences, to date the EU GHR regime has been used more sparsely. Currently, only 15 individuals and 4 entities are listed. It remains to be seen whether this regime will be used as liberally as the other GHR regimes given possible conflicting policy considerations of the 27 states involved, which may prevent any nimble action.

The GHR sanctions regimes can be used to target human rights violations across the world, irrespective of any nexus to the sanctioning jurisdiction. With the unveiling of the European Union's new regime, Foreign Affairs Minister Josep Borrell highlighted that a global regime is required to "gain more flexibility to go after the perpetrators regardless of where they are and dispenses us from having to set up a specific legal framework each time for each specific case."[131]

To date, the EU measures have been used in response to the following human rights violations:

- those involved in the poisoning and detention of Alexey Navalny;[132,133]
- Russian officials responsible for arbitrary arrests and detentions;[134]
- Individuals and entities from China, the Democratic People's Republic of Korea, Libya, Eritrea, South Sudan and Russia alleged to be responsible for "torture, extrajudicial killings, enforced disappearances or systematic use of forced labour." [135]

Coordinated Sanctions Activity

With these four sanctions regimes up and running, there has been a notable increase in the use of thematic sanctions in a coordinated effort to expose and deter human rights violations on the global stage. The coordination amplifies the impact of the measures by shutting off access to the financial systems of an increased number of global economies. Known as the "bite" of the sanctions, this has undoubtedly gotten sharper.

In March, the sanctioning jurisdictions acted in concert to impose restrictions against a number of Chinese officials in response to alleged human rights abuses in the Xinjiang region. Canada, the United Kingdom, and the United States released a joint statement[136] noting that the intention of the measures, which were made in parallel with EU sanctions, demonstrate that the nations "are united in calling for China to end its repressive practices against Uyghur Muslims and members of other ethnic and religious minority groups in Xinjiang, and to release those arbitrarily detained." [137]

The various states have also acted together to target perpetrators of recent human rights abuses in Belarus "in response to the 23 May forced landing of a commercial Ryanair flight between [two] EU member states and the politically motivated arrest of journalist Raman Pratasevich and his companion Sofia Sapega, as well as to the continuing attack on human rights and fundamental freedoms."[138]

On June 21, 2021, the governments of Canada, the United Kingdom, the United States, and the European Union released a joint statement "calling for the regime to end its repressive practices against its own people." [139] The benefit of the coordinated nature of these actions is that it is more of a challenge for those targeted to be able to circumvent their impact by jurisdiction shopping.

Retaliatory Sanctions by GHR Targets

However, with the increase in designations under the thematic regimes by these four powers, there has been a corresponding surge in the use of retaliatory sanctions by their targets. Russia was the first nation to threaten use of this tool following measures introduced by the United Kingdom and the United States in response to the nerve agent attack on Sergei and Yulia Skripal in Salisbury in 2018. Measures included U.S. sanctions[140] and the expulsion of “undeclared [Russian] intelligence officers” from the United Kingdom and the United States.[141]

In retaliation, Russian prime minister Dmitry Medvedev noted that “if they introduce something like a ban on banking operations or the use of any currency, we will treat it as a declaration of economic war. And we’ll have to respond to it accordingly — economically, politically or in any other way, if necessary.”[142]

In November 2020, Russia imposed reciprocal sanctions[143] on 25 British representatives following the unveiling of their human rights sanctions regime and immediate designation of 25 Russian officials.

More recently, China and Belarus have also introduced “tit for tat” sanctions in response to the imposition of human rights sanctions. Measures include the sanctioning of U.S. and Canadian nationals, EU and UK politicians and a think tank in response to the coordinated sanctions imposed in relation to Xinjiang human rights abuses.[144] Meanwhile Belarus imposed a travel ban on officials from Estonia, Latvia, and Lithuania[145] responding to the Baltic countries’ measures taken against Alexander Lukashenko and 29 other officials following the allegedly rigged elections in Belarus.[146]

Compliance Takeaways – Navigating Global Sanctions Regimes

As new sanctions regimes emerge, the compliance on global businesses increases. Actors that are subject to the sanctions regimes of the various jurisdictions in which they operate will need to identify which jurisdictions’ sanctions apply to their operations and search applicable databases which, at least to date, are not linked.

Moreover, there may be instances where actors will need to navigate conflicting sanctions regulations. Factors such as geopolitics will lead to divergences in how the sanctioning jurisdictions develop their respective regimes. This creates complexities for companies trying to understand their obligations and fulfill their compliance obligations.

Additionally, more GHR frameworks may be forthcoming, further adding to the compliance burden for some clients. Notably, in August this year, Australia introduced its International Human Rights and Corruption (Magnitsky Sanctions) Bill 2021, which is currently set to come into force by the end of 2021.[147] The delay in the establishment of Australia’s long awaited GHR sanctions regime likely reflects the geopolitical complexities of these measures. It has been reported that Australia’s vital trading relationship with China may have been linked to its reticence in expediting the GHR sanctions legislation because the recent focus of the coordinated measures was human rights abuses in Xinjiang.[148] Undoubtedly, geopolitics will continue to impact the use of these measures as the various nascent GHR regimes develop.

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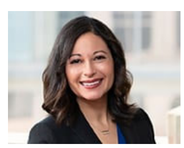

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4 *See, e.g.*, Country of Origin Marking for Ugly Stik Fishing Rods; Component Parts; Substantial Transformation; Multiple Countries of Origin, HQ 560115 (Mar. 7, 1997) ("HQ 560115")(finding that the country of origin of a fishing rod is the origin of the rod blank which imparts the essential character to the good); The Tariff Classification of A Valve Kit Packaged in Canada., NY N272737 (Mar. 9, 2016) (finding that the country of origin for a complete valve kit is the origin of the valve cartridge which imparts the essential character to the good).

5 A good has been substantially transformed in a country when it undergoes processing operations beyond "minor manufacturing and combining operations or simple assembly" that result in a "new and different article of commerce" having a new name, character, and use. *See Energizer Battery, Inc. v. United States*, 190 F. Supp. 3d 1308 (Ct. Int'l Trade 2016).

6 *See* HQ 560115.

7 *See* Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 14906 (Apr. 6, 2018); Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 85 Fed. Reg. 3741 (Jan. 22, 2020).

8 *See generally* General Note 3, Harmonized Tariff Schedule of the United States (HTSUS) (2021) (outlining the rates of duty for "products of" different countries and regions); *Belcrest Linens v. United States*, 741 F.2d 1368, 1370-71 (Fed. Cir. 1984) (upholding use of the substantial transformation test for determining whether an item is a "product of" a certain country under the HTSUS); The Application of Section 301 Remedies for Elec. Motors from Mexico, NY N302707 (Mar. 18, 2019) (holding that the substantial transformation test must be used to determine whether country-specific safeguard actions apply to certain goods).

9 *See* 19 U.S.C. § 1304; 19 C.F.R. § 134.1.

10 *See* 16 C.F.R. § 323.2.

11 *See* 19 U.S.C. § 2518(4)(B); 48 C.F.R. § 25.101.

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[39] *See Section 301 Trade Remedies Frequently Asked Questions,* U.S. Customs and Border Protection, https://www.cbp.gov/trade/programs-administration/entry-summary/section-301-trade-remedies/faqs (last visited Oct. 7, 2021).

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[41] International Consortium of Investigative Journalists, "About the Pandora Papers," available at: https://www.icij.org/investigations/pandora-papers/about-pandora-papers-investigation/ (last visited Oct. 21, 2021).

[42] *Id.*

[43] *Id.*

[44] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6402-6404, at § 6402 (2020).

[45] Financial Action Task Force, Executive Summary, Mutual Evaluation Report, "United States' Progress in Strengthening Measures to Tackle Money Laundering and Terrorist Financing," at 2 (Dec. 2016) (last visited Oct. 21, 2021).

[46] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6402-6404, at § 6403(a)(e)(2)(B) (2020).

[47] U.S. Bank Secrecy Act, 31 U.S.C. §§ 5311-5332.

[48] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6402-6404, at § 6403(a)(c)(2)(B) (2020).

[49] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6402-6404, at § 6403(a)(b)(1) (2020).

[50] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6402-6404, at § 6403(a)(a)(11)(A) (2020).

[51] *Id.*

[52] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6402-6404, at § 6403(a)(a)(11)(B) (2020).

[53] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6402-6404, at § 6403(a)(b)(2) (2020).

[54] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6402-6404, at § 6403(a)(a)(3) (2020).

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[56] Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 17557, at 17558 (proposed Apr. 5, 2021) to be codified at 31 C.F.R. 1010.

[57] *Id.*

[58] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6402-6404, at § 6403(a)(b)(1)(C) (2020).

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[61] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6402-6404, at § 6403(a)(c)(8) (2020).

[62] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6402-6404, at § 6403(a)(c)(2)(B) (2020).

[63] *Id.*

[64] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6402-6404, at § 6403(a)(h)(A) (2020).

[65] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6402-6404, at § 6403(a)(c)(2)(B)(iii) (2020).

[66] International Consortium of Investigative Journalists, "About the Pandora Papers," available at: https://www.icij.org/investigations/pandora-papers/about-pandora-papers-investigation/ (last visited Oct. 21, 2021).

[67] *See Pandora Papers: An offshore data tsunami*, Int'l Consortium of Investigative Journalists (Oct. 3, 2021), https://www.icij.org/investigations/pandora-papers/about-pandora-papers-leak-dataset/.

[68] *See Pandora Papers: An offshore data tsunami*, Int'l Consortium of Investigative Journalists (Oct. 3, 2021), https://www.icij.org/investigations/pandora-papers/about-pandora-papers-leak-dataset/ ("ICIJ is planning to incorporate data from the Pandora Papers into the Offshore Leaks database.")

[69] International Consortium of Investigative Journalists, Offshore Leaks Database, https://offshoreleaks.icij.org/ (last visited Oct. 21, 2021).

[70] 15 U.S.C. § 18a.

[71] 15 U.S.C. § 18. HSR filings are most often required for acquisitions of interests in United States entities (whether by domestic or foreign acquirers), as acquisitions of assets located outside the United States and of interests in foreign entities are often exempt. 16 C.F.R. §§ 802.50, 802.51.

[72] *See*, *e.g.*, Council Regulation 139/2004, art. 2(3), 2004 O.J. (L 024) (EC); Anti-Monopoly Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), http://english.www.gov.cn/archive/laws_regulations/2014/08/23/content_281474982987358.htm.

[73] 16 C.F.R. § 803.10(b). Cash tender offers and some acquisitions out of bankruptcy carry a 15-day waiting period instead of 30. *Id.*

[74] 16 C.F.R. § 803.11.

[75] 15 U.S.C. § 25.

[76] 31 C.F.R. Part 800.

[77] 31 C.F.R. § 800.401(b).

[78] *See* 31 CFR §§ 800.401, 800.407.

[79] *See* 31 CFR § 800.402 and 31 C.F.R. Part 800, Subpart E.

[80] 31 C.F.R. § 800.401(g). *See also* 31 C.F.R. § 800.405(b).

[81] 31 C.F.R. § 800.503(b). The 45-day period is triggered when CFIUS formally accepts the submission, which can occur up to 10 business days after the notice is filed. See, e.g., 50 U.S.C. § 4565(b)(1)(C)(i)(II)(aa); 31 C.F.R. § 800.503(a).

[82] 31 C.F.R. § 800.508(a).

[83] 31 C.F.R. § 800.508(e).

[84] FTC staff has reportedly begun asking parties to provide information on unionization, franchising, and environmental, social, and governance ("ESG") issues. Brian Koenig, *'Nontraditional Questions' Appearing in FTC Merger Probes*, Law360 (Sept. 24, 2021), https://www.law360.com/articles/1425218/-nontraditional-questions-appearing-in-ftc-merger-probes (paywall).

[85] Holly Vedova, *Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave*, Fed. Trade Comm'n: Competition Matters Blog (Sept. 28, 2021), https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined.

[86] *Statement of Chair L. Khan, Comm'r R. Chopra, and Comm'r K. Slaughter on the Withdrawal of the Vertical Merger Guidelines*, Fed. Trade Comm'n (Sept. 15, 2021), https://www.ftc.gov/public-statements/2021/09/statement-chair-lina-m-khan-commissioner-rohit-chopra-commissioner-rebecca.

[87] Although the DOJ has not withdrawn support for the current VMGs, it committed to examining them in light of the FTC's withdrawal, and specifically with respect to several of the factors cited by the FTC in the withdrawal. Press Release, U.S. Dep't of Justice, Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021), https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines.

[88] FTC and DOJ, *Hart-Scott-Rodino Annual Report for FY2019* at Appx. A, Fed. Trade Comm'n (July 2020), https://www.ftc.gov/reports/hart-scott-rodino-annual-report-fiscal-year-2019.

[89] *Id.* at 2.

[90] In addition to the federal agencies, states have standing to seek to enjoin unlawful acquisitions. 15 U.S.C. § 26. This adds additional actors to the process but does not add additional categories of risk, although the parties should keep in mind that the federal antitrust agencies and investigating states do not always agree on remedies or whether a transaction should be challenged.

[91] *See generally* Foreign Investment Risk Review and Modernization Act of 2018 (FIRRMA), H. R. 5515-538; 50 U.S.C. § 4565.

[92] *See* 31 C.F.R. § 800.248.

[93] 50 U.S.C. § 4565(b)(1)(H).

[94] *See*, *e.g.*, 50 U.S.C. § 4565(b)(1)(D).

[95] Press Release, U.S. Dep't of Treasury, Keynote Remarks by Assistant Secretary Feddo at the American Conference Institute's Sixth National Conference on CFIUS (July 20, 2020), https://home.treasury.gov/news/press-releases/sm1067.

[96] Committee on Foreign Investment in the United States, *Annual Report to Congress, Report Period: CY 2020* at 48, U.S. Dep't of Treasury (July 2021), https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2020.pdf.

[97] 31 C.F.R. § 800.901.

[98] *See*, *e.g.*, Christina Farr & Ari Levy, *The Trump administration is forcing this health start-up that took Chinese money into a fire sale*, CNBC (Apr. 4, 2019), https://www.cnbc.com/2019/04/04/cfius-forces-patientslikeme-into-fire-sale-booting-chinese-investor.html.

[99] *See* 31 C.F.R. § 800.701(a).

[100] *See* 31 C.F.R. § 800.401(f) (allowing parties to submit a notice instead of a mandatory declaration).

[101] Global Magnitsky Human Rights Accountability Act, Pub. L. No. 114-328, div. A, title XII, subtitle F, 130 Stat. 2533 (2016) (codified at 22 U.S.C. § 2656 note).

[102] Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112-208, 126 Stat 1496 (2012).

[103] Global Magnitsky Human Rights Accountability Act, Pub. L. No. 114-328, div. A, title XII, subtitle F, § 1262(1), 130 Stat. 2533 (2016) (codified at 22 U.S.C. § 2656 note).

[104] *Id.* at § 1263(a), 130 Stat. 2534.

[105] *Id.* at § 1263(b), 130 Stat. 2534.

[106] *Id.* at § 1263(b)(2)(A), 130 Stat. 2534.

[107] *Id.* (50 U.S.C. § 1701 et seq.)

[108] Executive Order 13818 of December 20, 2017, Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption, 82 Fed. Reg. 60839 (Dec. 20, 2017).

[109] Press Release, U.S. Dep't of the Treasury, Treasury Sanctions 17 Individuals for Their Roles in the Killing of Jamal Khashoggi (Nov. 15, 2018), https://home.treasury.gov/news/press-releases/sm547.

[110] Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Members of a Significant Corruption Network in South Africa (Oct. 10, 2019), https://home.treasury.gov/news/press-releases/sm789.

[111] Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Businessmen in South Sudan for Corrupt Dealings with Government Officials and Sanctions Evasion (Oct. 11, 2019), https://home.treasury.gov/news/press-releases/sm790.

[112] Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Chinese Entity and Officials Pursuant to Global Magnitsky Human Rights Executive Order (July 31, 2020), https://home.treasury.gov/news/press-releases/sm1073.

[113] Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law), S.C. 2017, c. 21.

[114] (SI 680/2020)

[115] The Global Human Rights Sanctions Regulations 2020, Explanatory Memorandum ¶ 7.1.

[116] The Global Human Rights Sanctions Regulations 2020, SI 2020/680, art. 4, ¶ 2.

[117] *Id.*

[118] The Global Human Rights Sanctions Regulations 2020, Explanatory Memorandum ¶ 4.3.

[119] *Id.* at ¶ 7.4.

[120] United Kingdom Press Release, UK announces first sanctions under new global human rights regime (July 6, 2020), https://www.gov.uk/government/news/uk-announces-first-sanctions-under-new-global-human-rights-regime.

[121] United Kingdom Press Release, Belarus: UK sanctions 8 members of regime, including Alexander Lukashenko (Sep. 29, 2020), https://www.gov.uk/government/news/belarus-uk-sanctions-eight-members-of-regime-including-alexander-lukashenko.

[122] United Kingdom Press Release, UK announces travel bans and asset freezes for human rights violators (Dec. 10, 2020), https://www.gov.uk/government/news/uk-announces-travel-bans-and-asset-freezes-for-human-rights-violators.

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] Office of Financial Sanctions Implementation, HM Treasury, *Financial sanctions targets: list of all asset freeze targets*, Government of the United Kingdom (Sep. 30, 2021), https://www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets/consolidated-list-of-targets.

[127] United Kingdom Press Release, UK sanctions perpetrators of gross human rights violations in Xinjiang, alongside EU, Canada and US (Mar. 22, 2021), https://www.gov.uk/government/news/uk-sanctions-perpetrators-of-gross-human-rights-violations-in-xinjiang-alongside-eu-canada-and-us.

[128] Council Regulation 2020/1998, 2020 O.J. (L 410/1) (EU).

[129] *Id.* at art. 2(1)(d).

[130] European Commission Press Release IP/20/1939, Sanctions and Human Rights: towards a European framework to address human rights violations and abuses worldwide (Oct. 19, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1939.

[131] Josep Borrell, *The long and complex road towards an EU Global Human Rights Sanctions Regime*, European External Action Service (Oct. 31, 2020), https://eeas.europa.eu/headquarters/headquarters-homepage/87884/long-and-complex-road-towards-eu-global-human-rights-sanctions-regime_en.

[132] Council Implementing Regulation 2021/371, 2021 O.J. (L.I. 71/1) (EU).

[133] Note that this human rights violation falls within the remit of The Chemical Weapons (Sanctions) (EU Exit) Regulations 2019, SI 2019/618 in the UK.

[134] Council Implementing Regulation 2021/478, 2021 O.J. (L.I. 99/1) (EU).

[135] *Id.*

[136] United Kingdom Press Release, Human rights violations in Xinjiang: Canada, UK and US joint statement (Mar. 22, 2021), https://www.gov.uk/government/news/joint-statement-canada-uk-and-us-statement-on-xinjiang.

[137] *Id.*

[138] United Kingdom Press Release, Belarus sanctions: joint statement by Canada, the EU, UK, and US (June 21, 2021), https://www.gov.uk/government/news/belarus-sanctions-joint-statement-by-canada-the-eu-uk-and-us.

[139] *Id.*

[140] Catherine Philp, Fiona Hamilton & Boer Deng, *US to sanction Russia over Skripal poisoning*, The Times (Aug. 9, 2018), https://www.thetimes.co.uk/article/us-to-sanction-russia-over-skripal-poisoning-mmnmjqm9g.

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[146] *Baltic states extend travel ban to more Belarus officials*, Reuters (Sep. 25, 2020), https://www.reuters.com/article/us-belarus-election-sanctions-idUSKCN26G1YM.

[147] International Human Rights and Corruption (Magnitsky Sanctions) Bill 2021 (Cth) (Austl.).

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