International Trade
Enforcement Roundup

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You are reading the **Summer 2024 Update** of the Bass, Berry & Sims Enforcement Roundup. After a short hiatus, we are back to reporting on notable enforcement actions and policy changes and providing a bit of our insight.

To stay up to date, subscribe to our GovCon & Trade blog. If you have questions about any actions addressed in the Roundup, please contact the international trade team. We welcome your feedback and encourage you to share this newsletter. Let's jump in!

Overview

- The Commerce Department's Bureau of Industry and Security (BIS) uses Information and Communications Technology and Services **(ICTS) rules for the first time**.
- President Biden issues first Committee on Foreign Investment in the United States **(CFIUS) prohibition against cryptocurrency** mining company.
- Department of Homeland Security (DHS) issues **second annual update to its Uyghur Forced Labor Prevention Act (UFLPA)** strategy.
- U.S. announces new tranche of **Russia sanctions and export restrictions**.
- New Notice of Proposed Rulemaking (NPRM) contemplates **outbound investment** regime.

Commerce Department Prohibits Russian Kaspersky Software for U.S. Customers (BIS Action)

Information and Communications Technology and Services Determination. On June 20, BIS issued its first determination under the ICTS rules when it designated Kaspersky Lab, Inc., the U.S. subsidiary of a Russia-based anti-virus software and cybersecurity company. As a result of the designation, the company may no longer transact with U.S. customers to provide its cybersecurity software.

The ICTS rules were first issued in 2021 to "identify, assess, and address certain transactions . . . between U.S. persons and foreign persons that involve information and communications technology or services designed, developed, manufactured, or supplied, by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary; and pose an undue or unacceptable risk." China, Cuba, Iran, North Korea, Russia, and Venezuela (the Maduro regime) are currently designated as "foreign adversaries." The Secretary of Commerce may designate additional governments as "foreign adversaries" at any time. The ICTS rules give a newly formed Office of Information and Communications Technology and Services broad discretion to prohibit certain ICTS transactions involving U.S. persons.

BIS determined that Kaspersky's ties to Russia represented a risk of Russian government access to sensitive U.S. information and that the company's software could be used to install malicious software on U.S. systems. Kaspersky reportedly attempted unsuccessfully to negotiate with BIS over remediation measures and safeguards intending to mitigate the perceived risks.

In conjunction with the ICTS designation, BIS added AO Kaspersky Lab, OOO Kaspersky Group, and Kaspersky Labs, Ltd. to the Entity List. The Treasury Department's Office of Foreign Assets Control (OFAC) also sanctioned 12 individuals in leadership roles at AO Kaspersky Lab.

The BIS press release can be found here. The OFAC press release can be found here.

Notably. While this is the first designation under the ICTS rules, it is unlikely to be the last. Several Chinese companies that provide ICTS in the United States apparently have received subpoenas from BIS. Companies should evaluate their exposure to other companies in the space, especially those from China and Russia, and prepare for future designations.

President Biden Prohibits the Acquisition of Real Estate in Wyoming (CFIUS Action)

First Prohibition (Under Biden). On May 13, President Biden prohibited the purchase and required divestment of a parcel of Wyoming land used as a cryptocurrency mining facility near Francis E. Warren Air Force Base. The order followed an investigation initiated by a public tip. CFIUS reviewed the transaction pursuant to its real estate regulations, which give CFIUS jurisdiction to review certain foreign investment in real estate near specific U.S. government facilities.

Following the public tip, CFIUS sent the investor—MineOne, a Chinese-owned crypto-currency miner—a non-notified transaction inquiry. Following a filing by the company, CFIUS concluded that the 2022 transaction where MineOne purchased the property and made improvements to it created national security risks due to its proximity to the U.S. government facility. CFIUS also concluded that improvements to the property included foreign equipment "potentially capable of facilitating surveillance and espionage."

Under the order, MineOne was immediately prohibited from accessing the site, and was required to implement measures to comply with the prohibition within seven days. In addition, all equipment and improvements made to the real estate were to be removed within 90 days of the order. Finally, MineOne was required to transfer or sell the property within 120 days of the order.

The press release can be found here.

Notably. The action highlights the risk of certain non-notified transactions. CFIUS has emphasized that it is prioritizing the pursuit of non-notified transactions. Foreign investors seeking to engage in transactions with U.S. businesses or real estate should carefully review whether a CFIUS filing is warranted.

In addition, the order represents both the first such order from the Biden administration and the first presidential order involving the purchase of real estate. With political pressure growing to review transactions involving foreign—especially Chinese—investments in U.S. real estate, companies should expect an increased focus on this area. In fact, on July 8, the Treasury Department issued a Notice of Proposed Rulemaking that would expand CFIUS jurisdiction to cover real estate transactions near more than 50 additional U.S. government facilities.

Department of Homeland Security Updates Uyghur Forced Labor Prevention Act (UFLPA) Strategy (DHS Action)

Second update. On July 9, the Forced Labor Enforcement Task Force (FLETF), a task force comprised of several U.S. government agencies and chaired by DHS, issued its second annual update to the UFLPA strategy document. We wrote about the first strategy update in an August 2023 Enforcement Roundup.

Most notably, the statutorily required update identified three new high-priority sectors – aluminum, polyvinyl chloride (PVC), and seafood. These sectors are now listed alongside cotton, polysilicon, and tomatoes. The FLETF uses the list of high-priority sectors to signal to importers that they should "prioritize scrutiny of supply chains that may involve products in those sectors" as relevant federal agencies will prioritize these sectors when enforcing their relevant authorities. In addition, the FLETF will prioritize these sectors when making additions to the UFLPA Entity List.

The annual update also outlines a process whereby FLETF member agencies can recommend additional high-priority sectors. In addition, the update underscores the FLETF's recent efforts to expand the number of entities on the UFLPA Entity List and streamline the review process for adding parties to the list. Importers have been vocal about expanding the list because they believe increased transparency will make compliance easier.

The updated strategy can be found here.

Notably. The inclusion of additional high-priority sectors is significant. While all companies should review their supply chains to ensure sourcing decisions comport with the UFLPA, the identification of new high-priority sectors signals companies operating in those sectors to be extra vigilant.

Also of interest is the influence academic and other groups seem to be having on FLETF efforts. For example, Sheffield Hallam University released studies on PVC and aluminum, while the Outlaw Ocean Project published a report on forced labor abuses in the seafood industry.

U.S. Targets Russia with New Sanctions and Export Controls (BIS, OFAC, State Action)

More Restrictions. On August 23, the U.S. Departments of Commerce, State, and Treasury concurrently took action against more than 500 entities for enabling the Russian war effort in Ukraine. The Department of State imposed sanctions on over 190 individuals and entities; OFAC designated almost 200 individuals and entities; and BIS added over 120 entities to the Entity List.

The Department of State and OFAC targeted transnational networks "involved in procuring ammunition and military materiel for Russia." These designated entities "launder[ed] gold for a sanctioned Russian gold company," "facilitat[ed] sanctions evasion for Russian oligarchs through offshore trust and corporate formation services, and supported Russia's military-industrial base by procuring sensitive and critical items such as advanced machine tools and electronic components." The sanctions target entities across numerous jurisdictions, including China, Switzerland, Turkey, and the United Arab Emirates. All transactions by U.S. persons involving the property of the designated entities (and vessels) are prohibited. Additionally, U.S. persons holding property of any of these entities must block and report that property to OFAC.

BIS also took action to "further constrain Russia's ability to arm its military by targeting illicit procurement networks designed to circumvent global export controls." BIS "expand[ed] the scope of the Russia/Belarus Military End User [MEU] and Procurement Foreign Direct Product [FDP] rule," "issu[ed] guidance to exporters on identifying suspicious transactions related to foreign corporate service providers," and "provid[ed] guidance and recommendations on contractual language referencing export regulations . . . specifically, restrictions that target unlawful reexports to Russia and Belarus." BIS also added over 100 new entities to the Entity List "applying the expanded Russia/Belarus MEU and Procurement FDP rule to dozens of entities outside Russia." As a general matter, a license is required to export, reexport, or transfer nearly any U.S.-origin item to a party on the Entity List.

The State Department press release can be found here. The Treasury Department press release can be found here. The BIS press release can be found here.

Notably. The designations and restrictions highlight the continuing and expanding risk associated with doing business in or involving Russia. A designation can be made with little or no warning and can immediately disrupt previously permissible business with Russia, to which many U.S.-origin items can still be shipped without violating the law.

Treasury Proposes New Outbound Investment Rule (Treasury Action)

Outbound proposed rule. On July 5, the Treasury Department published a NPRM to implement President Biden's August 2023 Executive Order on the regulation of outbound investments, raising national security concerns. The proposed rule prohibits or requires notification of certain investments made by "U.S. persons" in China, Hong Kong, and Macau. The rule focuses on investments in artificial intelligence, microelectronics, quantum computing, and semiconductors.

Under the proposed rule, U.S. investors would be required to conduct reasonable due diligence to determine whether a foreign investment is covered by the rule or if covered foreign persons are implicated. Civil and/or criminal penalties could be imposed for failing to comply. The proposed rule would also prohibit U.S. persons from knowingly directing non-U.S. persons to undertake otherwise prohibited transactions.

The proposed rule would provide for companies to seek an exemption from what would otherwise be considered a "covered investment" in certain situations involving publicly traded securities, limited partner investments, buyouts of country of concern ownership, intracompany transactions, certain syndicated debt financing, and binding commitments that predate the outbound Executive Order. Also, the rule proposes to allow parties to a covered investment apply for an exemption. However, it appears that applying for an exemption would be a fairly laborious process, and the exemption itself would only be granted if the investment is in the national interest of the United States.

The NPRM can be found here.

Notably. The proposed rule, which has been expected for some time, would have broad implications for the future of international investment in at least some important sectors. In anticipation of the rule coming into force, companies should assess how it could affect their mergers and acquisitions and investment processes, especially around due diligence into the activities of foreign targets in designated sectors.

International Trade Practice Group

The Bass, Berry & Sims International Trade Practice Group helps clients navigate the complex regulations associated with a global marketplace. Our team is experienced in guiding clients through challenging issues related to economic sanctions (OFAC), exports (DDTC and the ITAR; BIS and the EAR), imports (CBP), antibribery (DOJ and SEC), anti-boycott regulations (OAC and Treasury), and the Committee on Foreign Investment in the United States (CFIUS). Our work in this area has been recognized in leading legal industry outlets, including Chambers USA, whose research in 2024 revealed that "Bass, Berry & Sims represents a range of clients in export controls and economic sanctions matters. The team is experienced in handling EAR, OFAC and ITAR issues." A client added, "Bass Berry's service is excellent. They are technically sound, pragmatic and prompt." (from Chambers USA).

Learn more here.

Authors

Faith Dibble

202-827-2965

faith.dibble@bassberry.com

Thaddeus R. McBride

202-827-2959

tmcbride@bassberry.com