View this email in your browser

Lowenstein Sandler

Trade Matters

Lowenstein Sandler's Global Trade & National Security Newsletter

August 2023

Share:

1. Executive Order Kicks Off Long-Awaited Outbound Investment Restrictions Regime

On Aug. 9, President Joe Biden signed an Executive Order providing the framework for investment restrictions in China (including Hong Kong and Macau). The President has tapped the Department of the Treasury to oversee a narrowly tailored national security program designed to complement export controls. The program will not go into effect until Treasury releases regulations following a public comment period announced in an advance notice of proposed rulemaking (ANPRM). Comments are due by Sept. 28.

The executive order proposes to block U.S. investments in China to develop semiconductors and microelectronics, artificial intelligence, and quantum computer technologies. The order also proposes notification requirements for other sensitive outbound investments. The prohibitions are intended to prevent investments that “confer intangible benefits,” like technological know-how, that come with private equity investments, venture capital investments, joint ventures, and greenfield investment. The transaction parties will have the obligation to determine whether a given transaction is prohibited, subject to notification, or permissible without notification.

This complex proposal is the first of its kind, and the ANPRM contains great detail about the various parameters to be developed for the program. Any entities with ties to China related to the three areas of technology identified in the executive order should carefully parse the ANPRM and determine whether to provide comments.

2. Congress Questions Venture Capital Firms About Chinese Investment

Contact Us

for more information about any matters in this newsletter:

Doreen M. Edelman
Partner
Chair, Global Trade & National Security
202.753.3808
dedelman@lowenstein.com

Laura Fraedrich
Senior Counsel
202.753.3659
lfraedrich@lowenstein.com

Abbey E. Baker
Counsel
202.753.3806
abaker@lowenstein.com

Andrew Bisbas
Counsel
202.753.3807
abisbas@lowenstein.com

Jeffrey B. Jones
Special Counsel
202.753.3769
jejones@lowenstein.com

The House Select Committee on the Chinese Communist Party sent four venture capital firms letters in July demanding information about the firms' recent investments in Chinese artificial intelligence, semiconductors, and quantum computing. The China Select Committee was established earlier this year to address the threat of China to the United States. The committee has expressed concern about the potential national security threat from certain U.S. investments in Chinese entities. In the letters, the committee requested the names of the companies, transaction details, details on internal policies regarding decision making, and risk factors. Investment firms should be prepared as government oversight and regulation of U.S. companies doing business with China increase; as noted above, they have an opportunity to comment on the proposed new China investment restrictions.

3. Tri-Seal Compliance Note Highlights Importance of Voluntary Self-Disclosure of Potential Violations

The departments of Justice, Commerce, and the Treasury issued a Tri-Seal Compliance Note at the end of July stressing the importance of voluntarily disclosing potential violations of sanctions, export controls, and other national security laws, and summarizing associated procedures. Importantly, voluntary disclosures can lead to mitigation of civil or criminal liability. Depending on the agency and circumstances, the process can result in the implementation of a nonprosecution agreement or a reduction of 50 percent of the base penalty. Also, significant recent investment in additional resources for the enforcement offices at BIS, OFAC, and DOJ signal a continuing increase in enforcement actions.

4. Poor Remedial Compliance Results in $186M Fine

The Federal Reserve (Fed) fined Deutsche Bank $186 million for failing to make remedial progress under 2015 and 2017 consent orders. In the enforcement action, the Fed says that Deutsche Bank moved too slowly to fix the initial issues and remains "exposed to heightened levels of compliance risk." The Fed action provides a road map for compliance best practices, including improvements in systems and data, implementation of a customer due diligence program, and establishment of a framework for transaction monitoring. for failing to make remedial progress under 2015 and 2017 consent orders. In the enforcement action, the Fed says that Deutsche Bank moved too slowly to fix the initial issues and remains "exposed to heightened levels of compliance risk." The Fed action provides a road map for compliance best practices, including improvements in systems and data, implementation of a customer due diligence program, and establishment of a framework for transaction monitoring.

5. Remaining Section 301 Tariff Exclusions Set to Expire Unless USTR Acts

Since the Office of the United States Trade Representative (USTR) imposed additional Section 301 tariffs ranging from 7.5 percent to 25 percent on imports from China in 2018, it has also issued and periodically extended certain product-specific exclusions, including COVID-19-related exclusions that were introduced in 2020. All the exclusions are set to expire on Sept. 30 if USTR does not extend them. So far, USTR has not indicated whether it will extend any of these exclusions. Past extensions have been announced within days of expiration or

Christian C. Contardo
Associate
202.753.3804
ccontardo@lowenstein.com

Megan C. Bodie
Administrative Coordinator
202.753.3809
mbodie@lowenstein.com

retroactively implemented after expiration, so there is still a possibility that USTR will act as the expiration date approaches. To cope with the current uncertainty, companies importing products that currently fall under an exclusion should prepare for the possibility that they will have to pay up to 25 percent in additional tariffs on such entries come October. Companies should monitor announcements from USTR to ensure they take advantage of any forthcoming extensions or future opportunities to submit comments requesting Section 301 tariff relief.

6. AUKUS Countries Drafting List of Covered Tech Under New Trade Exemption

In a July 10 fact sheet, the Department of State announced a trade mechanism to facilitate the trade of U.S. defense articles and services between the United States, the UK, and Australia (AUKUS). The Directorate of Defense Trade Controls is working with its AUKUS counterparts to finalize the list of technologies and other defense items to be included in the covered technologies list for the AUKUS Trade Authorization Mechanism (ATAM). The ATAM will expedite and secure defense transfers of U.S. defense items for AUKUS projects, leveraging existing authorities to allow for speedy defense trade.

7. OFAC General License Authorizing Dealings in Certain PdVSA Bonds Extended

The Department of the Treasury's Office of Foreign Assets Control (OFAC) issued a new General License 5 under the Venezuela Sanctions Regulations on July 19, 2023, to extend the effective date of the authorizations therein to Oct. 20, 2023. OFAC has consistently reissued General License 5 to continue to allow activities related to dealings in certain PdVSA bonds. Since designating PdVSA, the U.S. government has taken steps to prevent activities that might result in a breakup of CITGO. OFAC also issued General License 42 in May 2023 authorizing the negotiation of settlement agreements with the IV Venezuelan National Assembly (but not any National Assembly convened by the Maduro regime) relating to Venezuela government debt, PdVSA, or any entity owned 50 percent or more by PdVSA. The outcome of these negotiations may impact whether OFAC will once again reissue General License 5.

TRADE TIP OF THE MONTH:

Last month, the U.S. Department of Defense (DOD) issued a memorandum on countering unwanted foreign influence in DOD-funded research at universities and research labs. DOD named certain Chinese, Russian, and Iranian institutions that present "elevated risks." Academic institutions, industry partners, and the public should ensure that they screen against this new list and take proper precautions if one of their partners is a named entity.

Additional Resources

- **Article**: "State Activism and Federal Power: Economic Sanctions, Foreign Direct Investment and Environmental, Social and Governance Laws"
  2023

Wolters Kluwer
Laura Fraedrich, Christian C. Contardo

- **Client Alert**: "AML Best Practices for Private Funds: Red Flags and Responses for Private Funds"
  July 25, 2023
  Lowenstein Sandler LLP
  Robert A. Johnston Jr., Scott H. Moss, Paula A. Ladd, Jimmy Kang, Samantha Sigelakis-Minski