



# Trade Matters

## Lowenstein Sandler's Global Trade & Policy Newsletter

August 2021

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### 1. Biden Administration Trade Posture

The Biden administration is slowly and steadily reviewing the decisions of the Trump administration. So far, the administration has struck a deal with the EU to end the 17-year-old dispute over subsidies to Boeing and Airbus, has continued the use of sanctions as a mechanism to further U.S. national security and foreign policy, and is addressing domestic economic policy to improve U.S. manufacturing of critical technologies and to safeguard U.S. technology against foreign unfair trade practices. At the same time, President Biden is leveraging relationships with strategic partners such as the EU and Australia to reform the WTO, bolster the Paris Agreement on climate change, and promote an option to China's Belt and Road Initiative with the OECD and G-7. This balance between free trade and protection of domestic industry is tenuous. On the one hand, Biden has maintained tariffs on steel and aluminum and duties on rare earth metals from China. On the other hand, to build new products in the United States, we need rare earth materials, most readily available in China, which is increasingly adverse to U.S. national security policy. Moreover, open and free trade with foreign countries, including China, results in lower prices for U.S. consumers. The next six months will tell us more as both Congress and the administration use domestic policy to build strength from within and to engender multinational cooperation.

### 2. Payoneer Settles OFAC Sanctions Violations for Over \$1.4 Million

The Office of Foreign Assets Control (OFAC) settled with [Payoneer Inc.](#), a publicly traded New York-based online money transmitter, for \$1.4 million in civil fines for 2,260 apparent violations related to processing payments for either parties

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located in the Crimea region of Ukraine, Iran, Sudan, and Syria, or individuals listed on the Specially Designated Nationals and Blocked Persons List. OFAC also determined that Payoneer's sanctions compliance program was deficient with respect to screening, testing, auditing, and transaction review procedures. OFAC found that Payoneer had reason to know the location of the users it subsequently identified as subject to sanctions based on common indicators of location within its possession. There are cost-effective ways to avoid such sanctions violations. Please let us know if you want to learn more.

### 3. Biden Administration Advises Companies to Exit Xinjiang

In an updated [Xinjiang Supply Chain Business Advisory](#), the Biden administration advises companies to consider exiting supply chains and investments with links to forced labor or surveillance systems in Xinjiang or other provinces of China; otherwise, they run the risk of violating U.S. law. The advisory, jointly published by State, Treasury, Commerce, Homeland Security, Labor, and the Office of the U.S. Trade Representative, urges companies with business in the region to undertake heightened due diligence measures. However, the advisory warns that completing adequate due diligence to fully identify and avoid complicity in human rights abuses may not be possible due to the lack of government and corporate transparency, the threat of detention for auditors and responsive workers, and the police state atmosphere in Xinjiang. These factors have led companies to refuse to conduct audits in this region. This issue is also a concern for more than just U.S. companies, as seen by the focus at the G-7 meetings on eradicating forced labor.

### 4. U.S. Government Issues Business Advisory on Risks of Doing Business in Hong Kong

In another [interagency advisory](#), issued on July 16, the U.S. government advises companies operating in Hong Kong that they face potential regulatory, financial, legal, and reputational risks. Businesses operating in Hong Kong, as well as individuals and foreign nationals, are subject to China's recently enacted National Security Law (NSL) and its vague and broad criminal provisions. As such, Hong Kong authorities may require businesses to provide information on their customers, censor their customers' online speech, and surrender data. Companies should continue to monitor the implementation of the NSL and be ready to respond if the Hong Kong government takes action against them. Hong Kong is no longer considered a separate destination under the Export Administration Regulations, so companies exporting to Hong Kong must follow the rules for exporting to China.

### 5. Top Reporting Foreign Investors Include Japan, Sweden According to Annual CFIUS Report

The Committee on Foreign Investment in the United States (CFIUS) has provided its [annual report](#) to Congress, detailing statistics on critical technology declarations and key determinations, and giving an overview of transactions reviewed by CFIUS. Top reporting foreign investors in U.S. companies producing critical technologies are Japan, Sweden, Canada, Germany, and the UK. Israel and China are

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## 6. Heads Up, Tech Companies: U.S. and Australia Negotiate Tech Transfer Agreement

As of July 1, the United States and Australia have begun negotiating a bilateral **Technology Safeguards Agreement** to increase cooperation and exchange of sensitive technologies and data in the civil space sector. The agreement will present rules that will allow U.S. companies to collaborate with Australian counterparts, while appropriately managing the movement of sensitive technologies and goods.

## 7. First Biden Administration FCPA Enforcement Action Offers Compliance Reminders

Swiss-based global engineering company Amec Foster Wheeler Limited (Foster Wheeler) has entered into a **three-year deferred prosecution agreement** with the Department of Justice and has agreed to pay \$41 million in penalties for violations of the Foreign Corrupt Practices Act (FCPA). Foster Wheeler did not properly conduct due diligence on third-party agents before hiring them. Those third-party agents obtained internal confidential information from a government official. While Foster Wheeler is a Swiss company owned by a UK parent company, U.S. authorities asserted jurisdiction because the company traded on Nasdaq and engaged in email correspondence related to the project on a U.S.-based email server, highlighting that even minimal U.S. activities can trigger U.S. jurisdiction.

## 8. China Tariffs (Section 301) Court Case Update

In the ongoing Court of International Trade (CIT) case challenging the legality of “Section 301” duties imposed under List 3 and List 4A, the CIT has granted a preliminary injunction stopping liquidation of entries that include such duties. The plaintiffs requested the injunction to keep the entries unliquidated to preserve their rights to 301 duty refunds on these entries. The request was made because the government refused to stipulate that the CIT has the power to grant refunds of 301 duties on liquidated entries, even if the plaintiffs ultimately win. As a result of the injunction, the case is effectively paused while the CIT and the parties work to agree on a process to stop liquidation of the correct entries and deal with the practical implications of this potentially years-long liquidation freeze. The government has been given until Aug. 6 to establish a process for identifying and freezing the entries that must remain unliquidated. Meanwhile, joining the litigation is still possible and doing so gives companies a chance to recoup List 3 and List 4A duties in the event they are deemed unlawful.

**Trade tip of the month:** The Biden administration has been ramping up sanctions against a number of countries, including Russia, Belarus, and China, and adding an increased number of entities to U.S. restricted-party lists. U.S. companies should ensure that their compliance programs are able to identify any specially designated nationals, parties under sectoral sanctions, or other restricted parties. Regularly running restricted-party screenings against trading partners will help prevent sanction violations.

## Additional Resources

- **In the Media:** "Watch: Is the 17-Year Battle Between the U.S. and EU on Aerospace Over?"  
July 29, 2021  
*SupplyChainBrain*  
Laura Fraedrich
- **In the Media:** "Congressional Report: Cos. should disclose adversarial foreign capital"  
July 24, 2021  
*Foreign Investment Watch*  
Doreen M. Edelman
- **Article:** "1st FCPA Case Under Biden Offers Compliance Reminders"  
July 21, 2021  
*Law360*  
Robert A. Johnston Jr.

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