

U.S. Trade Regulatory Issue Spotting and Risk Management

Economic Sanctions and CFIUS

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Agenda

- Economic Sanctions
 - primarily OFAC – Office of Foreign Assets Control
 - Scope
 - GT Policy
 - Potential GT Risks
- Foreign Investment in the U.S. – Don't let your deal be derailed
 - CFIUS – Committee on Investment in the United States
 - Scope
 - Potential GT Risks

U.S. Economic Sanctions

- Country-specific and targeted (individuals, entities)
- Penalties include civil and criminal (for individuals and entities)
- Apply to persons (natural persons and legal entities)
 - U.S. citizens or lawful permanent residents (green card holders) or refugees/asylees
 - Anyone physically located in the United States
 - Any entity organized under the laws of the United States (or any state or territory), including foreign branches
 - And for some sanctions programs including foreign subsidiaries

Comprehensive Sanction Countries

- U.S. Person involvement (including foreign subsidiaries of U.S. companies) in direct or indirect transactions involving the following is prohibited:
 - **Cuba**
 - **Iran**
 - **North Korea**
 - **Syria**
 - **Crimea Region of Ukraine**
- Business transactions involving these locations generally prohibited

Targeted Sanctions

- Targeted Sanctions (rest of world)
 - Balkans, Belarus, Burma (Myanmar), Central African Republic, Cote d'Ivoire, the Democratic Republic of the Congo, Iraq, Lebanon, Liberia, Libya, Russia, Somalia, South Sudan, Ukraine, Venezuela, Yemen, and Zimbabwe
 - Individuals and entities worldwide designated under various programs (including WMD, terrorist organizations, narco-traffickers, “rogue” regimes)

GT Policy

- Even non-U.S. offices of GT may be considered “U.S. Persons” for purposes of U.S. economic sanctions
- Employees of non-U.S. offices may, in turn, be employees of “U.S. Persons” for purposes of U.S. economic sanctions
- Case-by-case review by GC’s office may be required in matters involving sanctioned countries, individuals, or entities

Potential GT Risks - Sanctions

- Risks to GT (as a firm):
 - Government investigations
 - Significant civil and criminal penalties
 - Reputational harm including loss of existing and potential clients
- Risks to GT employees (as individuals):
 - Government investigations
 - Attorneys/lobbyists/staff may be held personally liable for violations
 - Significant civil and criminal penalties, including imprisonment
 - Reputational harm including loss of existing and potential clients
- Risks to clients:
 - Improper advice or dealings may cause clients to violate sanctions
 - Violations by GT may create legal liability for clients even if client does not violate the sanctions directly
 - Non-U.S. client may be permitted to undertake an activity, but GT as a firm cannot advise on it (and is disqualified or must step down after the matter is underway) or get OFAC license to proceed

Sanctions Issue Spotting

- Identify sanctioned countries or risks in new matters
- Sanctions risks are not industry-specific. So potentially all GT clients may have sanctions risks if doing any cross-border activities
- Consider GT capabilities to help clients assess sanctions compliance programs (OFAC has published Compliance Framework guidance which applies to even wholly non-U.S. entities-we can evaluate)
- We love to pitch sanctions work—it frequently leads to “gateway” matters with new clients, and becomes a regular point of contact for existing clients (who come to us for discrete counseling questions because law changes so frequently).

GT Export Controls & Sanctions

What We Do:

- Determine whether restrictions apply
- Provide compliance counseling on transaction basis
- Advise clients who have discovered violations (including voluntary disclosures and representation before USG agencies)
- Respond to US Gov inquiries (including admin. subpoenas)
- Seek and obtain US Gov licenses and authorizations
- Conduct risk, compliance, and monitoring assessments
- Evaluate compliance programs
- Design and recommend compliance program enhancements

CFIUS - Don't let a deal be derailed by U.S. national security issues

- Committee on Foreign Investment in the United States (CFIUS)
- Ripe for CFIUS review? Yes, if transaction involves both:
 - Foreign investment/acquisition of U.S. co./assets AND
 - U.S. national security implications
- New Mandatory Declaration requirement for certain investments under Pilot Program for Critical Technologies
- Failure to file or even poor planning of filing can lead to significant disruptions to closing
- Required mitigation of foreign ownership or control may impact the objectives of the deal, may require approval of multiple USG agencies, may be condition of closing

CFIUS National Security Examples

- Defense/Aerospace Industry
- Export-controlled goods, technology, services
- Telecommunications industry
- Leading or emerging technologies
- Government contracts (federal, state, municipal)
- Classified contracts, security clearance
- Proximity to sensitive sites
- Critical infrastructure
- Low-tech but sensitive, like food supply chain

CFIUS Scrutiny - Industries to Watch Especially for Critical Technologies

- Energy
- Aerospace
- Materials Manufacturing
- Semiconductor Manufacturing
- Computer Manufacturing
- Biotechnology
- Healthcare and Lifesciences

Foreign Investments Under CFIUS Critical Technologies Pilot Program

- Transactions that could result in **foreign control** of any “pilot program U.S. business” OR
- **Covered investments** that afford the foreign person:
 - **Access** to any material nonpublic technical information;
 - **Membership** or observer rights on the board of directors; OR
 - Involvement in substantive **decision-making** relating to **critical technologies**.
- No percentage threshold applies
 - Even minority “covered investment” may trigger mandatory declaration requirement

Pilot Program Industry NAICS Codes

Industry	NAICS Code
Aircraft Manufacturing	336411
Aircraft Engine and Engine Parts Manufacturing	336412
Alumina Refining and Primary Aluminum Production	331313
Ball and Roller Bearing Manufacturing	332991
Computer Storage Device Manufacturing	334112
Electronic Computer Manufacturing	334111
Guided Missile and Space Vehicle Manufacturing	336414
Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing	336415
Military Armored Vehicle, Tank, and Tank Component Manufacturing	336992
Nuclear Electric Power Generation	221113
Optical Instrument and Lens Manufacturing	333314
Other Basic Inorganic Chemical Manufacturing	325180
Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing	336419
Petrochemical Manufacturing	325110
Powder Metallurgy Part Manufacturing	332117
Power, Distribution, and Specialty Transformer Manufacturing	335311
Primary Battery Manufacturing	335912
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing	334220
Research and Development in Nanotechnology	541713
Research and Development in Biotechnology (except nanobiotechnology)	541714
Secondary Smelting and Alloying of Aluminum	331314
Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing	334511
Semiconductor and Related Device Manufacturing	334413
Semiconductor Machinery Manufacturing	333242
Storage Battery Manufacturing	335911
Telephone Apparatus Manufacturing	334210
Turbine and Turbine Generator Set Units Manufacturing	333611

Potential GT Risks - CFIUS

- Risks to clients:
 - Failure to identify transactions subject to mandatory declaration requirement could lead to civil penalties against client for failure to file
 - If CFIUS mitigation required, could impact value (or obviate purpose) of the deal (need to think about it early to structure deal)
- Additional Risks to GT (as a firm):
 - Failure to advise GT client of mandatory declaration requirement could result in client failing to file
 - Because CFIUS is normally joint process, if other side's counsel identifies the issue before we do, can diminish client confidence in GT
 - We may be missing business development opportunities to serve as CFIUS counsel if voluntary notices are not identified early or at all in deal process

GT CFIUS Practice-What We Do:

- Assist clients (whether investor or target) to determine whether deal triggers mandatory declaration, is ripe for voluntary notice, or neither
- Provide deal team CFIUS due diligence checklist triage questions, term sheet language, agreement clauses
- Work with deal team to structure investment to maximize chances of CFIUS approval
- Work with other side's CFIUS counsel to prep joint CFIUS notice
- Coordinate parallel U.S. regulatory filings (ex. Dept of State and Dept of Defense)
- Assist target with messaging to US Gov clients
- Design and negotiate mitigation plans that may be required