Holland & Knight

美国霍兰德奈特律师事务所

www.hklaw.com

CHINA PRACTICE
NEWSLETTER

JANUARY-FEBRUARY 2019

2019年1、2月刊

TABLE OF **CONTENTS**
目录

Holland & Knight
美国霍兰德奈特律师事务所

CHINA PRACTICE **NEWSLETTER**

Holland & Knight is a U.S.-based global law firm committed to provide high-quality legal services to our clients. We provide legal assistance to Chinese investors and companies doing business or making investments in the United States and Latin America. We also advise and assist multinational corporations and financial institutions, trade associations, private investors and other clients in their China-related activities. With more than 1,300 professionals in 28 offices, our lawyers and professionals are experienced in all of the interdisciplinary areas necessary to guide clients through the opportunities and challenges that arise throughout the business or investment life cycles.

We assist Chinese clients and multinational clients in their China-related activities in areas such as international business, mergers and acquisitions, technology, healthcare, real estate, environmental law, private equity, venture capital, financial services, taxation, intellectual property, private wealth services, data privacy and cybersecurity, labor and employment, ESOPs, regulatory and government affairs, and dispute resolutions.

We invite you to read our *China Practice Newsletter*, in which our authors discuss pertinent Sino-American topics. We also welcome you to discuss your thoughts on this issue with our authors listed within the document.

霍兰德奈特律师事务所是一家位于美国的全球性法律事务所，我们致力于向客户提供高质量的法律服务。我们向在美国及拉丁美洲进行商业活动或投资的中国投资人及公司提供他们所需的各类法律协助。我们也向跨国公司、金融机构、贸易机构、投资人及其他客户提供他们于其与中国相关活动中所需的咨询和协助。我们在28个办公室的1300多名对各领域有经验的律师及专业人员能够协助客户处理他们在经营或投资过程中所遇到的各种机会及挑战。

我们向中国客户及从事与中国有关活动的跨国客户提供法律协助的领域包括国际商业、企业并购、科技法律、医疗法律、房地产、环保法律、私募基金、创投基金、金融法律服务、税务、知识产权、私人财富管理法律服务、信息隐私及网络安全、劳动及雇佣法律、员工持股计划、法令遵循及政府法规、及争议解决。

我们邀请您阅读刊载我们各作者就与中美有关的各议题所作论述的 China Practice 期刊。我们也欢迎您向本期刊的各作者提供您对各相关议题的看法。

Overview of CFIUS, FIRRMA and the Pilot Program

By Ronald A. Oleynik, Antonia I. Tzinova, Seth M.M. Stodder and Andrew McAllister

CFIUS Background: The Old Regime

What Is CFIUS?

The Committee on Foreign Investment in the United States (CFIUS) was granted authority to review foreign investment in existing U.S. businesses under the Defense Production Act of 1950. CFIUS is an interagency committee chaired by the U.S. Department of the Treasury and comprised of representatives from 16 U.S. departments and agencies, including the U.S. Departments of Defense, State, Commerce and Homeland Security, among others. Before the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), CFIUS jurisdiction extended to any transaction that would result in foreign control over a U.S. business that impairs U.S. national security. A transaction that poses a threat to U.S. national security where the threat cannot be reasonably mitigated under existing law or a CFIUS mitigation agreement may be referred to the President of the United States with a recommendation to block the transaction. Foreign investors should note that a review of a "covered transaction" may be initiated any time after the transaction closes, with no statute of limitations. The only guarantee that a foreign acquirer will not be ordered to divest is if the transaction has been reviewed, and not objected to, by CFIUS.

FIRRMA: The New Era

FIRRMA Expands CFIUS Jurisdiction

President Donald Trump signed the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (NDAA) into law on Aug. 13, 2018. Among other things, the NDAA contains FIRRMA, the first major legislative reform impacting CFIUS reviews of foreign acquisitions since Congress passed the Foreign Investment and National Security Act of 2007 (FINSA).

The new law expands CFIUS jurisdiction, especially with respect to real estate transactions and non-controlling interests in businesses involved in critical infrastructure, critical technologies and access to sensitive personal data. It also makes certain filings involving foreign governments mandatory. Most of the changes affect only procedure and funding for the Committee and codify recent CFIUS practice. Nevertheless, FIRRMA brings important changes to the law that all involved in foreign investments in U.S. business should be aware of, and it does emphasize the continuing shift of the CFIUS process from a technical exercise toward a more political trade policy decision.

The most important changes brought by FIRRMA involve the significant expansion of CFIUS jurisdiction to review certain real estate transactions that were not previously of interest to CFIUS and transactions **not** resulting in the foreign **control** of a U.S. business.

The authority of the President of the United States to suspend or prohibit certain transactions is provided in Section 721 to the Defense Production Act of 1950, as amended (50 U.S.C. § 4565) (the Act). Under the Act, the President can suspend or prohibit any "covered transaction" when, in the President's judgment, there is credible evidence to believe that the foreign person exercising control over a U.S. business might take action that threatens to impair the national security of the United States, and the law does not otherwise provide adequate protection against such action. FIRRMA modifies the definition of "covered transactions."

Under the old standard, a "covered transaction" was any transaction that was proposed, pending or concluded by, or with, any foreign person, which could result **in control of a U.S. business by a foreign person**. "Critical infrastructure" was addressed within the context of a covered transaction and defined as "a system or asset, whether physical or virtual, so vital to the United States that the incapacity or destruction of the particular system or asset of the entity over which control is acquired pursuant to that covered transaction would have a debilitating impact on national security." Thus, CFIUS jurisdiction covered any acquisition of a U.S. business that would result in foreign **control** and that might threaten U.S. national security. It has long been the practice of the United States to leave the term national security undefined to allow CFIUS and the President maximum flexibility in asserting jurisdiction over foreign acquisitions of U.S. businesses.

By enacting FIRRMA, Congress made certain practices explicit and, in the process, expanded the reach of CFIUS. It did this by amending the term "covered transaction" to include:

- any non-passive investment by a foreign person in any U.S. business involved in critical infrastructure, the production of critical technologies or that maintains sensitive personal data that, if exploited, could threaten national security
- any change in a foreign investor's rights regarding a U.S. business
- the purchase, lease, or concession by or to a foreign person of certain real estate in close proximity to military or other sensitive national security facilities, and
- any other transaction, transfer, agreement, or arrangement designed to circumvent or evade CFIUS

These changes boil down to two major expansions of CFIUS jurisdiction: 1) real estate transactions of **developed and undeveloped land**, and 2) **non-controlling** foreign interests in critical infrastructure, critical technologies or sensitive personal data.

Real Estate Transactions: The Close Proximity Test

Until FIRRMA, CFIUS had jurisdiction over transactions that involved a "U.S. business," i.e., a going concern. While assets of a business that comprised most of the business would qualify, the mere acquisition of land did not warrant, and was specifically excluded from, CFIUS jurisdiction. However, during the past few years, CFIUS has developed and applied the so-called "locational test" and weighed in on transactions involving the acquisition of a U.S. business in close proximity to sensitive U.S. Government facilities.

FIRRMA takes this further. It expands the scope of CFIUS jurisdiction to include **any type of real estate transaction**, i.e., both developed and undeveloped real estate. FIRRMA specifies that "CFIUS jurisdiction includes the purchase, lease, or concession of private or public real estate that: is located within, or will function as part of, an air or maritime port; [or] is in close proximity to a U.S. military installation or another facility or property of the U.S. Government that is sensitive for reasons relating to national security." Under the old statute, the acquisition of a building that might be leased to a government agency would already fall within the purview of CFIUS review as an ongoing concern. However, a piece of undeveloped land on its own was specifically excluded from the scope of CFIUS jurisdiction under prior law and regulations.

FIRRMA changes this. It not only codifies recent CFIUS practice with respect to real estate businesses but also expands CFIUS jurisdiction to allow CFIUS to block the purchase of even **undeveloped** land that is in close proximity to a U.S. military installation or another facility or property of the U.S. Government that is sensitive for reasons relating to national security. This is a significant change that, for the first time, inserts CFIUS review into purely "greenfield" investment in vacant land. This change allows CFIUS to speculate about the potential use or development of land, or lack thereof.

Non-Controlling Interests in Critical Infrastructure, Critical Technologies or Sensitive Personal Data

Another major departure from the prior regime is the ability to block the acquisition of **non-controlling** interests in critical infrastructure, critical technologies or sensitive personal data. Since its inception, it had been a hallmark of CFIUS review that the foreign acquisition had to result in foreign control, which could pose a threat to U.S. national security. This is no longer the case.

Under FIRRMA, CFIUS jurisdiction now also includes **any foreign, non-passive** investment in U.S. critical infrastructure or critical technology, or a U.S. business that maintains or collects sensitive personal data of U.S. citizens that may be exploited in a manner that threatens national security. Such non-controlling interests will include minority equity interests with no board participation and no specific rights with respect to major decisions of the business. In essence, FIRRMA moves the focus from **control** to **influence**. Removing the control test will greatly expand the number of reviewed and reviewable transactions, particularly in the high-tech startup sector.

Voluntary and Mandatory Filing of Declaration

In addition to these substantive changes, FIRRMA also makes several procedural changes to CFIUS reviews. First, it creates a new, short form of filing (a "declaration") that will contain basic information regarding the transaction. These declarations are filed in three instances:

1. Parties may voluntarily submit such a declaration to request that CFIUS determine whether a full, formal filing is necessary. CFIUS is required to take action within 30 days following receipt of a declaration.

2. Parties **must** submit a declaration in **certain government-control** cases involving the acquisition of a "substantial interest" in a U.S. business by a foreign person in which a foreign government has a "substantial interest."

3. Parties **must** submit a declaration in transactions identified in implementing regulations (e.g., pilot programs as discussed in more detail below).

FIRRMA authorizes CFIUS to impose civil penalties on any party that fails to comply with the mandatory declaration requirement. Furthermore, parties to covered transactions that are subject to the mandatory declaration requirement may elect to submit a full written notice instead of a declaration.

Procedural Changes

In addition, FIRRMA implements a number of procedural changes.

- **Expanded Timeframe for CFIUS Review:** Previously, CFIUS undertook an initial 30-day review, with the option for an additional 45-day investigation. FIRRMA extends the review period to 45 days, retains the 45-day optional investigation period and authorizes a one-time extension of 15 days in "extraordinary circumstances," as defined in the CFIUS regulations.

- **Timing for Review of Draft Filings:** FIRRMA requires that CFIUS provide comments on draft notices that parties submit in advance of formal filing within 10 business days.

- **Timeline for Acceptance of Formal Filings:** FIRRMA requires that CFIUS accept formal filings within 10 business days and start the official review period clock.

- **Authority to Suspend Transactions:** FIRRMA provides the authority for CFIUS to suspend transactions or refer transactions to the President prior to the conclusion of the full review period.

- **Filing Fee:** Previously, there was no filing fee for submitting a notice to CFIUS; however, FIRRMA permits CFIUS to assess a fee of no more than 1 percent of the transaction or $300,000, whichever is less.

- **Committee on Foreign Investment in the United States Fund:** FIRRMA provides for the creation of a funding mechanism to be administered by the CFIUS chairperson and authorizes $20 million in appropriations to this fund for each of fiscal years 2019 through 2023 for CFIUS to perform its duty.

- **Expanded Reporting Requirements:** FIRRMA requires that CFIUS produce a report biannually (through 2026) that analyzes and includes information on investment in the United States by Chinese entities.

- **Voluntary and Mandatory Declarations:** As discussed above, parties would be given the opportunity to file a short-form declaration to obtain CFIUS' view on whether a transaction is subject to review.

- **Monitoring Mechanism:** FIRRMA requires that CFIUS create a monitoring mechanism with respect to transactions where the parties have not filed a notice with CFIUS.

CFIUS Pilot Program: The Future Is Now

Because of the extensive changes to the legal regime of CFIUS, some of FIRRMA's most significant provisions will not be effective until 18 months following the enactment of FIRRMA (i.e., Feb. 13, 2020); or 30 days after the U.S. Secretary of the Treasury publishes in the *Federal Register* a determination that the necessary regulations, organizational structure, personnel and other resources are in place to administer those provisions of FIRRMA (whichever is sooner). Notwithstanding this, in recognition of the need to immediately assess and address significant risk to national security posed by some foreign investment, FIRRMA also authorizes CFIUS to conduct one or more pilot programs to implement any provisions of the legislation before FIRRMA becomes fully effective.

The First CFIUS Pilot Program

The first CFIUS pilot program was announced on Oct. 11, 2018, and became effective on Nov. 10, 2018. The pilot program expands CFIUS' jurisdiction to include certain **non-controlling** investments by the foreign investors in a U.S. business that produces, designs, tests, manufactures, fabricates or develops one or more critical technologies that is either utilized in connection with the U.S. business' activity, or designed by the U.S. business specifically for use, in one or more of 27 pilot program industries, and affords the foreign investor any of the following rights:

- access to any material nonpublic technical information in the possession of the pilot program U.S. business (does not include financial data)
- membership or observer rights on the board of directors or equivalent governing body of the pilot program U.S. business, or the right to nominate an individual to a position on the board of directors or equivalent governing body of the pilot program U.S. business
- any involvement, other than through voting of shares, in substantive decision-making of the pilot program U.S. business regarding the use, development, acquisition or release of critical technology

Under FIRRMA, "critical technology" is defined with reference to existing control regimes, among others. Consistent with FIRRMA, the definition of "critical technology" in CFIUS' regulations has been updated to include:

- Defense articles – U.S. Munitions List
- Dual-use technology – Commerce Control List
- Nuclear equipment, materials, software, technology
- Select agents and toxins
- Emerging and foundational technologies (Export Control Reform Act of 2018)

As to pilot program industries, CFIUS has developed the list of 27 industries for which certain strategically motivated investment could pose a threat to U.S. technological superiority and national security, including aviation, defense, semiconductors, telecommunications, batteries, biotech, nanotechnology, among other strategic industries where the U.S. wants to keep its technological edge.

Pilot Program U.S. Business

A U.S. business meets the definition of a "pilot program U.S. business" if it produces, designs, tests, manufactures, fabricates or develops a critical technology that is 1) utilized in connection with the U.S. business' activities in one or more pilot program industries, or 2) designed by the U.S. business specifically for use in one or more pilot program industries.

The first step is to determine, if not already known, whether the U.S. business produces, designs, tests, manufactures, fabricates or develops a critical technology. This will involve considering everything that the U.S. business produces, designs, tests, manufactures, fabricates and develops, and determining whether anything falls within the definition of a "critical technology."

If a U.S. business produces, designs, tests, manufactures, fabricates or develops one or more critical technologies, the next step is to determine whether the U.S. business utilizes any of those critical technologies in connection with its activities in one or more pilot program industries (i.e., the 27 industries identified by CFIUS). If so, the U.S. business is a pilot program U.S. business.

If not, the final step is to determine whether one or more of the critical technologies produced, designed, tested, manufactured, fabricated or developed by the U.S. business is designed by the U.S. business specifically for use in one or more pilot program industries, irrespective of whether such use is by the U.S. business itself or by another person. If so, the U.S. business is a pilot program U.S. business.

Pilot Program Covered Transaction

If the U.S. business is a pilot program U.S. business, certain non-controlling investments by the foreign investors in said business which affords the foreign investor the right to 1) access any material nonpublic technical information of the pilot program U.S. business, 2) membership or observer rights on the board of directors or equivalent governing body of the pilot program U.S. business, or the right to nominate an individual to a position on the board of directors or equivalent governing body of the pilot program U.S. business, or 3) any involvement, other than through voting of shares, in substantive decision-making of the pilot program U.S. business regarding the use, development, acquisition or release of critical technology, will be deemed as a **pilot program covered transaction**. The pilot program requires that the parties to a pilot program covered transaction file a declaration with CFIUS (i.e., the mandatory declaration requirement under the pilot program).

Treatment of Certain Investment Fund Investments

The pilot program exempts certain indirect investments made through an investment fund by a foreign person in a pilot program U.S. business that affords the foreign person membership as a limited partner or equivalent on an advisory board or a committee of the fund from being considered as a pilot program covered transaction, if:

- the fund is managed exclusively by a general partner, a managing partner or an equivalent who is not a foreign person
- neither the advisory board or committee, nor the foreign person, has the ability to approve, disapprove or otherwise control the investment decisions of the investment fund or its portfolio companies
- the foreign person does not otherwise have the ability to control the investment fund, including the right to unilaterally dismiss, prevent the dismissal of, select or determine the compensation of the general partner
- the foreign person does not have access to material nonpublic technical information as a result of its participation on the advisory board or committee

The pilot program also exempts investment involving an air carrier.

Mandatory Declaration of Pilot Program Covered Transaction

As mentioned above, the pilot program mandatorily requires that parties to a pilot program covered transaction submit a declaration to CFIUS. Parties may, however, elect to submit a full written notice instead of a declaration. Parties will need to consider at the outset whether to submit a declaration or a full written notice based on the complexity of the transaction, timing considerations and other relevant factors. A full written notice may be more appropriate than a declaration when the parties believe that CFIUS may require more extensive information to analyze potential national security risks.

Upon the receipt of the declaration from the parties, CFIUS has 30 days to clear the transaction based on the declaration, initiate a unilateral review of the transaction or require the parties to file a full written notice.

Any person who fails to comply with the filing requirements may be liable for a civil penalty up to the value of the pilot program covered transaction.

CFIUS、FIRRMA 和 CFIUS 试点项目介绍

原文作者：*Ronald A Oleynik, Antonia I Tzinova, Seth M.M. Stodder and Andrew McAllister*

CFIUS的背景 – 之前的制度

CFIUS是什么?

美国外国投资委员会（”CFIUS”）是根据1950年的国防生产法案被授予审查外国对美国现有企业的投资的权力的机关。CFIUS是一个跨部门的委员会，由美国财政部长担任主席、并由来自包括国防部、国务院、商务部、国土安全部等16个美国不同部门及机关的代表所组成。在外国投资风险审查更新法案（“FIRRMA”）订立之前，CFIUS的管辖范围含括任何因造成美国企业被外国控制而损害到美国国家安全的交易。一个会对美国国家安全造成威胁的交易，如该威胁不能合理地依现有法律或与CFIUS所签订的缓解协议被减轻的话，该交易可能被提交给美国总统并建议美国总统阻止该交易的进行。外国投资人应注意即使交易已经完成，CFIUS仍有权对“CFIUS所管辖的交易”进行审查而不受任何时效限制。因此，为确保外国收购方之后不会被命令自其所收购的项目中退出的话，唯一的方法就是让CFIUS先审查其项目并确认CFIUS不反对该项目的进行。

FIRRMA: 新的时代

FIRRMA扩大了CFIUS的管辖范围

美国总统特朗普于2018年8月13日签署了“马侃参议员2019财政年度国防授权法案（“NDAA”）”， 而NDAA中包含了FIRRMA这个国会于2007年通过外国投资及国家安全法案（“FINSA”）后，第一个影响CFIUS审查收购项目的权限的主要立法改革。

新的法律扩大了CFIUS的管辖权限，尤其是对房地产交易、及对涉及关键基础设施、关键技术及可接触到敏感个人信息的企业的非控制性投资交易的管辖权限。新法也强制规定某些涉及外国政府的项目必须提交声明。虽然大部分的法律修改只影响到CFIUS的程序及预算及只将CFIUS最近的审查做法进行明文规定，FIRRMA对所有涉及外国在美国的投资的法律已经造成重大改变一事应受到关注，且该改变加强说明了CFIUS的审查程序将继续从一侧重技术考虑的审查转变为一将更受政治贸易政策影响的审查的趋势。

FIRRMA所带来最重要的改变是FIRRMA大大增加了CFIUS的审查权限，而使CFIUS有权审查某些之前CFIUS并未关注的房地产交易和***并未***导致外国人**控制**美国企业的交易。

1950年通过并经其后修订的国防生产法案（“国防生产法案”）第721条赋予了美国总统中止或禁止某些交易的权力。依据国防生产法案， 如美国总统依其判断认为存在外国人控制美国企业时可能会采取某些措施威胁或损害美国国家安全的可信证据、且法律未能提供有效防止该行为发生的保护时，美国总统可以中止或禁止任何该“受CFIUS所管辖的交易”的进行。而FIRRMA对“受CFIUS所管辖的交易”的定义做了修订。

根据先前的标准，一“受CFIUS所管辖的交易”是指任何外国人所拟进行、进行中或已完成的将造成**美国企业**受外国人控制的交易。而“关键基础设施”一词在受CFIUS所管辖的交易的背景下被提及到，且被定义为“在外国取得控制的CFIUS管辖交易中，其对美国的重要程度达到如失去功能或毁坏时将造成国家安全的减损的有形或无形系统或资产”。因此，之前CFIUS的管辖权限含括任何会造成外国**控制**且可能威胁美国国家安全的对美国企业的收购。长期以来，为使CFIUS及总统拥有最大的弹性来管辖外国对美国企业的收购，美国并未对国家安全一词做出定义。

而透过订立FIRRMA，国会明确了某些做法，且透过此过程扩大了CFIUS的管辖范围。它修订了“受CFIUS所管辖的交易” 一词而使其包括如下交易：

- 任何如利用该设施、技术或信息时可能会会对国家安全产生威胁的外国人对涉及关键基础设施、关键技术的制造、或持有敏感个人信息的美国企业的非被动式投资
- 任何外国投资人在美国企业中的权利的变更
- 外国人对临近军事或其他敏感国家安全设施的房地产的购买、租赁或权利取得，及
- 任何为规避CFIUS而设计的任何其他交易、转让、协议或安排

这些改变归结出CFIUS的管辖权限被重大地扩张到包含对以下交易的审查： 1）**已开发或未开发土地**的房地产交易； 及 2）外国人对关键基础设施、关键技术或敏感个人信息**的非控制**性投资。

房地产交易：临近标准

在FIRRMA之前，CFIUS对涉及一“美国企业”（即一运营中的事业）的交易具有管辖权。虽然如一企业的主要运营内容为其固定资产时,该企业仍将被视为一美国企业，但纯粹收购土地一事明确被排除于CFIUS的管辖权之外而不受CFIUS审查。不过，在过去几年中，CFIUS发展出并适用一套所谓“坐落地点测试”，并对收购临近敏感美国政府设施的美国企业的收购提出了它的看法。

FIRRMA将此更向前推进了一步。它将CFIUS的管辖权限扩大到包括**任何形态的房地产交易**（即包括已开发土地及未开发土地的房地产交易）。FIRRMA具体规定“CFIUS的管辖权限包括对座落于或可用作为机场或海港的一部、或临近美国军事设施或其他因国家安全因素而视为敏感的美国政府的设施或财产的私有或公有房地产的收购、租赁或权利取得”。根据之前的规定，收购一可能租赁给政府机构使用的楼宇，因其为一运营中的事业，该收购可能属于CFIUS所管辖的范围之内。但之前的法规明确将未开发土地的收购排除于CFIUS的管辖权限之外。

FIRRMA对此做了改变。它不只将最近CFIUS关于房地产企业的审查做法加以明文规定，也扩大CFIUS的管辖权限，让CFIUS开始有权禁止收购临近美国军事设施或临近其他因国家安全因素而视为敏感的美国政府的设施或财产的**未开发**土地的收购项目。这是一个重大的改变，它让CFIUS有权对投资未开发土地的“新建”投资进行审查。这个改变让CFIUS有权对土地的可能使用或开发与否进行臆测。

对关键基础设施、关键技术或敏感个人信息的非控制性投资

另一项与之前法律规定的重大不同是CFIUS现有权阻止对涉及关键基础设施、关键技术或敏感个人信息的**非控制性**投资。自CFIUS设立以来，CFIUS审查的特征一直是只有造成外国人控制而对美国国家安全产生威胁的外国收购才需被禁止。现已经不再是这个情况了。

根据FIRRMA，CFIUS的管辖权限现也包括任何如以某些方式利用该设施、技术或信息可能会威胁国家安全的**外国对**关键美国基础设施、关键技术、或持有或收集敏感美国公民个人信息的美国企业的**非被动式**投资。该非控制投资将包括没有董事代表席次及对企业主要决策的制定没有具体权利的少数股权投资。本质上，FIRRMA已将焦点从**控制**转为**影响**了。把是否造成控制的要求移除的结果将大大增加受审查或应受审查的交易项目的范围，尤其是对高科技新创企业领域而言。

自愿及强制提出声明的规定

除了这些实质规定的改变之外，FIRRMA也对CFIUS的审查做了几项程序变更。首先，它制订了新的将包含交易基本信息的简式申报（“声明”）的制定。这些声明应在以下三个情况下被提出：

1. 当事人可**自愿**向CFIUS提出该声明以要求CFIUS决定他们是否必须提出一全面及正式的申请。CFIUS必须在收到声明后30日内做出决定。

2. 在涉及外国政府拥有“重大股权”的投资人所做的将导致其对美国企业拥有“重大股权”的某些外国政府控制的投资案，当事人**必须**提交声明。

3. 施行规则中所列出的交易（例如下文中更加详述的试点项目）的当事人必须提交声明。

FIRRMA授权CFIUS对未能遵守强制声明规定的任何当事人处以民事罚款。此外，受CFIUS管辖的交易的当事人如其应进行强制声明的提出时，也可选择提出一全面性的书面通知以代替声明。

程序变更

此外，FIRRMA执行了几项程序变更。

- 延长了CFIUS的审查时间。CFIUS先前采行30天初期审查、并可选择性延长45天进行调查的做法。FIRRMA将审查时间延长到45天、保留了45天的选择性调查时间、并授权在CFIUS规则中所定义的“特别情况”下给予一次15天的时间延长。

- 审查申报稿的时间： FIRRMA规定CFIUS对正式提出申报前所提交的申报通知表稿，应在10个工作天内给与评论意见。

- 受理正式申报的时间：FIRRMA规定CFIUS应在10个工作天内受理正式申报并开始计算正式审查时间。

- 授权中止交易：FIRRMA授权CFIUS在全部审查期间结束前先中止交易或将交易转给总统。

- 申请费：先前向CFIUS提出通知申请无需缴费。不过，FIRRMA允许CFIUS收取最高为交易金额百分之一或三十万美元（以较小的为准）的申请费。

- CFIUS基金：FIRRMA规定设立一由CFIUS主席管理的基金募集机制，且授权在2019年到2023年之间每年拨款两千万美元供CFIUS执行其职务之用。

- 扩大报告要求： FIRRMA要求CFIUS到 2026年前，每半年提交一份分析及包括中国机构在美国投资的信息的报告。

- 自愿及强制性声明：如前所述，当事人有机会向CFIUS提出一份简式声明，以取得CFIUS对交易是否应受CFIUS审查的看法。

- 监督机制：FIRRMA要求CFIUS设立针对那些交易的当事人未向CFIUS提交通知的交易的监督机制。

CFIUS试点项目：新的时代提前到临

由于FIRRMA对CFIUS的法律规则做出了广泛的修改，FIRRMA的某些最重要的条款将会于FIRRMA订立日起18个月后（即2020年2月13日）、或美国财政部在联邦公报公告中确认为执行FIRRMA条款规定的必要规定、组织架构、人员、及其他资源已经到位之日后30天起(以较早的日期为准)才开始生效适用。尽管如此，在考量到有必要立即评估及处理某些外国投资所造成的国家安全重大风险的情况下， FIRRMA亦授权CFIUS在FIRRMA完全生效前实施一个或多个试点项目。

而首个CFIUS试点项目于2018年10月11日被公告并于2018年11月10日生效。这个试点项目将CFIUS的管辖权限扩大到包括某些外国投资人对生产、设计、测试、制造、制作或开发一个或多个关键科技的美国企业的**非控制性**投资、如该关键科技用于与该试点项目的27个产业的一个或多个产业有关的美国企业活动中，或该关键科技为美国企业特别为试点项目的27个产业的一个或多个产业的使用所设计、且该投资让投资人有以下任一权利：

- 接触到试点项目美国企业所持有的任何重要非公众所知悉的技术信息（不含财务信息）
- 在试点项目美国企业的董事会或类似的管理机构中拥有席次或观察权、或有权任命一人担任美国企业的董事会或类似的管理机构的职位
- 以投票方式之外，取得对试点项目美国企业关于关键科技的使用、开发、收购或发布的实质决策制定的任何参与

在FIRRMA之下， “关键科技”系根据现有的科技控管制度及其他规定所定义。与FIRRMA一样，CFIUS规则中关于“关键技术”的定义已被更新到包括：

- 国防事物 – 美国军需表
- 双用途科技 – 商业控制表
- 核子设备、材料、软件、科技
- 特定试剂及毒素
- 新兴及基础科技（2018年外销管制改革法）

就有关试点项目产业的问题，CFIUS发展出一个进行某些策略激励投资可能会对美国科技领先性及国防安全造成威胁的27个产业，包括航空、国防、半导体、通讯、电池、生物科技、奈米科技及其他美国希望保持科技优势的策略性产业。

试点项目美国企业

如果一美国企业生产、设计、测试、制造、制作或开发一个或多个关键科技，且1）该关键科技用于与试点项目的27个产业的一个或多个产业有关的美国企业的活动之中，或2）该关键科技为美国企业特别为试点项目的27个产业的一个或多个产业使用所设计，则该美国企业符合“试点项目美国企业”的定义。

首先，如还不知道的话，需先决定一美国企业是否生产、设计、测试、制造、制作或开发一个或多个关键科技。这将涉及考虑该美国企业所生产、设计、测试、制造、制作或开发的每一事物，以决定是否有任何事物落于“关键科技”的定义之内。

如一美国企业生产、设计、测试、制造、制作或开发了一个或多个关键科技， 则下一步是决定该美国企业是否在其与一个或多个试点项目产业（即CFIUS所确认的27个产业）有关的活动中使用了该等关键技术。如是的话，该美国企业为试点项目美国企业。

如不是的话，最后一步是决定该美国企业所生产、设计、测试、制造、制作或开发的一个或多个关键科技是否为试点项目的27个产业的一个或多个产业的使用所特别设计，而不考虑是否由该美国企业本身或其他人使用。如是的话，该美国企业为试点项目美国企业。

试点项目所规范的交易

如果一美国企业为试点项目美国企业，则使外国投资人享有以下权利的外国投资人对该企业的非控制性投资，将被视为**试点项目所规范的交易：** 1）有权接触到试点项目美国企业所持有的重要非公众所知悉的技术信息； 2）有权在试点项目美国企业的董事会或类似的管理机构中拥有席次或观察权、或有权任命一人担任美国企业的董事会或类似的管理机构的职位；或3）有权以投票方式之外，取得对试点项目美国企业关于关键科技的使用、开发、收购或发布的实质决策制定的任何参与。而试点项目强制规定任何**试点项目所规范的交易**的当事人必须提交声明
（即试点项目的强制声明规定）。

对于某些投资基金投资的规定

如在符合下列几项规定的情形时，试点项目豁免外国人透过让外国投资人在基金的咨询委员会或类似机构中担任有限合伙人或类似职务的投资基金对试点项目美国企业进行的的某些间接投资，而不将该等投资视为试点项目所规范的交易:

- 基金完全由非外国人的一般合伙人、管理合伙人或类似职务人员所管理
- 咨询会、委员会及外国人都没有权力通过、反对或以其他方式控制投资基金或其投资的项目公司的投资决定
- 外国人没有权力以其他方式控制投资基金，包括没有权力单方解聘、拒绝解聘、选任一般合伙人、或决定其薪酬
- 外国人不会因参与咨询会或委员会而获取重大的非公众所可得知的科技信息。

试点项目也对关于空运的投资项目进行豁免。

对试点项目所规范的交易的强制声明规定

如前所述，试点项目强制规定试点项目所规范的交易的当事人必须向CFIUS提交一声明。但当事人可选择提交一份全面性的书面通知以代替声明。当事人将需在交易之初根据交易的复杂度、时间考量及其他相关因素考虑是否提交一声明或全面性的书面通知。如当事人认为CFIUS可能会要求提供更广泛的信息以分析是否存在潜在国家安全风险时，提交一份全面性的书面通知可能比提交声明更合适。

收到当事人提出的声明后30日内，CFIUS应在30日内根据声明做出准许该交易、开启单方面对交易进行审查的程序、或要求当事人提交全面的书面通知。

任何人未能遵守申报的规定的话，可能被处以需承担最高不超过试点项目所规范交易的交易金额之民事罚款。

New California Labor and Employment Laws for 2019

By Linda Auerbach Allderdice and John H. Haney

In 2018, California enacted numerous labor and employment laws. Unless otherwise noted, each of the laws listed below became effective on Jan. 1, 2019. This article highlights selected and significant new laws, as well as California's rising minimum wages and exempt salary thresholds.

California's Minimum Wages and Exempt Salary Thresholds Increase in 2019

SB 3, enacted in the 2015-2016 legislative session, sets forth a schedule for minimum wage increases through 2023.

Beginning Jan. 1, 2019, for employers with 26 employees or more, the minimum wage will increase from $11 per hour to $12 per hour, and the exempt annual salary threshold will increase from $45,760 to $49,920. For employers with 25 employees or less, the minimum wage will increase from $10.50 per hour to $11 per hour, and the exempt annual salary threshold will increase from $43,680 to $45,760.

In general, exempt employees are employees whose duties "primarily" consist of administrative, professional or executive exempt duties, and who receive a salary of at least two times the state minimum wage for full-time employment. Under California law, "primarily" means more than one-half of the employee's work time. Exempt employees are not entitled to, among other things, overtime pay.

SB 1300 – Significant New Protections and Prohibitions Under the California Fair Employment and Housing Act

SB 1300 makes several significant changes to the California Fair Employment and Housing Act (FEHA). These changes make it essential for employers to review their equal employment opportunity (EEO) policies and practices to ensure compliance and to mitigate risk.

1. SB 1300 marks a drastic change in the legal landscape in which FEHA harassment claims are litigated by making it easier to bring FEHA harassment claims and, at the same time, significantly more difficult to obtain summary judgment on such claims. Effective Jan. 1, 2019:

    a. Harassment cases "are rarely appropriate for disposition on summary judgment."

    b. A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile or offensive working environment. In SB 1300, the California legislature has rejected the higher "severe or pervasive" standard for unlawful harassment established by the U.S. Court of Appeals for the Ninth Circuit in its precedential decisions.

    c. A plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. Rather, a plaintiff need only prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job.

    d. The existence of a hostile work environment depends upon the totality of the circumstances. Under this framework, a discriminatory remark, even if made outside of the context of an employment decision or uttered by a nondecision-maker, may be relevant circumstantial evidence of discrimination. The California Legislature expressly rejected the "stray remarks doctrine" under which a discriminatory remark outside of the context of an adverse employment decision did not create a triable issue of fact that could defeat summary judgment, reaffirming California Supreme Court precedent.

    e. When conduct sufficiently offends, humiliates, distresses or intrudes upon its victim, so as to 1) disrupt the victim's emotional tranquility in the workplace, 2) affect the victim's ability to perform the job as usual, or 3) otherwise interfere with and undermine the victim's personal sense of well-being, that conduct deprives a victim of the statutory right to work in a discrimination-free workplace. Thus, such conduct rises to the level of harassment creating a hostile, offensive, oppressive or intimidating work environment.

2. Employers are prohibited from requiring an employee, as a condition of employment or continued employment, or in exchange for a raise of bonus, to:

a. sign a release of a claim or right under the FEHA. (In this context, "release of a claim or right" includes "requiring an individual to execute a statement that he or she does not possess any claim or injury against the employer or other covered entity, and includes the release of a right to file and pursue a civil action or complaint with, or otherwise notify, a state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity.")

b. sign a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment. These prohibitions do not apply to a "negotiated" agreement to settle an underlying FEHA claim that has been filed by an employee in court, before an administrative agency, alternative dispute resolution forum or through an employer's internal complaint process. "Negotiated" in this context means that "the agreement is voluntary, deliberate, and informed, provides consideration of value to the employee, and that the employee is given notice and an opportunity to retain an attorney or is represented by an attorney."

3. The bill specifies that a court shall not award a defendant who prevails in a civil action fees and costs unless the court finds that the action was frivolous, unreasonable or groundless when brought, or that the plaintiff continued to litigate after it clearly became so.

4. The bill specifies that an employer can be held liable to employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace for any type of harassment – not just sexual harassment – prohibited under the FEHA and committed by a nonemployee. For such liability to attach, the employer, its agents or its supervisors must know, or should have known, of the nonemployee's conduct and must fail to take immediate and appropriate corrective action.

5. The bill authorizes, but does not require, an employer to provide bystander intervention training "that includes information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors."

SB 1343 – Harassment Prevention Training Requirements Extended to Smaller Employers and Nonsupervisory Employees

The FEHA currently requires employers with 50 or more employees to provide sexual harassment prevention training to all supervisory employees within six months of their assumption of a supervisory position and once every two years.

SB 1343 extends training requirements to smaller employers and to nonsupervisory employees. More specifically, the bill requires that by Jan. 1, 2020, employers with five or more employees must provide at least two hours of sexual harassment prevention training to supervisory employees, and at least one hour of sexual harassment prevention training to nonsupervisory employees in California within six months of their assumption of a supervisory position.

Beginning Jan. 1, 2020, for seasonal and temporary employees or any employee hired to work for less than six months, employers must provide training within 30 calendar days after the hire date or within 100 hours worked, whichever is earlier.

The bill requires the Department of Fair Employment and Housing (DFEH) to make publicly available a one-hour online training course for nonsupervisory employees, and a two-hour online training course for supervisory employees. These training courses will comply with training requirements, but employers are still authorized to provide their own compliant training courses.

SB 820 – Settlement Agreements Cannot Prevent Disclosure of Factual Information Related to Sexual Harassment or Discrimination Claims

SB 820, which adds California Civil Procedure Code section 1001, applies to any settlement agreement entered into on or after Jan. 1, 2019. SB 820 renders as unenforceable any provision in any settlement agreement that prevents the disclosure of factual information related to claims filed in a civil action or administrative action regarding any of the following acts:

1. Sexual assault not governed by California Civil Procedure Code section 1002(a) – California Civil Procedure Code section 1002(a) prohibits settlement agreement provisions that prevent disclosure of factual information related to certain felony sex offenses, childhood sexual abuse, sexual exploitation of a minor, conduct prohibited with respect to a minor, and sexual assault against an elder or dependent adult.

2. Sexual harassment as defined by California Civil Code section 51.9 – California Civil Code section 51.9 was amended by SB 224, which is discussed below in the next section.

3. Workplace harassment or discrimination based on sex, or the failure to prevent an act of workplace harassment or discrimination based on sex, or an act of retaliation against a person for reporting harassment or discrimination based on sex.

4. Harassment or discrimination based on sex, or an act of retaliation against a person for reporting harassment based on sex, by the owner of a housing accommodation.

A court may consider the pleadings and other papers in the record, or any findings of the court in determining the factual foundation of the causes of action as specified.

For settlement agreements not involving a government agency or public official as a party, the agreement can include a provision which shields the identity of the claimant and all facts that could lead to the discovery of his or her identity, if requested by the claimant.

SB 820 does not prohibit provisions which protect against disclosure of the settlement sum paid under the agreement.

SB 224 – Sexual Harassment Claims Will Be Easier to Bring Under California Civil Code Section 51.9

Before 2019, the elements for a sexual harassment claim under California Civil Code section 51.9 required, among other things, that there is "a business, service, or professional relationship between the plaintiff and defendant," and the statute sets forth a nonexhaustive list of the persons with whom the plaintiff may have such relationships, including physician, psychotherapist, attorney, accountant, teacher, among others. SB 224 adds the following persons to that list: 1) elected official, 2) lobbyist and 3) director or producer.

Another element in the existing law is that there is an "inability by the plaintiff to easily terminate the relationship." SB 224 removes this element, thereby making it easier for a plaintiff to bring a claim under section 51.9.

SB 224 also makes it an unlawful practice for a person to deny or to aid, incite or conspire in the denial of rights created by section 51.9.

AB 2770 – Expanding the Scope of "Privileged Communications" to Protect Employees Making Sexual Harassment Allegations and to Protect Former Employers when Communicating Credible Allegations

One aim of AB 2770 is to help prevent future workplace sexual harassment by permitting former employers to communicate in a privileged way with an alleged harasser's new potential employer. A common practice when hiring new employees is conducting a reference check, where a prospective employer contacts an applicant's former employer. Under existing libel laws, the former employer is permitted to say whether or not it would rehire the applicant in response to a reference check. However, former employers were at risk for a libel or slander lawsuit if they informed a prospective employer that the applicant would not be rehired because of allegations of sexual harassment.

AB 2770's expansion of "privileged communications" now protects and permits the former employer to inform a prospective employer whether the decision not to rehire the applicant "is based on the employer's determination that the former employee engaged in sexual harassment." The former employer may communicate such in response to a reference check if it does so without malice. In theory, including such correspondence as "privileged communications" limits or eliminates a former employer's liability for slander or libel in connection with such statements.

AB 2770 also includes under the aegis of "privileged communications" an employee's "complaint of sexual harassment . . . [made] without malice, to an employer based on credible evidence." This provision appears to operate as a method to protect accusers from libel or slander lawsuits brought as a method of "silencing" allegations.

AB 3109 – Contracts and Settlement Agreements Cannot Waive a Party's Right to Testify in Certain Administrative, Legislative, or Judicial Proceedings

AB 3109, which adds California Civil Code section 1670.11, applies to any contract or settlement agreement, entered into on or after Jan. 1, 2019. AB 3109 makes unenforceable any provision that waives a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or alleged sexual harassment of the other party to the contract or settlement agreement, or on the part of the agents or employees of the other party, if the party has been required or requested to attend the proceeding per a court order, subpoena or written request from an administrative agency or the legislature.

AB 2282 – Clarifications Regarding Employers' Use and Consideration of Salary History Information

Under current law, an employer cannot rely on the salary history information of an applicant for employment as a factor in determining whether to offer the applicant employment or what salary to offer the applicant, with exceptions. Current law also generally forbids an employer from seeking salary history information from an applicant for employment. However, an employer may rely on salary history information as a factor in determining whether to offer employment or what salary to offer if the applicant voluntarily discloses their salary history information. Current law requires an employer, upon reasonable request, to provide the pay scale for a position to an applicant applying for employment.

AB 2282 clarifies the existing law and adds new provisions to the salary law. In terms of providing a pay scale to an applicant for a position, the bill defines "pay scale" as "a salary or hourly wage range." The bill defines "applicant" or "applicant for employment" as "an individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position." The bill defines "reasonable request" as "a request made after an applicant has completed an initial interview with the employer."

The bill also provides much needed clarification regarding what employers can and cannot do during the hiring process and in making compensation decisions. Under the revised law, employers are not prohibited from asking an applicant about his or her ***salary expectation*** for the position being applied for. However, employers must still be careful not to seek past salary history information.

The bill also clarifies that employers can make compensation decisions based on a current employee existing salary as long as any wage differential resulting from the compensation decision is justified by one or more specified factors, including a seniority system, a merit system, or education, training and experience.

SB 1252 – Employees Have a Right to Receive a Copy of Itemized Wage Statements, in Addition to Inspecting Itemized Wage Statements

SB 1252 amends California Labor Code section 226 to specify that an employee not only has the right to "inspect" their itemized wage statements – containing, among other things, information regarding the employee's gross and net wages earned – but also to "receive" a copy of their itemized wage statements. The bill specifies that it is not a change in the law, but declaratory of existing law. This legislative statement may allow for retroactive application of the law to conduct occurring within the applicable statute of limitations period.

AB 1976 – Expanded Lactation Accommodation Requirements

Before 2019, California law required an employer to make reasonable efforts to provide an employee with use of a room or other location, **other than a toilet stall**, in close proximity to the employee's work area for the employee to express milk in private.

AB 1976 expands the lactation accommodation requirement. Employers must now make reasonable efforts to provide an employee with use of a room or other location, **other than a bathroom**.

The bill further provides that an employer who makes a temporary lactation location available to an employee will be in compliance if all of the following conditions are met:

1. the employer is unable to provide a permanent location because of operational, financial or space limitations
2. the temporary lactation location is private and free from intrusion while an employee expresses milk
3. the temporary lactation location is used only for lactation purposes while an employee expresses milk
4. the temporary lactation location otherwise meets the requirements of state law concerning lactation accommodation

If an employer demonstrates to the Department of Industrial Relations that the requirement to provide the use of a room or other location, other than a bathroom, would impose an undue hardship when considered in relation to the size, nature or structure of the employer's business, an employer must then make reasonable efforts to provide the use of a room or other location, other than a toilet stall, in close proximity to the employee's work area, for the employee to express milk in private.

SB 826 – Certain Corporations' Board of Directors Must Include a Minimum Number of Female Directors by the Close of 2019 and 2021

SB 826 adds California Corporations Code section 301.3. SB 826 requires a publicly held domestic or foreign corporation whose principal offices are located in California, per the corporation's U.S. Securities and Exchange Commission (SEC) Form 10-K, to have at least one female director on its board of directors by the close of the 2019 calendar year. A corporation may increase the number of directors on its board to comply.

By the close of the 2021 calendar year, such corporations must have:

1. at least three female directors if the corporation has six or more directors
2. at least two female directors if the corporation has five directors
3. at least one female director if the corporation has four or fewer directors

California's Secretary of State will publish a report on its website, no later than July 1, 2019, which documents the number of domestic and foreign corporations whose principle executive offices, per the corporation's SEC Form 10-K, are located in California and who have at least one female director.

SB 826 authorizes the Secretary of State to adopt regulations to implement the new law and provides for significant fines for violations of those regulations. The bill makes clear that a female director having held a seat for at least a portion of the year is not a violation. The bill defines "female" as "an individual who self-identifies her gender as a woman, without regard to the individual's sex at birth," and defines "publicly held corporation" as "a corporation with outstanding shares listed on a major United States stock exchange."

2019 年加州新劳动及雇佣法律

原文作者：*Linda Auerbach Allderdice and John H Haney*

2018 年加州订立了许多劳动及雇佣法律。除非另有标识之外，以下所列的各该法律于 2019 年 1 月 1 日起生效。本文重点标识出以下几项重要的新法以及提高的加州最低工资及豁免员工工资起点：

加州于2019年起提高其最低工资及豁免员工工资起点

2015 年至 2016 年立法会期中所订立的加州参议院3号法案（“SB 3”）规定了直到2023年将提高的最低工资。

从 2019 年1月1日起，雇用 26 人或 26 人以上的雇主应支付的最低工资将从每小时 11 美元提高到 12 美元，而豁免员工的年度工资起点将从45,760美元提高到 49,920 美元。对雇用 25 人或 25 人以下的雇主，最低工资将从每小时10.50美元提高到11美元，而豁免员工的年度工资起点将从43,680 美元提高到 45,760 美元。

一般而言，豁免员工是指职责“主要”包含行政、专业或管理性质的豁免性工作、且收入至少为州所规定全职工作最低工资两倍以上的员工。而依加州法律规定，构成“主要”的要件为从事豁免性工作的时间超过员工工作时间一半以上。豁免员工不享有加班费等权利

加州参议院1300号法案（“SB 1300”）于加州公平雇佣及住房法中增加了重要的新的保护及禁止规定

SB 1300对加州公平雇佣及住房法（Fair Employment and Housing Act）（FEHA)作了许多重大改变。由于这些改变，雇主应重新检视他们的公平雇佣政策及做法以确保合规及降低风险。

1. SB 1300 对加州的依公平雇佣及住房法所提出的骚扰诉讼的法律游戏规则做出了重大的改变，它让提起公平雇佣及住房骚扰诉讼变得更容易。同时也大大提高在该等诉讼中取得即决审判（Summary judgment）的难度。从2019年1月1日起：

   a. 只有“极少数的骚扰案件”合适以即决审判的方式处理。

   b. 如骚扰行为对原告工作的进行造成不合理的干扰或造成一恐吓、不友善或令人不适的工作环境的话，一次的骚扰行为事件将足以造成是否存在不友善工作环境的可裁判争议。在SB 1300中，加州立法机关拒绝了之前美国第九巡回上诉法院在其先前判例中所制定关于造成非法骚扰需存在的较高的“严重及普遍存在”的标准。

   c. 原告无需证明其实际工作效率因骚扰而降低。 相反地，原告只需证明一合理的人在遭到该歧视行为待遇时将如原告一样，感到骚扰改变了工作环境而使其更难进行工作。

   d. 是否存在不友善的工作环境将视整体状况而决定。在此框架下，一个歧视性的评论，即使是在做出聘雇决定的情况外做出或是由不具决定权的人所随口说出，都可能成为是否造成歧视的相关间接证据。加州立法机关再度确认了加州最高法院之前的判例，明确地拒绝了“偏离评论理论”。而根据“偏离评论理论” ， 在做出不利的聘雇决定的情况外所做出的歧视性的评论，将不会构成一个可裁判争议而导致无法获得即决审判。

e. 当一行为足以冒犯、羞辱、惹恼或侵扰其受害人，而造成 1）受害人在职场上的情绪不安，2）影响受害人如常进行工作的能力 ，或3）以其他方式影响或损害了受害人的福祉，该行为将被视为剥夺了受害人所应享有不受歧视的工作环境的法定权益。因此，该行为将被视为已提升至造成不友善、冒犯、压迫或威胁的工作环境的骚扰程度。

2. 禁止雇主以提供工作、延长聘用或以增加报酬为条件要求雇员：

a. 签署放弃其FEHA所赋予的请求或权利（在此情况下，“放弃请求或权利”包括“要求雇员签署一表示其对雇主或其他FEHA所规范的对象不具有任何请求或权利的声明、包括放弃向州的政府机关、其他检察官、执法机构或任何法院或政府部门提出或进行民事诉讼或投诉的权利。”）

b. 签署意图剥夺雇员揭发有关在职场上所发生的不法行为（包括但不限于性骚扰行为）的不诋毁协议。

这些禁止规定对为和解雇员已经向法院、行政机关、替代性争议解决机构或雇主内部申述程序提出的FEFA请求所签署“经协商的合约”并不适用。而此情况下所指的“经协商的合约”是指经自愿、审慎考虑、知情、给予雇员对价、且雇员收到通知并有机会聘请律师或已有律师代表所协商签署的合约。

3. 该法案具体规定法院不应判给民事诉讼胜诉的被告律师费及法院费用，除非法院认定该民事诉讼系浮滥地、不合理地或没有任何理据地被提起，或原告在明确知道该等状况后仍继续进行诉讼。

4. 该法案明确规定雇主可被认定需就非员工对雇员、求职人员、无给实习生、志愿人员或依合约在职场提供服务的人员所做包括性骚扰在内的FEHA所禁止的任何形式骚扰行为承担责任。而为产生该责任，雇主或其代理人或监督人必须知道或应该知道非员工的行为且未能采取立即及合适改正措施。

5. 该法案授权（但不要求）雇主提供“包括给予能使旁观者发现潜在问题行为及激励旁观者当观察到问题行为时能采取行动的信息及实用指导”的旁观者介入训练。

加州参议院1343号法案（“SB 1343”）将骚扰训练扩大到小型雇主及不负管理职责的雇员

FEHA目前要求雇用50个或50个以上员工的雇主对所有负管理职责的员工在其接受该负管理职责的工作后6个月内及其后每两年提供一次性骚扰防制训练。

SB 1343将该训练的要求扩大到小型雇主及不负监管理责的雇员。更具体而言，该法案要求到2020年1月1日前，聘有5名或5名以上员工的雇主必须对其所聘负管理职责的员工提供至少2个小时的性骚扰防制训练，且对其所聘在加州的不负管理职责的员工在其接受管理职责工作后6个月内提供至少1个小时的性骚扰防制训练。

自2020年1月1日起，对季节性或暂时性员工或任何聘用来从事短于6个月期间工作的员工，雇主必须在聘用日起30个历日内或开始工作后100个小时内（以先到的为准）提供训练。

该法案要求公平雇佣及住房部（DFEH）向不负管理职责的雇员提供大众均可获取的1小时线上训练，且向负管理职责的雇员提供大众均可获取的2小时线上训练。这些训练课程将符合训练规定，但雇主仍有权提供他们自己的申诉训练课程。

加州参议院820号法案（“SB 820”）规定和解协议不得禁止揭露有关性骚扰或歧视请求的事实信息

SB 820对加州民事诉讼法增加了一第1001条， 并对任何于2019年1月1日或其后所签订的和解协议适用。SB 820 规定任何和解协议如禁止对因以下行为所提出的任何民事诉讼或行政诉讼的请求的相关事实信息进行揭露的话，该禁止规定条款无效：

1. 加州民事诉讼法第1002(a) 条所未包括的性侵行为 – 加州民事诉讼法第1002(a) 条已规定和解协议条款不得对某些重大性侵犯罪、儿童性虐待犯罪、未成年人性剥削犯罪、禁止与未成年人从事的行为及对长者或依赖其的成年人的性攻击犯罪行为的相关事实信息的揭露做出禁止规定。

2. 加州民法第51.9条所定义的性骚扰行为 – 加州民法第51.9条被加州参议院224号法案所修订，将于以下论述。

3. 基于性别而产生的职场骚扰或职场歧视行为、或未能避免基于性别而产生的职场骚扰或职场歧视行为、或对基于性别而产生的职场骚扰或职场歧视行为的报复行为。

4. 住房设施的所有人所进行基于性别而产生的职场骚扰或职场歧视行为、或其对基于性别而产生的职场骚扰或职场歧视行为的报复行为。

法院可考虑记录中的诉状或其他文书、或法院对任何具体诉讼请求的事实基础的任何认定。

就未涉及任何政府部门或政府官员为一方的和解协议，如提出请求之人要求时，协议可遮掩该请求人身份及所有可能导致该请求人身份被揭发的条款。

SB 820 并不禁止防止揭露依协议所支付和解金额的条款。

加州参议院224号法案（“SB 224”）将使依加州民法第51.9条所提出的性骚扰诉讼请求更容易提出

在2019年之前，加州民法第51.9条所规定的性骚扰的要件，除其他之外还包括“原告和被告间存在一商业、服务或职业关系”，且法律非穷尽地列出可与原告建立该等关系的人员，例如医师、心理治疗师、律师、会计师、老师等。 SB 224将以下人员增列于该列表中：1）被选上的公职人员，2）游说人员、及 3）导演或制片人。

现行法律的另一个提起诉讼请求的要件是“原告没有能力轻易终止该关系”。SB 224 剔除了该要件，因此使原告更容易依加州民法第51.9条提出诉讼请求。

SB 224 并规定任何人拒绝或帮助，怂恿或共谋拒绝第51.9条所赋予的权利的行为为违法行为。

加州众议院2770号法案（“AB 2770”）将“受法律保护的沟通”的范围扩大，以保护雇员做出性骚扰请求及保护先前雇员对可信的指控做出沟通。

AB 2770 的一个目的是以允许先前雇员以享有受法律保护的沟通的权利与被指控做出骚扰行为人的新的可能雇主进行沟通。一聘用新员工的惯常做法是进行一推荐人核实，按该做法，新的可能雇主联系了求职人员的先前雇主。依目前的文字毁谤法律，先前雇主对该核实可以回复其是否愿意再度聘用该求职人员。但先前雇主如果告知可能的新雇主因为性骚扰的指控他们将不会再聘用该求职人员的话，先前雇主可能会面临文字临诽谤或口头毁谤的诉讼风险。

AB 2770 对“受法律保护的沟通”的范围的扩大，保护及允许先前雇主告知可能的新雇主其不再聘用求职人员的决定是否是“基于雇主认定先前雇员从事了性骚扰行为”。先前雇主在没有恶意的情况下可以对推荐人核实要求做出该等回复。理论上，将该等沟通列入“受法律保护的沟通”减低或免去了先前雇主因做出该等回复而可能面临的口头毁谤或文字诽谤的诉讼风险。

AB 2770 也在“受法律保护的沟通”的保护中加上雇员“在没有恶意的情况下以可信的证据向雇主提出的性骚扰控诉”。这个条款看来是一个为避免雇主利用文字毁谤或口头毁谤诉讼的威胁以让提出控诉的人噤声的方法。

加州众议院3109号法案（“AB 3109”）规定合约或和解协议不得免除一方不在特定行政、立法或司法程序中作证的权利。

AB 3109对加州民法增加了第1670.11条，并对任何于2019年1月1日或其后签订的任何合约或和解协议适用。 根据AB 3109， 任何豁免一方在一行政、立法或司法程序中对合约或和解协议的另一方或其代表或雇员所涉及的被指控的刑事或性骚扰行为进行作证的约定，如该一方已依法院命令、传票或行政部门或立法机关的书面要求下规定或要求出席该程序的话，该约定无效。

加州众议院2282号法案（“AB 2282”）对雇主使用及考虑历史薪资信息的进一步阐明

依目前法律，除例外的情况下，雇主不得依照求职人员的历史薪资信息作为其决定是否给予工作机会或提供多少薪资的因素。目前法律一般而言也禁止雇主向求职人员索取之前薪资的信息。但如果求职人员主动揭露其历史薪资信息时，雇主可依据历史薪资信息作为决定是否给与工作机会或提供多少薪资的因素。目前法律要求雇主在经合理要求后，向求职人员提供关于某一职位的薪资级别表。

AB 2282 对现行法律做了阐明并对薪资法律增加了一些新的规定。对于向求职人员提供薪资级别表一事，该法案将“薪资级别表”定义为薪资或小时薪资范围。该法案将“申请人”及“求职者”定义为一向雇主申请工作的个人且该人目前不以任何方式或职务受该雇主雇用。该法案将“合理要求”定义为“申请人在完成与雇主首次面试后所做出的要求”。

该法案也对雇主在聘用过程中及做出报酬决定时可以及不可以做的事做出迫切需要的阐明。依现行法律，雇主并不被禁止向求职者询问他或她对其所申请的工作职位的期待薪资。但雇主仍然必须谨慎地不去询问历史薪资信息。

该法案也阐明雇主可依据相信雇员的薪资来决定报酬，只要任何薪资决定的薪资差异具备一个或多个具体的合理理由，包括年资体系、绩效体系或教育、训练和经验。

加州参议院1252号法案（“SB 1252”）规定雇员除有权检视列举明细的薪资单外，有权要求一份列举明细的薪资单

SB 1252对加州劳动法第226条加以修订，以明确规定雇员不只有权“检视”具体列举包括他们所赚到的总工资及净工资金额等信息的薪资单外，也有权“收到”该薪资单。该法案具体说明其并非对法律进行修改，而是对现行法律的一项宣告。这项立法声明可允许法律回溯适用诉讼时效期间发生的行为。

加州众议院1976号法案（“AB 1976”）增加了便利泌乳设施的要求

2019年之前，加州法律要求雇主行使合理努力以提供雇员使用临近雇员工作地点的一个房间或马桶设施之外其他地点，让雇员可以私下泌乳。

AB 1976 扩大了泌乳设施的要求。雇主现必须行使合理努力提供雇员一个房间或洗手间之外的其他地点。

该法案规定如雇主向雇员提供一暂时泌乳地点，而符合下列条件时，将被视为符合法律规定：

1. 雇主因经营、财务及空间限制而无法提供固定地点
2. 暂时的地点为私密地点且雇员泌乳时不会受到干扰
3. 暂时地点在员工泌乳时只做为泌乳之用
4. 暂时地点在其他方面符合州法关于泌乳设施的要求

如雇主向产业关系部展现如提供除洗手间外的房间或其他地点，在考虑到雇主事业的规模、性质或结构下将对雇主造成过度困难的话，雇主必须行使合理努力提供雇员一个临近雇员工作地点的一个房间或马桶设施之外其他地点，让雇员可以私下泌乳。

加州参议院826号法案（“SB 826”）规定某些公司的董事会在2019年及2021年底前必须包括最低数额的女性董事

SB 826 对公司法增加了一第301.3条。SB 826 要求由公众持有的主要办公地点位于加州的本国或外国公司 （依公司向美国证管会所提出的10-K表而定）在2019历年结束之前必须在其董事会中有一位女性董事。公司可增加其董事人数以符合规定。

在2021历年结束前，该公司必须有：

1. 至少3位女性董事 （如公司有6位或6位以上董事时）
2. 至少有2位女性董事 （如公司有5位董事时）
3. 至少有1位女性董事 （如公司有4位或4位以下董事时）

加州州务卿将于2019年7月1日之前在其网站发布一报告，记录依公司向美国证管会所提出的10-K表主要办公地点位于加州且有至少一位女性董事的本国或外国公司。

SB 826 授权州务卿制定为执行新的法律的规定并对违反这些规定制定相当的罚款。该法案明确规定如一位女性董事至少在一年中的部分期间担任董事之外将不视为违反该法案。该法案将“女性”定义为一将她的性别自认为女性的个人，而不考虑其出生时的性别，且将“公众持有的公司”定义为“其发行股份在美国主要证券交易市场上市的公司”。

Resolving Civil Disputes in the United States

By Stacey H. Wang

Foreign suppliers who sign contracts provided by their U.S. business partners specifying dispute resolution procedures in the U.S. often do not appreciate the implications of that agreement until a dispute arises. Dispute resolution clauses commonly include provisions that require disputes to be litigated exclusively in certain venues, such as in the state or federal court of a specific county, or require arbitration of disputes pursuant to certain rules of a particular institution, such as the American Arbitration Association (AAA) or JAMS, or a process involving a combination of mediation, arbitration and/or litigation. This article provides, at a high level, the basic strategy considerations in resolving disputes in the context of such forum selection clauses.

Forum Selection Clauses

A forum selection clause is a provision in the parties' agreement that specifies where and how the parties will resolve disputes arising under the contract. It is typically accompanied by a statement of consent to jurisdiction by the parties to that forum and a selection of the governing law. The typical forum selection clause will identify a venue (such as an arbitral institution or the courts of a particular county).

There are certain perceived advantages and disadvantages to having claims heard in a particular forum. For example, a company located in California may have in its supplier contracts the requirement that claims against it must exclusively be brought in the county in which the company is located. The company prefers to have claims against it heard in its "hometown," where potential jurors and judges are more likely to know and care about the company. It also makes litigating disputes more predictable, in that the company likely already has counsel handling matters for it in that county who are familiar with the practices of the judges likely to preside over the cases. Another example is where the parties to a complex agreement, such as in a large real estate development project, agree to arbitration using industry experts as arbitrators, to avoid the risk and uncertainty of having non-expert lay jurors making decisions about the parties' dispute. In addition, discovery obligations may differ depending on the forum, which affects the expense of the proceeding. These issues are discussed below.

Civil Litigation in State and Federal Courts

Among the many differences between civil litigation in state and federal courts, the following considerations are helpful to understanding how cases proceed in each forum. These differences may lead one party in a dispute to "forum shop" by filing a case in its preferred forum first, before the other party can file suit in a different forum. Forum selection clauses, generally enforceable in business disputes, aim to prevent this by having the parties agree beforehand on where the dispute will be heard.

One limitation to forum selection clauses is that parties may not agree exclusively to a federal court unless the dispute satisfies the subject matter jurisdiction requirements of federal court, because federal courts are courts of limited jurisdiction. State courts, in contrast, are courts of general jurisdiction and can hear cases unless the case involves a subject over which federal courts have exclusive jurisdiction. If a party files in state court a case that could have originally been filed in federal court, a defendant may "remove" the case to federal court.

The judges governing the case: U.S. Supreme Court justices, the court of appeal judges, and district court judges are nominated by the U.S. President and confirmed by the U.S. Senate. They enjoy lifetime appointments and may be removed only through impeachment. This system encourages an independent judiciary that, in theory, is not subject to the political process.

In contrast, states implement their own respective systems for appointing and removing state judges. For example, in California, state court judges are typically appointed by the state governor and then confirmed in the next general election, called a "retention vote." Some judicial seats are filled directly through the statewide general election. These state judges may be challenged at a general election or, more rarely, be recalled in a special recall election.

The American civil jury: The federal and state systems differ with respect to the jury systems as well. In the federal system, the Seventh Amendment to the U.S. Constitution provides for a right to jury trial in civil cases. Rule 48 of the Federal Rules of Civil Procedure, which implements this right, requires that a jury trial begin with 6 to 12 jurors, and unless the parties agree otherwise, the verdict must be returned by a unanimous jury of at least 6 jurors. States have their own jury systems, which may call for less jurors or less-than-unanimous verdicts. State courts also draw jurors from a more limited geographic area than federal courts located in the same county because of the difference in geographic reach of each court. When given a choice, a defendant may invoke procedures to remove a case filed initially in state court to federal court due in part to the federal requirement that a jury verdict must be unanimous and to have a more geographically diverse jury pool.

Jury trials take longer to try and are more expensive. Not only must separate fees be posted for jury trials, but jury trials require additional elements not needed in a bench trial, e.g., jury selection, reading of jury instructions, more extensive evidentiary hearings and conferences with the judge outside the presence of the jury. These elements require extensive pretrial filings. Preparation for a jury trial in a complex or high-value matter might include making presentations to a mock jury to test trial themes and key evidence, more extensive use of visual graphics and engaging a jury trial consultant. Thus, preparing a case for a jury trial is strategically different from preparing a case for a bench trial.

Despite this investment, due to the rules governing jury trials, if the number of jurors falls below the required number, if a jury fails to return a verdict or for some other irregularity during trial, the court may declare a mistrial. If a mistrial is declared, then the trial is not completed. The case may ultimately be dismissed, settled or retried to a new jury.

Bench trials: With all of the expense and risk associated with jury trials, parties sometimes agree ahead of time to waive the right to a jury trial. Even if that agreement does not occur ahead of time, parties can agree at the time the case is litigated or simply waive the right to a jury. In a typical federal civil case, a plaintiff must assert the jury demand at the time it files the complaint. States may vary in the procedures to demand and waive a jury trial. In California, there are a number of ways a party may waive the right to a jury trial, including failing to appear at trial, by written or oral consent to waive a jury, by failing to demand a jury at the time the case is first set for trial and by failing to pay the jury fee. However, even if a party has waived its right to a jury, the court may still reinstate a jury trial at its discretion.

There may be a tactical decision to waive the right to a jury. If the plaintiff believes that the case is particularly complex or may stir emotions in jurors to the plaintiff's detriment, it may wish to have its claim tried before the judge on the theory that a judge is better able to understand complex issues and to set aside the emotions involved in a case. However, the contrary view is that having a jury deliberate the evidence actually protects against the biases and emotions of a single judge. The selection of a jury is more art than science, however, and cases often settle after the parties see the final panel of jurors who will decide their fate. In fact, the risks and expense of a jury trial lead the vast majority of cases to settle before a verdict is rendered. In addition, even within a case to be tried before a jury, there are certain issues that may be decided by a judge. While the right to a jury for a particular claim or defense may be subject to some analysis, factual legal questions on the basic issue of whether a contract was breached by a party's actions is triable by a jury. In addition, through summary judgment procedures, a party may have a claim disposed of if there are no conflicting facts for a jury to decide or a reasonable jury could not differ on the outcome.

Discovery obligations: Discovery obligations in the U.S. are extensive compared to the discovery obligations, if any, in other countries. These obligations also differ depending on the forum. The federal rules in recent years adopted the "proportionality" analysis, which requires that the discovery obligations be proportional to the needs of the case, as a limit to the parties' general right to obtain any non-privileged matter that is relevant to a claim or defense. Federal rules impose general limits on the number of depositions and written discovery requests that a party may serve without further permission from the court. Like everything else discussed above, state courts have their own rules for the scope of discovery and discovery procedures. Some follow the federal rules, others do not. In California, discovery of matters relevant to the subject matter of the action or any pending motion made in the action is allowed, if the information is admissible or appears "reasonably calculated to lead to the discovery of admissible evidence." The quoted portion of this standard used to be in the federal rules but was replaced in 2015 by the "proportionality" standard, yet it remains the rule in California.

Under either system, a “document” subject to production to the other side broadly includes electronic data such as emails and text messages, and can also include metadata, i.e., information about the data itself, such as when the data was created, modified or moved, and by whom. Because of the broad scope of discovery, experienced counsel can save costs by discussing discovery ahead of time and forming a discovery plan. The Federal Rules of Civil Procedure require counsel to meet at the beginning of the case to discuss this and other case management issues. Some state courts and some individual judges may also require this of counsel as well.

Alternative dispute resolution in the court system: Even in matters litigated in court, litigants may be encouraged or required to mediate their disputes. For example, in the U.S. District Court for the Central District of California, as is common in federal courts, litigants typically select one of the following: private mediation, panel mediation (i.e., selecting from a panel of mediators who have agreed to provide a specified number of hours for free) or a settlement conference with a judge.

Private Arbitration in the U.S.

Seeking to bypass the expense and complications of litigating in court, parties may agree to use arbitration as the means to resolve their disputes. Institutions such as AAA, JAMS and ADR Services provide general mediation and arbitration services, and some have specialized rules for particular industries, such as the Construction Industry Arbitration Rules offered by AAA. Other specialized institutions such as the Financial Industry Regulatory Authority (FINRA) provide dispute resolution for the securities industry.

Arbitration bypasses the court system and can save substantial time and money. Avoiding the expense of a jury proceeding and the often backlogged calendars of the court to have motions heard, the parties simply pay for an arbitrator or an arbitral panel to resolve their dispute. The parties may agree (in advance or otherwise) on limited discovery or agree to follow the arbitral institution’s rules governing discovery. Enforcement of arbitral awards may also be more streamlined than a court judgment.

Keep in mind, however, that in the absence of a clear forum selection clause, parties may end up litigating in court the issue of whether the clause applies to the dispute at all. In addition, a party may seek interim relief (i.e., temporary restraining orders and preliminary injunctions) from a court rather than from an arbitrator due to the time it takes to select an arbitrator and initiate an arbitration. Finally, even where the parties have agreed to arbitration, the failure of a party to timely file a motion seeking to compel arbitration when the other party has sued in court may result in a waiver of arbitration. Therefore, even though there is an arbitration provision, that does not necessarily mean that the parties can completely avoid the courts.

在美国解决民事争议

原文作者：*Stacey H. Wang*

当外国供货商和他们的美国商业伙伴签署包括具体规定如何在美国解决他们的争议的条款的合约时，通常在争议真正发生前他们并未能领会到这些协议条款的含义。争议解决条款通常包括要求争议唯一只能在某个特定审理地点进行争讼的规定，例如在位于某一特定郡县的联邦法院进行、或要求根据某一特定仲裁机构（例如美国仲裁协会AAA或JAMS仲裁机构）的仲裁规则对争议进行仲裁、或透过一结合调解、仲裁及/或诉讼的程序进行。本文将从高层角度就如何在签订协议管辖条款的背景下解决争议提出一些基本策略考量供参考。

协议管辖条款

协议管辖条款是当事人合约中明确规定当事人应在那个地方及如何解决因合约所生的争议的条款。通常该条款也附随当事人同意接受某一管辖地管辖的声明及准据法的选择。典型的协议管辖条款将列出一审理地点（例如一仲裁机构或位于某个郡县的法院）。

在某一特别管辖地处理争议主张会有某些一般认为的优点及缺点。例如一个位于加州的公司可能在其供应合同中要求所有对其提出的法律主张都必须只能在该公司所在的郡县内提出。公司可能认为在公司所在地的潜在陪审员及法官将更可能了解它的案件及更关心它，而偏好在其“主场”处理对其提出的诉讼请求。又因为公司应该已经有熟悉可能处理该案的法官的做风的律师在该郡县协助公司处理案件，这个做法也让公司对争议的诉讼能作更好的预测。另一个例子是如大型房产开发项目的复杂合约的当事人同意使用产业专家担任仲裁人进行仲裁，以避免由非专家的陪审员来对当事人的争议做出裁决将带来的风险和不确定性。此外，各个管辖地关于证据揭露的义务规定也可能不同，而其将对诉讼程序的费用产生影响。这些问题将在下文中探讨。

在州法院及联邦法院进行民事诉讼

在州法院及联邦法院进行民事诉讼存在许多不同之处，以下考量将对了解案件将如何在各该法院进行有所帮助。这些不同之处可能导致发生争议当事人一方抢在其他当事人在不同法院提起诉讼之前，先在其偏好的法院提起案件的“管辖法院挑选”行为。一般而言，协议管辖条款的约定在商业争议的解决中是有效的约定，其目的是透过当事人事前同意争议将在那个地方处理以避免挑选管辖法院的行为。

因为联邦法院的管辖权是有限的，除非争议本身符合联邦法院关于对事管辖权的规定，一个对协议管辖条款的限制是当事人不得同意争议应专属由联邦法院管辖。相反地，州法院的管辖权属一般管辖权。除非案件牵涉的事项应专属由联邦法院管辖，州法院可以审理任何案件。如果当事人一方向州法院提出最初也可在联邦法院提起的案件时，被告可以申请将该案件“转移” 到联邦法院审理。

审理案件的法官：美国联邦最高法院法官、联邦上诉法院法官和联邦地方法院法官均由美国总统任命并经美国参议院确认担任。他们享有被终生任命的权利且只能透过弹劾程序解除其任命。理论上，这个制度鼓励促成一不受政治程序影响的独立司法体系。

相反地，各州有他们各自关于任命及解任州法官的制度。例如，在加州，州法院法官一般是由州长任命并由其后的一般选举确认该任命，而这被称为“维持任命投票”。某些司法职位是由全州一般选举所选出的人士直接担任。这些州法官的职位可能在一般选举中被挑战，或在更不常见的情况下，在特别罢免的选举中被罢免。

美国民事陪审团制度：联邦及州在陪审团制度上也有所不同。在联邦制度中，美国宪法第7修订条款赋予民事案件中有要求陪审审判的权利。而为执行该权利的联邦民事诉讼法第48条规定陪审审判的案件的陪审员人数开始应为6到12人，且除非当事人另有同意，陪审团的认定必须由至少6名以上的陪审员在一致无异议通过的情况下做出。各州有其自己的陪审团制度，并可能规定可有更少人数的陪审团、或陪审团可在低于一致无异议要求的情况下做出认定。由于不同法院管辖的地域范围不同，州法院可召集陪审员的地域范围也比位于同一郡县的联邦法院更小。当有选择时，部分由于联邦要求陪审团的认定须在一致无异议的情况下做出、且从地域角度而言联邦有更均衡的陪审员召集来源，被告可能会提出将案件由原先提出的州法院转移到联邦法院的程序。

陪审审判的案件耗时更长且更昂贵。不只需对陪审团的审理另外缴费，且陪审审判案件存在法官审判案件所没有的额外要素，例如挑选陪审员、阅读陪审员指示、更广泛的证据庭的召开、及与法官在陪审团不在场时开会等。这些要素造成广泛的庭前申请的提出。为一复杂或高涉案金额的陪审审判案件的开庭准备可能还包括了为测试诉讼诉求及关键证据效果而向模拟陪审团进行陈述演练、更多视觉图片的使用、及聘用陪审审判顾问。因此，准备陪审审判案件在策略上与准备由法官审判的案件有所不同。

不过尽管有这些费用，由于关于陪审审判案件的规定，如果陪审员人数低于规定的人数或陪审团未能做出认定、或审理过程中发生某些不合规情事，法院可能宣布审判无效因而造成审判未能完成。而案件可能最终被驳回、和解、或由新的陪审团重新审判。

由法官审判的案件：考量到与陪审审判有关的所有费用及风险，当事人有时会事前同意放弃陪审审判的权利。即使事前没有同意，当事人也可在案件进行诉讼时做出该等同意或直接放弃陪审审判的权利。在一个典型的联邦民事案件中，原告必须在提出诉讼时同时提出陪审审判的要求。而各州对要求或放弃陪审审判的程序的规定可能有所不同。在加州，一当事人可有几种放弃陪审审判权利的方式，包括不去参加开庭、以书面或口头同意的方式放弃陪审审判权利、在最初安排案件庭审日期时没有要求陪审审判、及没有缴纳陪审团费用。不论如何，即使一当事人放弃了其所拥有的陪审审判权利，法院仍可依其职权决定重行进行陪审审判。

也可能存在基于策略考虑而放弃陪审审判权利的情形。如果原告认为案件特别复杂或可能挑起陪审团对原告不利的情绪时，基于法官较能理解复杂的争议且较能排除被案件所涉的情绪影响的理论，原告可能希望其案件由法官来审理。不过，相反的观点是由陪审团来权衡及考虑证据事实上防止了由单一法官审判可能带来的偏见及情绪风险。陪审团人员的挑选也更像是一门艺术而不是科学， 但各当事人经常在看到将决定他们命运的陪审团人员的最终组成后决定对案件进行和解。事实上，与陪审团有关的风险及费用导致了绝大多数的案件在陪审团做出认定前完成和解。
此外，即使在由陪审审判的案子中，某些问题还是可能由法官来决定。虽然是否有权要求由陪审团来审判某些特定请求主张或抗辩一事可能需透过某些分析来决定，但就一方的行为是否构成了违约这个基本争议的法律事实问题应该是由陪审团来审理的。另外，在如没有存在需由陪审团来决定的事实争议或合理的陪审团不会对结果有不同认定的情况下，一当事人可透过即决审判的程序来处理其诉讼请求。

证据揭露义务：美国的证据揭露义务相较其他国家的证据揭露义务（如有的话）来的更加广泛。而该等义务又因不同管辖法院而有所不同。几年前联邦的规定采用了“比例原则”来对揭露义务进行分析，而该原则要求证据揭露义务应与该与案件的证据需求成适当比例，而对当事人一般要求取得法律保护免于揭露事项以外的任何与请求或抗辩相关事项的权利造成了限制。联邦规则对当事人在没有进一步得到法院允许时可以提出的口头质问及书面揭露要求的次数做了一般性的限制。

和以上所提到的其他事项一样，州法院有他们自己关于揭露范围及揭露程序的规则。有些参照联邦规则、而有些则不是如此。在加州，要求与诉讼的请求事项或为诉讼所提出的任何进行中的申请有关的事物的揭露是被允许的，只要该等信息是在法庭中可被允许提出的证据或看来“可合理导致在法庭中可被允许提出的证据的发现”。上述特别以引号标示出的标准过去也是联邦规则中所采用的标准，但在2015年被“比例原则”这个标准所取代。不过，上述以引号标示出的标准现今仍然为加州的规则所采用。在任一制度中，一应向对方提出的“文件”广泛地包括例如电子邮件及短讯等电子数据，且也可包括后设资料（即关于信息本身的信息，例如信息在何时及为何人所创设、修改或移除）。 由于揭露范围相当宽广，有经验的律师可透过尽早讨论揭露问题及制定揭露计划而节省费用。联邦民事诉讼法要求律师在案件开始时讨论这个和其他案件管理问题。有些州法院及有些个别法官可能也会对律师做出这些要求。

法院制度下的替代性争议解决方式：即使对在法院进行诉讼的事项，诉讼各方仍可能被鼓励或被要求对他们的争议进行调解。例如，在加州中区的美国联邦地方法院，与联邦法院中常见的做法一样，诉讼各方通常选择进行以下程序：私人调解、小组调解（即从调解人名单中选任同意无偿提供特定小时调解服务的调解人进行调解）、或与法官召开和解会议。

在美国进行私下仲裁

为了避开法院诉讼的费用及复杂问题，当事人可以同意以仲裁的方式来解决他们的争议。像AAA、JAMS和“ADR服务”这些机构提供一般的调解及仲裁服务‘且一些机构有为特别产业制定专门的规则，例如AAA制定了营造产业仲裁规则。其他专门的机构例如金融产业监管机构（FINRA ）对金融产业提供争议解决服务。

仲裁避开了法院系统且可节省大量的时间和金钱。为了避免陪审审判程序的费用及法院关于审理各项申请的积压日程，有些当事人直接付费聘请一个或一组仲裁人来解决他们的争议。当事人可在之前或其他时间决定进行有限的证据揭露程序或同意遵守仲裁机构关于证据揭露的仲裁规则。仲裁裁决的执行也可能较法院判决来的简单。

不过，需注意的是在没有一清楚的协议管辖条款时，当事人最后可能需在法院争讼他们所签订的协议管辖条款是否对他们的争议适用。此外，由于组成仲裁庭及提出仲裁申请需要一些时间，一当事人可以向法院而非仲裁人寻求中间救济（即暂时禁令及临时禁止令）。最后，即使当事人同意采用仲裁，如一方在另一方向法院提出诉讼后未能及时提出申请要求命令进行仲裁的话，也可能导致被视为放弃仲裁的权利。因此，即使存在仲裁约定条款，并未必能表示当事人可完全避开法院。

USPTO Announces Revised Guidance for Determining Subject Matter Eligibility

By Brian Colandreo

The U.S. Patent and Trademark Office (USPTO) on Jan. 4, 2019, announced revised guidance for subject matter eligibility under 35 U.S.C. § 101. The USPTO also concurrently announced guidance on the application of 35 U.S.C. § 112 to computer-implemented inventions. The documents took effect on Jan. 7, 2019.

Neither software nor computer programs are explicitly mentioned as being statuary subject matter in the United States patent statutes. However, the law has evolved to address new technologies, and decisions of various U.S. courts (e.g., the U.S. Supreme Court and U.S. Court of Appeals for the Federal Circuit) beginning in the latter part of the 20th century have sought to clarify the boundary between patent-eligible and patent-ineligible subject matter for a number of new technologies including computers and software.

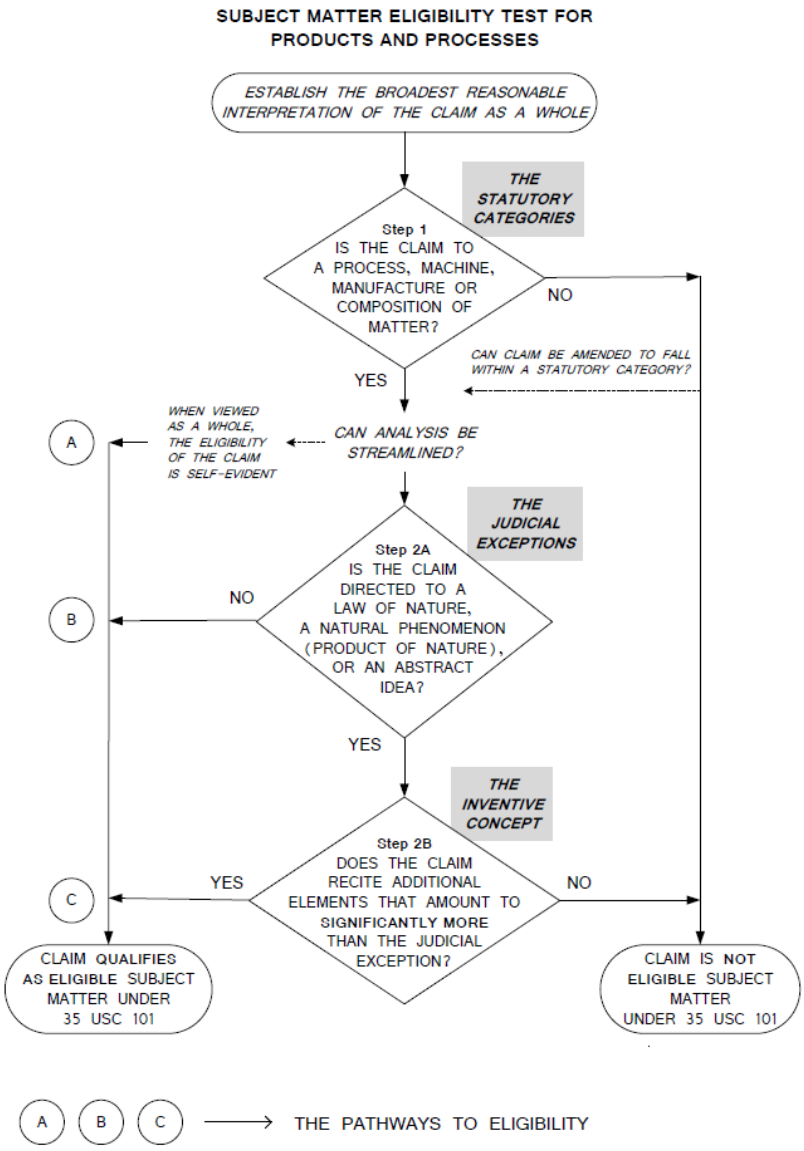
On June 19, 2014, the U.S. Supreme Court ruled in *Alice Corp. v. CLS Bank International* that "merely requiring generic computer implementation fails to transform [an] abstract idea into a patent-eligible invention." The Court used the analysis from its decision in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.* and held *Alice's* patents invalid as directed to an abstract idea, requiring an "inventive concept" for the claimed method to confer patent eligibility.

The Supreme Court in *Mayo* laid out a framework for determining whether an applicant is seeking to patent a judicial exception itself, or a patent-eligible application of the judicial exception. This framework, which is referred to as the *Alice/Mayo* test.

The first part of the *Alice/Mayo* test is to determine whether the claims are directed to an abstract idea, a law of nature or a natural phenomenon (i.e., a judicial exception). If the claims are directed to a judicial exception, the second part of the *Alice/Mayo* test is to determine whether the claim recites additional elements that amount to significantly more than the judicial exception. The Supreme Court has described the second part of the test as the "search for an 'inventive concept'."

The *Alice/Mayo* two-part test is used by the USPTO to evaluate the eligibility of claims under examination. The process of the *Alice/Mayo* two-part test is illustrated in the accompanying diagram.

In its statement for announcing the revised guideline, the USPTO states that properly applying the *Alice/Mayo* test in a consistent manner has proven to be difficult, and has caused uncertainty in this area of the law. Among other things, it has become difficult in some cases for inventors, businesses and other patent stakeholders to reliably and predictably determine what subject matter is patent-eligible. The legal uncertainty surrounding Section 101 poses unique challenges for the USPTO, which must ensure that its more than 8,500 patent examiners and administrative patent judges apply the *Alice/Mayo* test in a manner that produces reasonably consistent and predictable results across applications, art units and technology fields.



美国专利及商标局公布关于判断发明主题的可专利性的修订指引

原文作者：*Brian Colandreo*

美国专利及商标局于2019年1月4日公布了依美国专利法第101条规定判断发明主题可专利性的修订指引。美国专利及商标局也同时公布了关于如何适用美国专利法第102条于计算机实施的发明的指引。这些文件于2019年1月7日起生效。

软件及计算机程序在美国专利法中都没有被明确地提到为法定的发明主题。不过，法律一直在演进以处理伴随新科技而来的问题，且20世纪后期起许多美国法院（例如美国联邦最高法院及美国联邦巡回上诉法院）透过做出许多判决来寻求厘清包括计算机及软件在内的许多新科技是具有或不具有可专利性的发明主题的区分界限。

2014年6月19日，美国联邦最高法院在 ***Alice Corp. v. CLS Bank International*** 一案中判定“仅仅需进行一般的计算机应用并未能将一抽象概念转化为一个具有可专利性的发明”。美国联邦最高法适用其于 ***Mayo Collaborative Services v. Prometheus Laboratories, Inc.*** 一案中所确立的分析方法，判定Alice的专利指向的是一个抽象概念而无效，并判定一方法的权利要求须含有“发明性概念”才具有可专利性。

美国联邦最高法院在Mayo 一案订立出一个判断申请人是否只是就一个司法例外本身申请专利，或是提出涉及司法例外的一个具可专利性的申请的分析架构。
这个分析架构被称为 ***Alice/Mayo*** 分析法。

Alice/Mayo 分析法的第一步是决定权利要求是否指向的是抽象概念，自然规律或自然现象（即司法例外）。如果权利要求指向的是司法例外的话，Alice/Mayo分析法的第二步是决定权利要求是否叙述了使其显著超出司法例外的其他要素。美国联邦最高法院将该分析法的第二步描述为“寻求一“发明性概念”。

Alice/Mayo 两步分析法被美国专利及商标局在审查专利申请时用来评估权利要求是否具可专利性。

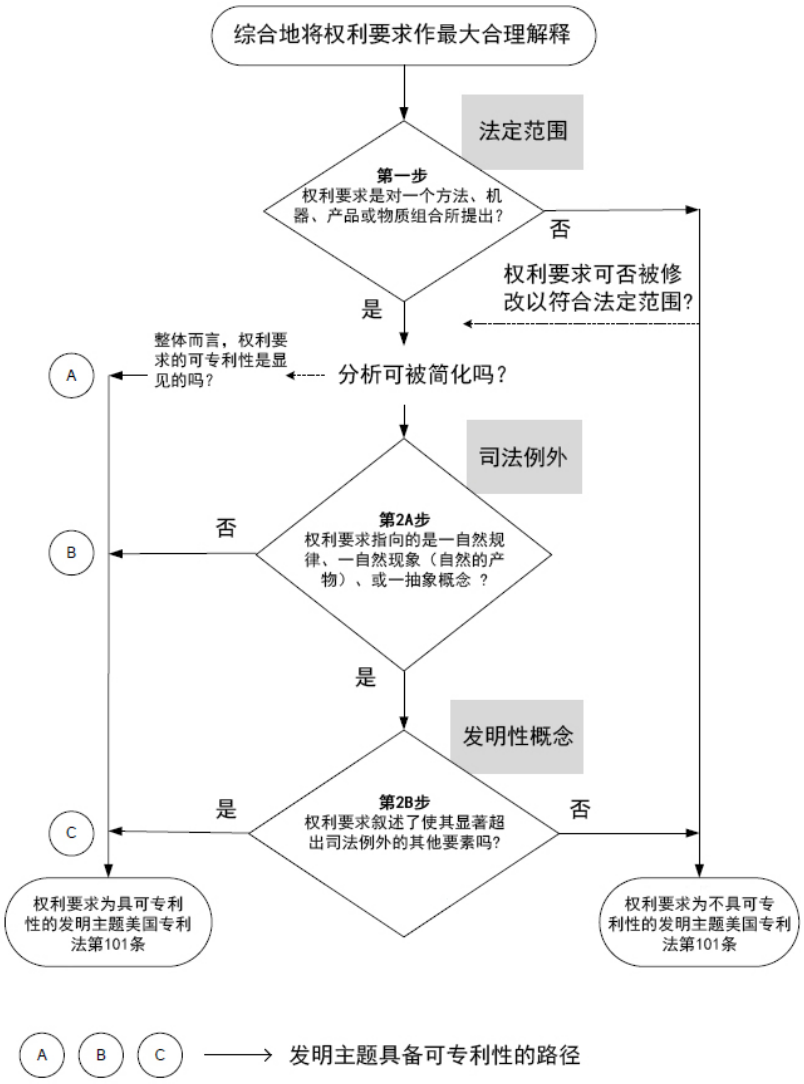
Alice/Mayo 的两步分析法的程序如所附图表所示：

在美国及专利商标局公布修订的指引的声明中，美国专利及商标局表示以一致的方式适用Alice/Mayo分析法被证明为确有困难，且对此法律领域造成了不确定性。除别的问题以外，它造成发明人、企业和其他与专利利益有关的人员在某些情况下难以用可信赖及可预期的方法判断何种发明主题具有可专利性。这个围绕第101条的法律不确定性也造成美国专利及商标局的一项特别挑战，因为美国专利及商标局需确保其超过8500名专利审查人员及行政专利法官能够在各申请、工艺部门及技术领得到合理一致及可预测的结果的方式适用Alice/Mayo分析法。

修订指引的全文已公布于以下联邦公报中：

101条指引 | 112 条指引

产品及程序发明主题可专利性分析



About This Newsletter
有关本期刊

Information contained in this newsletter is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem. Moreover, the laws of each jurisdiction are different and are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult competent legal counsel. Holland & Knight lawyers are available to make presentations on a wide variety of China-related issues.

本期刊所刊载的信息仅供我们的读者为一般教育及学习目的使用。本期刊并不是为作为解决某一法律问题的唯一信息来源的目的所设计，也不应被如此使用。此外，每一法律管辖区域的法律各有不同且随时在改变。如您有关于某一特别事实情况的具体法律问题，我们建议您向合适的律师咨询。美国霍兰德奈特律师事务所的律师能够对许多与中国相关的问题提出他们的看法及建议。

About the Authors
关于本期作者

Linda Auerbach Allderdice is a litigation partner in the firm's Los Angeles and San Francisco offices and heads the firm's Labor, Employment and Benefits Practice Group in California. She represents clients in complex litigation in all aspects of labor and employment law, including class action litigation.

Brian J. Colandreo is a partner in Holland & Knight's Boston office and the leader of the firm's Patent Protection and Prosecution Team. A registered patent attorney, he focuses his practice on client management, general intellectual property prosecution, transactional work, litigation support, due diligence work, and utility and design patent opinion work.

John H. Haney is a Los Angeles labor and employment attorney who represents employers in a variety of matters involving wage and hour compliance, wrongful termination, discrimination, retaliation, harassment, unfair labor practices, workers' compensation, trade secret misappropriation, government agency investigations, class actions, representative actions, and occupational safety and health regulations.

Andrew K. McAllister is a Washington, D.C., attorney and member of Holland & Knight's International Trade Group as well as its Anti-Corruption and Foreign Corrupt Practices Act (FCPA) Team. He focuses on export controls, sanctions, customs, antidumping (AD) and countervailing duties (CVD), anti-corruption and industrial security.

Ronald A. Oleynik, head of Holland & Knight's International Trade Group, is a partner practicing in the firm's Washington, D.C., office in the area of international trade regulation. His experience includes a broad range of industrial security, customs, export and international trade matters.

Seth M.M. Stodder, a partner in Holland & Knight's Los Angeles office, represents clients on a wide variety of matters involving international trade and cross-border transactions, proceedings before the Committee on Foreign Investment in the United States (CFIUS), immigration and visas, cybersecurity and data privacy, civil and criminal government investigations and national/homeland security. He served in various roles with the U.S. Department of Homeland Security (DHS) under President Barack Obama and President George W. Bush.

Antonia I. Tzinova, a partner in Holland & Knight's Washington, D.C., office, practices in the areas of international trade, foreign direct investment and industrial security. She advises on defense and high-technology exports, U.S. trade embargoes and economic sanctions, and customs matters.

Stacey H. Wang is a partner in Holland & Knight's Los Angeles office and a member of the West Coast Litigation Group, Compliance Services Team, and White Collar Defense and Investigations Team. She represents domestic and foreign businesses in complex commercial and intellectual property matters, such as infringement, trade secret theft, business fraud and antitrust/unfair competition actions.

Contact Our China Practice Attorneys
与我们的 China Practice 律师联系

Primary Contacts 主要联系人：

Hongjun Zhang, Ph.D. 张红军博士
Washington, D.C.
+1.202.457.5906
hongjun.zhang@hklaw.com

Mike Chiang 蒋尚仁律师
San Francisco
+1.415.743.6968
mike.chiang@hklaw.com

Juan M. Alcala | Austin
+1.512.954.6515
juan.alcala@hklaw.com

Josias N. Dewey | Miami
+1.305.789.7746
joe.dewey@hklaw.com

R. David Donoghue | Chicago
+1.312.578.6553
david.donoghue@hklaw.com

Jonathan M. Epstein | Washington, D.C.
+1.202.828.1870
jonathan.epstein@hklaw.com

Leonard H. Gilbert | Tampa
+1.813.227.6481
leonard.gilbert@hklaw.com

Sophie Jin | Washington, D.C.
+1.202.469.5179
sophie.jin@hklaw.com

Robert J. Labate | San Francisco
+1.415.743.6991
robert.labate@hklaw.com

Alejandro Landa Thierry | Mexico City
+52.55.3602.8002
alejandro.landa@hklaw.com

Rebecca Leon | Miami
+1.305.789.7703
rebecca.leon@hklaw.com

Moqi Liu | San Francisco
+1.415.743.6963
moqi.liu@hklaw.com

Jeffrey W. Mittleman | Boston
+1.617.854.1411
jeffrey.mittleman@hklaw.com

Anita M. Mosner | Washington, D.C.
+1.202.419.2604
anita.mosner@hklaw.com

Ronald A. Oleynik | Washington, D.C.
+1.202.457.7183
ron.oleynik@hklaw.com

John F. Pritchard | New York
+1.212.513.3233
john.pritchard@hklaw.com

Robert Ricketts | London
+44.20.7071.9910
robert.ricketts@hklaw.com

Luis Rubio Barnetche | Mexico City
+52.55.3602.8006
luis.rubio@hklaw.com

Enrique Gomez-Pinzon | Bogotá
+57.1.745.5800
enrique.gomezpinzon@hklaw.com

Douglas A. Praw | Los Angeles
+1.213.896.2588
doug.praw@hklaw.com

Evan S. Seideman | Stamford
+1.203.905.4518
evan.seideman@hklaw.com

Jeffrey R. Seul | Boston
+1.617.305.2121
jeff.seul@hklaw.com

Vivian Thoreen | Los Angeles
+1.213.896.2482
vivian.thoreen@hklaw.com

Matthew P. Vafidis | San Francisco
+1.415.743.6950
matthew.vafidis@hklaw.com

Stacey H. Wang | Los Angeles
+1.213.896.2480
stacey.wang@hklaw.com

Jose V. Zapata | Bogotá
+57.1.745.5940
jose.zapata@hklaw.com

Office Locations
办公室地点

Anchorage | Atlanta | Austin | Bogotá | Boston | Charlotte | Chicago | Dallas | Denver | Fort Lauderdale | Houston
Jacksonville | Lakeland | London | Los Angeles | Mexico City | Miami | New York | Orlando | Philadelphia | Portland
San Francisco | Stamford | Tallahassee | Tampa | Tysons | Washington, D.C. | West Palm Beach