Holland & Knight

美国霍兰德奈特律师事务所

www.hklaw.com

CHINA PRACTICE 期刊
NEWSLETTER

NOVEMBER - DECEMBER 2022

2022 年 11、12 月刊

Table of Contents

CHINA PRACTICE NEWSLETTER 3
U.S. LABOR DEPARTMENT ISSUES PROPOSED RULE ON INDEPENDENT CONTRACTORS 4
美国劳工部发布关于独立承包商的拟议规则 8
THE LONE STAR INFRASTRUCTURE PROTECTION ACT AND ITS EFFECT ON FOREIGN INVESTMENT IN ERCOT 11
德州基础设施保护法及其对与 ERCOT 有关的外商投资的影响 15
ADDRESSING UNDERWATER STOCK OPTIONS 18
解决行权价格高于股票市价的水下股票期权 23
NEW EXECUTIVE ORDER CREATES ROADMAP OF HEIGHTENED CFIUS SCRUTINY FOR CROSS-BORDER M&A 28
新的行政命令制定了加强 CFIUS 对跨境并购的审查的路线图 32
CFIUS 2021 ANNUAL REPORT: CONSIDERATIONS FOR BUSINESSES 35
CFIUS 2021 年度报告：企业应考虑的事项 38
ABOUT THIS NEWSLETTER 41
有关本期刊 41
ABOUT THE AUTHORS 41
关于本期作者 41

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 1,700 professionals in 32 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, oil and energy, 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 32 个办公室的 1700 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、石油及能源、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。

U.S. Labor Department Issues Proposed Rule on Independent Contractors

By Timothy Taylor, Peter N. Hall and Lindsey R. Camp

HIGHLIGHTS:

- The U.S. Department of Labor (DOL) has issued a new proposed rule addressing the distinction between employees and independent contractors under the Fair Labor Standards Act (FLSA).
- The proposed rule would replace the generally employer-friendly test announced by the DOL in January 2021 with a test that is decidedly more likely to result in findings that contractors have been misclassified under the FLSA and are entitled to overtime.
- The proposed rule was made public on Oct. 11, 2022, and will be officially published in the *Federal Register* on Oct. 13, 2022. Interested parties will have 45 days to submit public comments on the proposed rule. Employers interested in explaining the effect the proposed rule would have on their businesses will have until Nov. 28, 2022, to submit their concerns and arguments to the DOL.

Consistent with its June 2022 announcement, the U.S. Department of Labor (DOL) has issued a new proposed rule addressing the distinction between employees and independent contractors under the Fair Labor Standards Act (FLSA). The proposed rule would return the DOL to a more traditional six-factor test, though one with a pro-employee tilt. The proposed rule appears to give the DOL more flexibility in its enforcement and could bring new uncertainty to employers.

A BRIEF BUT COMPLICATED HISTORY

The FLSA provides various benefits to employees, including a minimum wage and overtime pay for hourly employees. The FLSA does not apply to independent contractors. The distinction between the two has been a frequently litigated issue for roughly 80 years.

Courts today typically use a nonexhaustive all-the-circumstances test to determine whether, as a matter of "economic reality" rather than formal labels, a worker is an employee or an independent contractor. To guide this inquiry, courts use slightly varied formulations of the following factors, give or take a factor or two: 1) the alleged employer's control; 2) the worker's opportunity for profit or loss depending on their managerial skill; 3) the worker's investment in the job; 4) the amount of skill required; 5) the work arrangement's permanence; and 6) whether the service is integral to the business.

In January 2021, the DOL, under then-President Donald Trump, issued a regulation on independent-contractor status. (See Holland & Knight's previous alerts, "DOL May Rescind Final Rules on Independent Contractor, Joint Employer Status," March 25, 2021, and "DOL Rescinds Trump-Era Rule Regarding Employment Status Under the FLSA," May 19, 2021.) While the DOL had previously issued guidance documents on the subject – letters, memos, and the like – it had never before issued a formal regulation. The 2021 regulation emphasized the first two factors, control and opportunity for profit, as the most probative. The DOL justified the promulgation of a regulation on this topic, and their particular test, on the need for clarity in a modern economy.

Shortly after the Biden Administration took office, the DOL attempted to delay and then repeal the Trump-era rule. Their original plan was simply to return to the status quo of no published regulation on the subject. As Holland & Knight reported at the time, the DOL's effort to repeal the Trump-era version of the rule was tied up in litigation (See Holland & Knight previous alert, "Texas Federal Court Reinstates Trump Labor Department's Independent Contractor Rule," March 23, 2022). As a result, the Trump rule issued in 2021 is currently the official rule the DOL ostensibly follows.

The DOL has since decided to try again, and this time by not just repealing the 2021 Trump rule, but by replacing it with something new. It has done so by the proposed rule made public on Oct. 11, 2022, which will be officially published in the *Federal Register*, government's daily catalog, on Oct. 13, 2022.

WHAT THE PROPOSED RULE IS *NOT*

The proposed rule addresses independent-contractor classification under the FLSA, and not any other statute. Different and typically narrower tests apply for determining employee status under, for instance, the Internal Revenue Code (taxes), National Labor Relations Act (unionization), Title VII (discrimination) and common law (for tort liability and other purposes).

The proposed rule also does not directly affect independent-contractor classification for purposes of state employment laws. For instance, the proposed rule does not directly affect states that have implemented a California-style "ABC" test for classifying workers.

WHAT THE PROPOSED RULE SAYS

The proposed rule would add a new Part 795 to Title 29 of the Code of Federal Regulations entitled "Statements of General Policy or Interpretation Not Directly Related to Regulations." According to the Introductory Statement, the purpose of the regulation is to serve as a "practical guide" for employers and employees to understand how the DOL will apply the FLSA. As will be discussed below, the content of the proposed rule and some initial observations on how the content relates to existing law and its potential practical impact. Overall, it appears that the rule tilts the playing field heavily toward employee status.
The regulation begins by framing the ultimate question that, in the DOL's view, separates employees from independent contractors: is the worker, as a matter of economic reality, "economically dependent on the employer for work or in business for themselves." § 795.105(a). Notably, the regulation contemplates that every worker falls into one category or another. It does not expressly contemplate a worker who *chooses* to focus on providing services to a single customer.

To determine which of the two categories a worker fits, the DOL sets forth six nonexclusive factors. While the DOL's factors are familiar and have been cited in federal cases for decades, the DOL's explanation of how to apply each factor largely rejects recent federal appellate authority finding independent contractor status.

Factor 1: "*Opportunity for profit or loss depending on managerial skill*." If a worker can set or negotiate his pay, accept or decline jobs, choose the order or time of performance, engage in marketing to expand the business, and hire others, purchase materials or otherwise invest in the business, the worker is more likely to be an independent contractor. However, deciding to do more work or accept more jobs is not indicative of contractor status. It is unclear how the ability to "accept or decline jobs" indicates contractor status, while the decision to "take more jobs" does not.

Factor 2: "*Investments by the worker and the employer*." Investments that are "capital or entrepreneurial" in nature, such as those increasing the worker's ability to do different types or more work, reducing costs or extending market reach are indicative of contractor status. However, investing in tools to do the job indicate employee status. It is not clear how this factor would be applied in jobs that do not require any significant investment beyond a computer and internet connection. This factor also embraces the idea that the worker's level of investment should be compared to the business' investments. The utility of the relative-comparison factor is at best unclear and at worst illogical, as nearly every business will have invested more overall than any individual worker, and it would change the nature of the employment relationship based not on the worker's activities or the work done, but simply on the size of the business engaging the worker.

Factor 3: "*Degree of permanence of the work relationship*." When the working relationship is indefinite or continuous, it indicates employee status. When the work is definite in duration, nonexclusive, project-based or sporadic "based on" the worker providing services to other businesses, it is indicative of contractor status. When the work is project-based or sporadic for some other reason (such as the nature of the business), then it does not indicate contractor status.

Factor 4: "*Nature and degree of control*." This factor looks at various indicia of control over the work and the economic aspects of the relationship. Importantly, control that is merely reserved, but not exercised, still counts as "control." Also notable is the DOL's statement that control exercised to ensure compliance with "legal obligations, safety standards, or contractual or customer service standards may be indicative of control." Prohibiting a subcontractor from engaging in unlawful discrimination, requiring it to follow safety rules or flowing down compliance clauses, would therefore appear to undermine contractor status.

Factor 5: "*Extent to which the work performed is an integral part of the employer's business*." This factor weighs in favor of employee status when the work is "critical, necessary, or central to the employer's principal business." It is unclear what role a contractor could play that would not be "critical, necessary, or central to the employer's business." For instance, external accounting and marketing functions, both historically areas for independent contractors, would seem to be both "critical" and "necessary."

Factor 6: "*Skill and initiative*." This factor looks at whether the worker uses "specialized skills" in performing the work, and whether those skills "contribute to business-like initiative." Being highly skilled in the substance of a particular field (such as engineering, journalism or hospitality) does not seem to be the kind of "skill" contemplated. Rather, skill in running an independent business is what matters.

The DOL then includes a catch-all provision stating that additional factors may be relevant "if the factors in some way indicate whether the worker is in business for themself, as opposed to being economically dependent on the employer for work."

WHAT NOW?

The proposed rule is just that: *proposed*. Interested parties will have 45 days to submit public comments on the proposed rule. Employers interested in explaining the effect the proposed rule would have on their businesses will have a deadline of Nov. 28, 2022, to submit their concerns and arguments to the DOL. After the comment period closes, the DOL will need to decide whether to move forward with a final rule. If it does, it is believed that the final rule would issue sometime in the second half of 2023, or perhaps in early 2024.

At that point, it is likely that legal challenges to the rule will ensue, with the possibility of injunctions or other events forestalling its effects. Such litigation could take many months or even a year or more to resolve.

The practical result of the new rule, if it is finalized and goes into effect, will be that many workers – including workers who *want* to be independent contractors – will be reclassified as employees under the FLSA. Because independent contractors are generally not paid a salary, and because a salary is usually a prerequisite for exemption from overtime rules, many workers who are reclassified will be entitled to overtime, no matter how much money they otherwise make.

For more information, questions or how the DOL's proposed rule may affect your business or employees, contact the authors or another member of Holland & Knight's Labor, Employment and Benefits Group.

美国劳工部发布关于独立承包商的拟议规则

原文作者：Timothy Taylor 、Peter N. Hall 及 Lindsey R. Camp

重点摘要:

- 美国劳工部 (劳工部) 发布了一项新的拟议规则，处理《公平劳动标准法》(FLSA) 下雇员和独立承包商之间的区别的问题。
- 拟议的规则将取代劳工部于 2021 年 1 月宣布的对雇主普遍友好的测试，而取代的测试显然更有可能导致认为工作者在 FLSA 下被错误归类为承包商，并认为其有权领取加班费。
- 拟议规则于 2022 年 10 月 11 日公布，并将于 2022 年 10 月 13 日在*联邦公报*上正式公布。有关各方将有 45 天的时间就拟议规则提交公众意见。有兴趣解释拟议规则对其业务的影响的雇主将需在 2022 年 11 月 28 日之前向劳工部提出他们的担忧和论据。

如其于 2022 年 6 月所公告，美国劳工部 (劳工部) 发布了一项新的拟议规则，以处理《公平劳动标准法》(FLSA) 下雇员和独立承包商之间的区别的问题。拟议的规则将使劳工部回归到更传统的六个因素测试，尽管其中一个具有偏向雇员的倾向。拟议规则似乎使劳工部在执行方面更具灵活性，并可能给雇主带来新的不确定性。

简段但复杂的历史

FLSA 为员工提供各种福利，包括最低工资和小时工的加班费。FLSA 不适用于独立承包商。大约 80 年来，两者之间的区别一直是一个经常被提起诉讼的问题。

现今的法院通常使用非穷尽的所有情况的测试来确定在"现实经济"而非正式名称下，一位工作者应该是雇员还是独立承包商。为了指导这项调查，法院采用含有以下因素的不同方式（有时少或多适用一两个因素）：1）被主张的雇主的控制程度； 2) 工作者的盈利或亏损机会是否取决于他们的管理技能； 3) 工作者对工作的投资； 4) 所需的技能数量； 5) 工作安排的持久性； 6) 服务是否对业务不可或缺。

2021 年 1 月，时任总统特朗普 (Donald Trump)政府的劳工部发布了一项关于独立承包商地位的规定。（请参阅 Holland & Knight 之前的提示文章，“ 劳工部可能撤销关于独立承包商、共同雇主身份的最终规则”，2021 年 3 月 25 日和“ 劳工部撤销特朗普时代关于 FLSA 下的就业身份的规则”，2021 年 5 月 19 日）。虽然劳工部之前已经发布了关于该议题的指导文件——包括信件、备忘录等——但它之前从未发布过正式的规定。2021 年的规则强调前两个因素（即控制和盈利机会）是最具证明性的因素。劳工部表示颁布有关该议题的法规及其特殊测试的理由是现代经济需要明确性。

拜登政府上任后不久，劳工部试图推迟并废除特朗普时代的规定。他们最初的计划只是回到没有公布有关该议题的法规的现状。正如 Holland & Knight 当时报道的那样，劳工部废除特朗普时代版本规则的努力陷于诉讼之中（请参阅 Holland & Knight 先前的提示文章，“德克萨斯联邦法院恢复特朗普劳工部的独立承包商规则”，2022 年 3 月 23 日)。因此，2021 年发布的特朗普规则目前是劳工部表面遵循的官方规则。

此后，劳工部决定再试一次，这一次不仅是废除 2021 年特朗普规则，而是用新的东西取而代之。它已通过 2022 年 10 月 11 日公布的拟议规则做到了这一点，该规则将于 2022 年 10 月 13 日在政府的每日目录*联邦公报*上正式公布。

拟议规则*不是什么*

拟议规则涉及 FLSA 下的独立承包商分类，而不是任何其他法规。根据《国内税收法》（税收）、《国家劳动关系法》（工会）、《第七章》（歧视）和普通法（用于侵权责任和其他目的）等适用不同且通常更窄的测试来确定该等法律下的员工身份。

拟议规则也不会直接影响州的就业法的独立承包商分类。例如，拟议规则不会对已经实施加州式的"ABC"测试来对工作者进行分类的州产生直接影响。

拟议规则的内容

拟议规则将在联邦法规第 29 章中增加一个新的第 795 部分，名称为"与法规没有直接关系的一般政策或解释的声明"。根据声明的介绍，该法规的目的是作为"实用指南"，让雇主和雇员了解劳工部将如何应用 FLSA。正如下文将讨论的，包括拟议规则的内容以及关于该内容如何与现有法律的关系及其潜在实际影响的一些初步观察。总体而言，该规则似乎使游戏规则严重倾向于员工身份。

该法规首先提出了一个终极问题，即在劳工部看来，区分雇员与独立承包商：作为经济现实问题，工作者是否"在经济上依赖雇主工作或经营自己的业务"。 § 795.105(a)。值得注意的是，该法规考虑到每个工作者都属于一类或另一类。它没有明确考虑*选择*专注于为单个客户提供服务的工作者。

为了确定工作者适用这两个类别中的哪一个，劳工部列出了六个非排他性因素。虽然劳工部的因素很熟悉，并且几十年来一直在联邦案件中被引用，但劳工部关于如何应用每个因素的解释在很大程度上拒绝了最近联邦上诉机关对独立承包商身份的认定。

因素 1：*"取决于管理技能的盈利或亏损机会。"*如果工作者可以设定或协商他的工资、接受或拒绝工作、选择执行工作的顺序或时间、参与营销以扩大业务、雇用他人、购买材料或以其他方式投资于业务，则该工作者更有可能成为独立承包商。然而，决定做更多的工作或接受更多的工作并不是承包商身份的表征。目前尚不清楚为何"接受或拒绝工作"的能力是承包商身份的表征，而"接受更多工作"的决定则不是。

因素 2：*"工作者和雇主的投资"*。本质上属于"资本或创业"的投资，例如提高工作者从事不同类型或更多工作的能力、降低成本或扩大市场范围的投资，都是承包商身份的表征。但是，投资于完成工作的工具是雇员身份的表征。目前尚不清楚这一因素将如何应用于除了计算机和互联网连接之外不需要任何重大投资的工作。这个因素也包含了工作者的投资程度应该与企业的投资相比较的想法。相对比较因素的效用充其量是不明确的，最坏的情况是不合逻辑的，因为几乎每个企业的总体投资都比任何单个工作者都多，而且它可能会改变雇佣关系的性质，而该改变不是基于工作者的活动或工作已完成，但仅取决于聘用该工作者的企业的规模。

因素 3：*"工作关系的持久程度"*。当工作关系是永久的或连续的时，它是雇员身份的表征。当工作的持续时间是确定的、非排他性的、基于项目的或"基于"为其他企业提供服务而断断续续的，它是承包商身份的表征。当工作是基于项目的或由于某些其他原因（例如业务性质）而断断续续进行时，它并非承包商身份的表征。

因素 4：“*控制的性质和程度*”。这个因素着眼于控制工作的各种标志和关系的经济方面。重要的是，仅保留但未执行的控制仍算作“控制”。同样值得注意的是劳工部的声明，即为确保遵守“法律义务、安全标准或合同或客户服务标准而进行的控制可能是控制的表征”。因此，禁止分包商从事非法歧视，要求其遵守安全规则或遵守合规条款，似乎会损害对承包商的身份的支持。

因素 5：“*所从事的工作在多大程度上是雇主业务不可或缺的一部分*。”当工作“对雇主的主要业务至关重要、必要或至关重要”时，这一因素有利于雇员的地位。目前尚不清楚承包商可以扮演什么角色，而不是“对雇主业务至关重要、必要或核心”。例如，外部会计和营销职能，这两个历史上都是独立承包商的领域，似乎既“关键”又“必要”。

因素 6：“*技巧和主动性*”。这个因素着眼于工作者在执行工作时是否使用“专业技能”，以及这些技能是否“有助于商业主动性”。在特定领域（例如工程、新闻或酒店业）的实质内容方面具有高度技能似乎并不是所考虑的那种“技能”。相反，经营独立企业的技能才是最重要的。

然后，劳工部包括一个兜底条款，指出其他因素可能是相关的，“如果这些因素以某种方式显示工作者是否为自己做生意，而不是在经济上依赖雇主工作。”

现在怎么办？

提议的规则就是：*提议*的。相关方将有 45 天的时间就拟议规则提交公众意见。有兴趣解释拟议规则对其业务的影响的雇主将需在 2022 年 11 月 28 日之前向劳工部提交他们的担忧和论据。评论期结束后，劳工部将需要决定是否推进最终规则。如果是这样，相信最终规则将在 2023 年下半年的某个时间发布，或者可能在 2024 年初发布。

届时，很可能会随之而来对该规则的法律挑战，禁令或其他事件可能会阻止其影响。此类诉讼可能需要数月甚至一年或更长时间才能解决。

新规则的实际结果，如果最终确定并生效，将是许多工作者——包括*希望*成为独立承包商的工作者——将被重新归类为 FLSA 下的雇员。由于独立承包商通常不领取工资，而且工资通常是豁免加班规则的先决条件，因此许多被重新分类的工作者将有权获得加班费，无论他们赚了多少钱。

如需更多信息、问题或劳工部提议的规则可能如何影响您的企业或员工，请联系作者或 Holland & Knight 劳工、就业和福利小组的其他成员。

The Lone Star Infrastructure Protection Act and Its Effect on Foreign investment in ERCOT

By Dane McKaughan

In the 2021 Legislative Session, the Texas Legislature passed the Lone Star Infrastructure Protection Act (LSIP), modifying the Business and Commerce Code to prohibit certain persons from owning or operating facilities that provide access to or control of "critical infrastructure" in the state. Specifically, LSIP added Chapter 113 to the Business and Commerce Code and Chapter 2274 to the Government Code that prohibits business entities and governmental entities from entering into any agreement relating to critical infrastructure with companies owned by individuals or companies (including affiliates) from the countries of China, Iran, North Korea and Russia, or companies (including affiliates) headquartered in those countries. The passage of LSIP and the corresponding actions taken by governmental entities such as the Electric Reliability Council of Texas (ERCOT) have caused confusion in the electricity market in Texas. This article discusses LSIP and how it has been applied in ERCOT to Chinese companies seeking to interconnect with ERCOT, as well as proposing some steps that can be taken to participate in the Texas market while still remaining compliant with LSIP.

WHAT IS CRITICAL INFRASTRUCTURE UNDER LSIP?

LSIP expressly defines "critical infrastructure" as "a communication infrastructure system, cybersecurity system, electric grid, hazardous waste treatment system, or water treatment facility." TEX. BUS.& COM. CODE § 113.001(2); TEX. GOV'T CODE § 2274.0101(2). Applying that definition, the ERCOT grid clearly is critical infrastructure, and that is the context in which LSIP has most often been applied since its passage.

WHAT IS "DIRECT ACCESS OR CONTROL"?

The Texas Attorney General (AG) on Sept. 23, 2021, issued an opinion (KP-0388) interpreting LSIP as it applies to foreign ownership of facilities potentially interconnecting with ERCOT and ownership of land on which such facilities are sited. The examples being evaluated by the AG involved a Chinese company. This company was in the process of constructing generation facilities in ERCOT and had already submitted documents seeking interconnection with the grid. The AG looked at ERCOT's standard generation interconnection agreement (SGIA), which specifies that the generation resource to be connected to a transmission service provider must "own and operate" the proposed generation resource. The SGIA is a necessary step to allow a company to access the ERCOT grid, which as noted above is expressly defined as critical infrastructure. Thus, such an arrangement on its face triggered LSIP in this example because per the SGIA the generation resource must be owned and operated by the entity seeking interconnection, and that entity cannot be owned or operated by a Chinese company.

The AG opinion further discussed whether the Chinese company could lease the facilities and/or the land on which it is sited to an entity not implicated by LSIP. The AG opined that a lessee would not "own" the facilities as required by the SGIA, and therefore this scenario could not survive the requirements of the ERCOT Protocols (as expressed in the SGIA) and LSIP. With respect to leasing the land, the AG concluded that a lease arrangement for the land may still allow for a company to have direct or remote access to critical infrastructure, either through some provision of the lease agreement itself or through a possible breach of the lease agreement wherein the Chinese owner of the facilities and/or land would regain access to the critical infrastructure.

Based on this opinion, ERCOT removed the Chinese company from the queue seeking interconnection. ERCOT further took the position that the Chinese company could not continue to own the land on which these generating facilities would be constructed. This left the particular Chinese company scrambling to recapture some of the value it had already invested in the project. Thus, ERCOT has taken a broad view of "direct control or access" to critical infrastructure as it relates to Chinese ownership of generation resources or the property on which those facilities are sited.

WHAT STEPS CAN BE TAKEN TO MITIGATE THE IMPACT OF LSIP ON CHINESE INVESTMENT IN THE ERCOT MARKET?

As an initial matter, the constitutionality of LSIP has not been tested in the courts, and may violate the doctrine of federal preemption (foreign policy is generally a federal, not state, activity), and the Dormant Foreign Commerce Clause and Dormant Interstate Commerce Clause of the U.S. Constitution. But unless, and until, such a case is successfully litigated in the courts, the interpretation of LSIP by ERCOT will likely have control in situations where Chinese companies seek to own facilities connected to the ERCOT grid.

But this does not mean that Chinese investment in generation projects going forward is necessarily foreclosed in ERCOT. To understand what opportunities remain, it may be helpful to provide some background on the interconnection process. In developing new generation resources, one of the first regulatory approval steps an entity must take is to file its SGIA with ERCOT. The filing of the SGIA triggers an ERCOT review of the proposed generation or storage resource. ERCOT reviews a SGIA to:

a. determine the facilities required to directly interconnect new generation

b. ensure that the interconnection is accomplished in a manner that maintains the reliability of the ERCOT system and be in compliance with North American Electric Reliability Corporation Reliability (NERC) standards, ERCOT Protocols, Planning Guide and Operating Guides;

c. increase the quality of communications among interconnecting entities, transmission service providers and ERCOT;

d. provide the best available information on future capacity additions; and

e. provide accurate initial data about the proposed generation resource to ERCOT to ensure that ERCOT and stakeholders have the information necessary for planning purposes.

Since the passage of LSIP, upon receipt of a new SGIA, ERCOT has propounded a request for information to all newly proposed interconnecting entities (IE). This request asks the entity to certify that the IE does not fall into one or more of the following categories:

a. the IE or Property Owner, or a wholly owned subsidiary, majority-owned subsidiary, parent company, or affiliate of the IE or Property Owner, is owned by:

   (i) individuals who are citizens of China, Iran, North Korea, Russia, or a designated country; or

   (ii) a company or other entity, including a governmental entity, that is owned or controlled by citizens of or is directly controlled by the government of China, Iran, North Korea, Russia, or a designated country; or

b. the majority of stock or other ownership interest of the IE or Property Owner, or a wholly owned subsidiary, majority-owned subsidiary, parent company, or affiliate of the above referenced IE or Property Owner is held or controlled by:

   (i) individuals who are citizens of China, Iran, North Korea, Russia, or a designated country; or

   (ii) a company or other entity, including a governmental entity, that is owned or controlled by citizens of or is directly controlled by the government of China, Iran, North Korea, Russia, or a designated country; or

c. the IE or Property Owner, or a wholly owned subsidiary, majority-owned subsidiary, parent company, or affiliate of the IE or Property Owner is headquartered in China, Iran, North Korea, Russia, or a designated country.

To the extent that the IE responds positively to one or more of these scenarios, then ERCOT will likely refuse to allow that IE to enter the interconnection queue and notify the IE that the project violates LSIP and cannot be connected to the ERCOT grid under these circumstances.

But there are some things of note here. First, ERCOT's request for information refers to a "wholly owned" or "majority-owned" entity, subsidiary or affiliate. This reference to a "majority-owned" entity comes straight from the text of the LSIP. This suggests that minority ownership by one or more Chinese companies in facilities or property seeking interconnection with ERCOT may not trigger LSIP and would allow for the IE to make the desired certification. Which in turn allows the IE to remain in the interconnection queue while the project is developed. So, this opens the door to Chinese investment in an IE up to a majority stake.

Secondly, the development time between when an IE submits a SGIA and when the project is energized and interconnected to the grid can take years and often requires significant capital to be raised in order to construct the facilities. This opens the possibility of Chinese investment in the project between the time when the IE submits the SGIA and certifies its compliance with LSIP and the time when the project is fully constructed and ready to be interconnected. ERCOT is unlikely to seek additional LSIP-related certifications throughout the development process. So long as the Chinese investment occurs after the initial LSIP certification to ERCOT and is recouped before interconnection, then the project should comply with LSIP. ERCOT requested the certification from the Chinese company in the above example after it had already submitted its SGIA and after it was already in the interconnection queue because the Legislature passed the LSIP after these events had already taken place. For new projects, the certification will be requested at the initial stages after submitting the SGIA. There is also an open question if Chinese ownership of a project's debt rather than equity triggers the LSIP.

Finally, the AG opinion is careful not to sweep up every possible lease agreement for Chinese-owned generation facilities and/or property to LSIP-compliant entities. Specifically, the AG states that "the extent to which any specific agreement grants direct or remote access to or control of critical infrastructure will depend in part on the terms of the contract at issue." Thus, it remains possible that a contract can be drafted in such a way as to allow for the lease without the possibility of access or control of critical infrastructure by a Chinese owner of the generation resource and/or property. This interpretation has been confirmed in conversations with ERCOT regarding other potential projects with Chinese investment and their potential interconnection to the ERCOT grid. Again, though, approval of such a circumstance will depend on the specific contractual language.

CONCLUSION AND TAKEAWAYS

In conclusion, LSIP has created confusion and caused ERCOT to remove existing Chinese-owned projects from the interconnection queue. But there remain potential avenues for Chinese investment in ERCOT. ERCOT continues to need additional capacity to serve growing demand in the state, so ERCOT has an incentive to find a way to approve projects so long as the LSIP is not violated. Possible options for Chinese investment include minority ownership, investment strictly in the development and construction stage after the initial LSIP-certification has been made and before actual interconnection, and artful drafting of contracts to remove the possibility of any potential control or access by the Chinese company. Nonetheless, given the uncertainty that LSIP creates and the broad interpretation of "control or access" that ERCOT has taken, any new Chinese investment in ERCOT may choose to seek some certainty from ERCOT on prospective projects. Having ERCOT buy-in from the start of any project mitigates the possibility of negative surprises to Chinese investors in the ERCOT market.

德州基础设施保护法及其对与 ERCOT 有关的外商投资的影响

原文作者： Dane McKaughan

在 2021 年的立法议程中，德州立法机关通过了《德州基础设施保护法》（LSIP），修改了《事业及商业法规》， 以禁止某些人拥有或运营能够进入或控制该州“关键基础设施”的设施。具体而言，LSIP 在《事业及商业法规》中增加了第 113 章，并在《政府法规》中增加了第 2274 章，以禁止商业实体和政府实体与中国、伊朗、朝鲜和俄罗斯等国的个人或公司（包括附属公司）所拥有的公司、或总部位于这些国家的公司（包括附属公司）签订任何关于关键基础设施的协议。LSIP 的通过以及德州电力可靠性委员会（ERCOT）等政府实体采取的相应行动在德州电力市场中造成疑惑。本文讨论了 LSIP 以及它如何在 ERCOT 中对寻求与 ERCOT 互联的中国公司进行适用，并提出了一些可以采取的步骤，以能在同时仍遵守 LSIP 的情况下参与德州市场。

LSIP 下的关键基础设施是什么？

LSIP 明确将“关键基础设施”定义为“通信基础设施系统、网络安全系统、电网、危险废物处理系统或水处理设施” 。德州《事业及商业法规》第 113.001（2）条；德州《政府法规》第 2274.0101（2）条。应用这个定义，ERCOT 电网显然是关键基础设施，这也是自 LSIP 通过以来最常应用的情况。

什么是“直接进入或控制”？

2021 年 9 月 23 日，德州总检察长（AG）发布了一项意见（KP-0388），解释 LSIP 如何适用于可能与 ERCOT 互联的设施的外国所有权以及此类设施所在地的土地所有权的问题。AG 评估的例子涉及一家中国公司。该公司正在建造 ERCOT 的发电设施，并已提交寻求与电网互联的文件。AG 研究了 ERCOT 的标准发电互联协议（SGIA），该协议规定，要将发电资源连接到输电服务的供供应商必须“拥有并运营”该预计连结的发电资源。签订 SGIA 是允许一公司接入 ERCOT 电网的必要步骤，如上所述，ERCOT 电网被明确定义为关键基础设施。因此，这种安排本身就在在本例中触发了 LSIP 的适用，因为根据 SGIA，发电资源必须由寻求互联的实体拥有及运营，而该实体不能由中国公司拥有或运营。

AG 的意见进一步讨论了中国公司是否可以将其所在的设施和/或土地租赁给未受 LSIP 影响的实体。AG 认为，承租人不会“拥有”SGIA 要求的设施，因此，这种情况无法满足 ERCOT 的要求（如 SGIA 所述）和 LSIP 的规定。关于土地租赁，AG 得出结论认为，土地租赁安排仍可能允许公司通过租赁协议本身的某些规定，或通过使设施和/或土地的中国所有人能重新获得进入关键基础设施的权力的赁协议的可能违反，而直接或远端进入关键基础设施。

基于这一观点，ERCOT 将中国公司从寻求互联的队列中移除。ERCOT 进一步采取了中国公司无法继续拥有建造这些发电设施的土地的立场。这使得这家特定的中国公司正仓促地取回其在该项目中已经投资的部分价值。因此，在关系到对中国人拥有的发电资源或这些设施所在的财产时的“直接控制或进入” 关键基础设施的问题，ERCOT 采取一个广泛的看法。

可以采取哪些措施来缓解 LSIP 对中国对 ERCOT 市场投资的影响？

首先，LSIP 的合宪性尚未在法院中被测试，它可能违反联邦优先权原则（即外交政策通常是联邦而非州的活动），以及美国宪法的潜伏外交商务条款和潜伏州际商务条款。但是，除非此类案件在法院中被成功诉讼解决，否则在中国公司寻求拥有与 ERCOT 电网相连的设施的情况中，ERCOT 对 LSIP 的解释应会具有控制权。

但这并不意味着中国对未来发电项目的投资机会必然会在 ERCOT 被关闭。为了了解还有哪些机会，提供一些互联过程的背景可能会有所帮助。在开发新的发电资源时，实体必须采取的首批监管批准步骤之一是向 ERCOT 提交其 SGIA。SGIA 的备案触发了 ERCOT 对拟议发电或存储资源的审查。ERCOT 审查 SGIA 以：

a. 确定直接与新的发电互联所需的设施

b. 确保得以维持 ERCOT 系统可靠性的方式完成互联，并符合北美电力可靠性公司可靠性（NERC）标准、ERCOT 的要求、规划指南和操作指南；

c. 提高互联实体、传输服务供应商和 ERCOT 之间的通信质量；

d. 提供关于未来新增产能的最佳可用信息；和

e. 向 ERCOT 提供关于拟议发电资源的准确初始数据，以确保 ERCOT 和利益相关者拥有规划所需的信息。

自 LSIP 通过以来，在收到新的 SGIA 后，ERCOT 向所有新提议的互联实体提出了信息请求。此请求要求实体证明互联实体不属于以下一个或多个类别：

a. 互联实体或财产所有人，或全资子公司、多数股权子公司、母公司，或互联实体或资产所有人的关联公司，由以下公司所有：

   (i) 中国、伊朗、朝鲜、俄罗斯或指定国家公民；或

   (ii) 由中国、伊朗、朝鲜、俄罗斯或指定国家公民拥有或控制或直接控制的公司或其他实体，包括政府实体；或

b. 上述互联实体或财产所有人或其全资子公司、控股子公司、母公司或附属公司的大部分股票或其他所有权权益由以下人士持有或控制：

   (i) 中国、伊朗、朝鲜、俄罗斯或指定国家公民；或

   (ii) 由中国、伊朗、朝鲜、俄罗斯或指定国家公民拥有或控制或直接控制的公司或其他实体，包括政府实体；或

c. 互联实体或财产所有人，或其全资子公司、多数股权子公司、母公司或附属公司，其总部位于中国、伊朗、朝鲜、俄罗斯或指定国家。

如果互联实体符合上述一种或多种情况，那么 ERCOT 可能会拒绝允许互联实体进入互联队列，并通知互联实体项目违反 LSIP，在这些情况下无法连接到 ERCOT 电网。

但这里有一些值得注意的事情。首先，ERCOT 的信息请求是指“全资”或“多数股权”实体、子公司或附属公司。这种对“多数股权”实体的引用直接来自 LSIP 的文本。这表明，一家或多家中国公司在寻求与 ERCOT 互联的设施或财产中的少数股权可能不会触发 LSIP，并允许互联实体进行所需认证。这反过来又允许互联实体在项目开发期间保留在互联队列中。因此，这为中国企业对互联实体投资到不超过多数股权的程度打开了大门。

其次，从互联实体提交 SGIA 到项目通电并与电网互联之间的开发时间可能需要数年，通常需要筹集大量资金来建设设施。从互联实体提交 SGIA 并证明其符合 LSIP 的时间到项目完全建成并准备互联的时间，这为中国投资该项目提供了可能性。ERCOT 不太可能在整个开发过程中寻求额外的 LSIP 相关认证。只要中国投资发生在 ERCOT 的初始 LSIP 认证之后，并在互联之前收回，那么项目应符合 LSIP。ERCOT 在上述示例中要求中国公司提供认证，前提是其已经提交了 SGIA，并且已经进入互联队列，因为立法机构在这些事件发生后通过了 LSIP。对于新项目，将在提交 SGIA 后的初始阶段申请认证。还有一个悬而未决的问题是，中国对项目债务而非股权的所有权是否触发了 LSIP。

最后，AG 的意见谨慎地避免将中国拥有的发电设施和/或财产的所有可能租赁协议都清理给符合 LSIP 的实体。具体而言，AG 表示，“任何具体协议允许直接或远端进入或控制关键基础设施的程度将部分取决于相关合同的条款。”，仍有可能起草合同，以便在不允许发电资源和/或财产的中国所有者进入或控制关键基础设施的情况下允许租赁。这一解释已在与 ERCOT 就中国投资的其他潜在项目及其与 ERCOT 电网的潜在互联进行的对话中得到证实。然而，同样，这种情况的批准将取决于具体的合同语言。

结论和要点

总之，LSIP 造成了混乱，导致 ERCOT 将现有中国拥有的项目从互联队列中删除。但中国对 ERCOT 的投资仍有潜在渠道。ERCOT 继续需要额外的能力来满足该州不断增长的需求，因此，只要不违反 LSIP，ERCOT 就有动力寻找批准项目的方法。中国投资的可能选择包括少数股权，在取得初始 LSIP 认证之后和实际互联之前，严格在开发和建设阶段进行投资，以及巧妙地起草合同，以消除中国公司进行任何潜在控制或进入权力的可能性。尽管如此，考虑到 LSIP 带来的不确定性以及 ERCOT 对“控制或进入”的宽泛解释，任何中国对 ERCOT 的新投资都可能会选择从 ERCOT 那里寻求对未来项目的一些确定性。如能让 ERCOT 在任何项目开始时给予支持将可以减轻 ERCOT 市场中中国投资者出现负面意外的可能性。

Addressing Underwater Stock Options

By John D. Martini, Victoria H. Zerjav and Nicole F. Martini

HIGHLIGHTS:

- Given the significant decline in the stock prices of many companies over the past several months of 2022, a number of companies are reassessing their equity programs and considering repricing outstanding employee stock options.
- Companies are concerned that significantly "underwater" options no longer provide the incentives to employees that were intended when they were originally granted, and they also fear they may lose employees to other companies where these employees can receive new options at today's lower exercise prices.
- This Holland & Knight alert offers recommendations on how to address underwater options.

Given the significant decline in the stock prices of many companies over the past several months of 2022, a number of companies are reassessing their equity programs and considering repricing outstanding employee stock options.[1] Companies are concerned that significantly "underwater" options no longer provide the incentives to employees that were intended when they were originally granted. They also fear they may lose employees to other companies where these employees can receive new options at today's lower exercise prices.

ADDRESSING UNDERWATER OPTIONS

When deciding how to address underwater options, companies should keep the following considerations in mind:

- **Accounting**. Under Financial Accounting Standards Board (FASB) Accounting Standards Codification (ASC) Topic 718 – Stock Compensation, an accounting charge may be incurred based on the approach taken.
- **Section 409A**. New options must be structured so that they are either exempt from or compliant with Section 409A of the Internal Revenue Code of 1986, as amended (Section 409A).
- **Recognition of Ordinary Income**. Depending on the approach taken, option holders may lose their ability to control the timing of a taxable event.
- **Incentive Stock Options**. Option repricings involving incentive stock options (ISOs) raise certain tax issues. First, if an option is repriced, the adjustment will be considered a new option and will give rise to a new grant date for purposes of the ISO holding periods set forth in Section 422 of the Internal Revenue Code. Second, Section 422(d) of the Code provides that ISOs will be treated as non-qualified stock options (NQSOs) to the extent that the aggregate fair market value of the stock with respect to which ISOs are exercisable for the first time during any calendar year exceeds $100,000. In a repricing, if the exercisability of the prior option is carried over to the new option, the new option may cause the aggregate ISOs vesting in that year to exceed the $100,000 limitation.

- **Shareholder Approval**. Whether shareholder approval is required depends on the approach taken and the terms of the equity plan document. See also the below regarding shareholder considerations.

- **Tender Offer**. The S. Securities and Exchange Commission (SEC) has taken the position that a stock option repricing in the form of an exchange program that allows employees to surrender existing, out-of-the-money options for new, lower-priced options involves individual investment decisions and, therefore, constitutes an issuer tender offer. As a result, these exchange programs are subject to Rule 13e-4, the issuer tender offer rule, which, among other things, requires the filing of a Schedule TO with the SEC and the dissemination to option holders of the disclosure documents specified by the rule. In addition, the issuer must also comply with Regulation 14E, which places restrictions on the conduct of tender offers and requires all tender offers to remain open for at least 20 business days. These requirements will add significant costs and time delays to the process of conducting these exchange programs.

However, the SEC issued an exemptive order for issuer exchange offers that are conducted for compensatory purposes, which generally eliminates the following tender offer requirements:

- the "all holders" rule, which requires that the tender offer is open to all holders of the share class subject to the offer, and

- the "best price" rule, which requires that all holders in a tender offer be paid the same price

In order to qualify for this exemption, the exchange offer must meet the following four conditions:

- the issuer is eligible to use Form S-8, the options subject to the exchange offer were issued under an employee benefit plan, and the new options offered in the exchange will be issued under such a plan

- the exchange offer is conducted for compensatory purposes

- the issuer discloses in the offer to purchase the essential features and significance of the exchange offer

- except as exempted by the order, the issuer complies with all requirements of Rule 13e-4

If the repricing is only offered to a small number of executives, however, the repricing is unlikely to be considered a tender offer.

ADDRESSING OUT-OF-THE-MONEY OPTIONS

Companies may consider one or a combination of the following Options 1-4 to address stock options that are no longer in the money.

Option 1: Straight Option Repricing

Mechanism. The employer reduces the exercise price of the option to the fair market value of the stock as of the date of the repricing. The employer accomplishes this by either amending the outstanding options to change the exercise price or canceling the outstanding options and issuing new options with the lower exercise price.

Shareholder Approval. Companies should look to their equity plan documents to determine whether an option repricing may be effected without shareholder approval. If the company is public, the plan document must explicitly state that repricings are permitted without shareholder approval; if the plan document is silent, New York Stock Exchange (NYSE) and Nasdaq listing standards treat the silence as prohibition. Public companies must also file a proxy statement, and if new securities are granted to named executive officers and/or Section 16 insiders, the company must file Form 8-K and/or Form 4, respectively. It is common in plans for private companies that no shareholder approval would be required, but in addition to the plan documents, shareholder agreements should be reviewed.

Tax Impact. If an option is canceled and a new option is issued or the original option is repriced, there is no tax event. In order for the new option or repriced option to remain exempt from Section 409A of the Code, the exercise price of such option must be at least equal to or greater than the fair market value of the stock underlying the option at the time of grant or repricing, as applicable.[2]

Accounting. FASB ASC Topic 718 – Stock Compensation states that an option exchange is a modification of the original option. Because a straight option repricing increases the value of the option (or replaces an option with a higher-value option), an accounting charge is incurred. While this may not be a concern for a private company, this can be meaningful for a public company.

Option 2: Value-for-Value Exchange

Mechanism. The employer issues new options in exchange for the underwater options at a ratio of less than one-to-one. The new grant has a fair value (using a method such as Black Scholes) equal to or less than the value of the original grant.

Shareholder Approval. The shareholder approval requirements for a value-for-value exchange are the same as the requirements for a straight option repricing. Shareholders and (for public companies) proxy advisory firms prefer the value-for-value exchange because dilution and compensation expense are minimized.

Tax Impact. The tax implications of a value-for-value exchange are the same as the tax implications for a straight option repricing.

Accounting. Because the value of the options (in the aggregate) either remains the same or decreases, no accounting charge should be incurred.

Option 3: Exchange for Other Equity

Mechanism. The employer cancels outstanding options and grants another equity award (often restricted stock or restricted stock units) with equal or lower value as a replacement.

Shareholder Approval. The shareholder approval requirements for an exchange for other equity are the same as the requirements for a straight option repricing.

Tax Impact. Option holders are generally taxed at the time the new awards of restricted stock or RSUs vest. If the holder makes an 83(b) election with respect to an award of restricted stock, the holder is taxed on the grant date.

Accounting. Because the value of the award (in the aggregate) either remains the same or decreases, no accounting charge is incurred.

Option 4: Cash Buyout

Mechanism. The employer cancels outstanding options in exchange for a cash payment.

Shareholder Approval. Shareholder approval is unlikely to be required. Plan documents and shareholder agreements should be reviewed.

Tax Impact. Option holders are taxed at the time of the cash-out.

Accounting. The company recognizes an expense for any vested portion of the option (to the extent unexercised) equal to the greater of the settlement fair value or the original grant date fair value and the expense for any unvested portion is recognized immediately (to the extent that it has not yet been amortized). If the cash payout exceeds the current fair value of the award, the excess is recorded as an additional compensation cost.

PROXY STATEMENT DISCLOSURE

Public companies subject to the proxy statement requirements of Section 14 of the Securities Exchange Act must include in any proxy statement containing executive compensation information detailed disclosures concerning option repricings effected during the last fiscal year that included the executive officers listed in the various compensation tables contained in the proxy statement, also known as the "named executive officers." The required disclosures include:

- a report of the compensation committee explaining the terms of the repricing and the basis for the repricing
- detailed tabular information concerning all repricings of options held by any executive officer during the last 10 fiscal years.

Of course, if an option repricing program excludes the named executive officers, this disclosure is not required.

Under the SEC's new pay versus performance disclosure rules, companies will need to carefully consider how an option repricing or exchange will impact how they calculate the value of equity awards. The value of the equity awards would be included in the calculation of compensation actually paid to the named executive officer.

SHAREHOLDER AND OTHER RELATED CONCERNS

Implementation of an option repricing program often generates a negative backlash from shareholders (particularly in public companies, but this is also a concern for private companies) who have seen the value of their holdings diminish, who fear addition dilution from the outstanding options and who believe repricings diminish the goal of aligning shareholders' and management's interests. Shareholder opposition to option repricings creates a risk of shareholder lawsuits. These lawsuits will generally allege a waste of corporate assets based on the grounds that the company has received no benefit from the repricing.

Other negative implications of option repricings include:

- sending a signal to the market that the company does not expect to achieve its previous stock price
- sending a message to employees that performance of the company's stock is not important because management can always reduce option exercise prices whenever necessary
- creating the impression that employees do not face the same risks as the company's shareholders, who, of course, cannot reprice their stock holdings

In response to shareholder concerns, companies that decide to go forward with a repricing program may wish to consider implementing one or more of the following approaches:

- obtain shareholder pre-approval of any particular repricing program, or at least of the outer boundary terms of any future option repricings
- exclude executive officers and directors from the repricing program
- provide employees with fewer repriced options in exchange for their underwater options
- reprice only a portion of the underwater options
- adjust the vesting provisions of the new grants

CONCLUSION

While option repricings or similar restructuring of equity awards may be a very meaningful way to readjust and right size incentive programs in a down market, any repricing or restructuring should be done only after consideration of the requirements and the risks involved so the issuer is fully prepared to respond to any questions or contests of the decision.

If you have any questions about your company's equity incentive plans, please contact the authors, another member of Holland & Knight's Executive Compensation and Benefits Team or your primary Holland & Knight attorney.

Notes

[1] While it is more common to hear of public companies repricing options, private companies can and do reprice options as well.

[2] Repricing an option several times may create a risk that the exercise price is treated as variable instead of fixed for purposes of Section 409A of the Code.

解决行权价格高于股票市价的水下股票期权

原文作者： John D. Martini 、Victoria H. Zerjav 及 Nicole F. Martini

重点摘要：

- 鉴于许多公司的股价在 2022 年过去几个月中大幅下跌，一些公司正在重新评估其股票期权计划，并考虑对已发行的员工股票期权进行重新定价。
- 公司担心，显着“水下”的股票期权不再为员工提供最初授予时的预期激励效果，他们还担心他们可能会失去员工到这些员工可以得到具有现今较低行权价格的新的期票期权的其他公司。
- 本 Holland & Knight 提示文章提供有关如何解决水下期权的建议。

鉴于许多公司的股价在 2022 年过去几个月中大幅下跌，一些公司正在重新评估其股票期权计划，并考虑对已发行的员工股票期权进行重新定价。[1] 公司担心，显着“水下”的期权不再向员工提供最初授予时的预期激励效果，他们还担心他们可能会失去员工到这些员工可以得到具有现今较低行权价格的新的股票期权的其他公司。

解决水下期权

在决定如何解决水下期权时，公司应考虑到以下注意事项：

- **会计**。根据财务会计准则委员会 (FASB) 会计准则编纂 (ASC) 主题 718 – 股票薪酬，可能会根据所采取的方法产生会计费用。
- **第 409A 条**。必须将新的期权规划成不受经修订的 1986 年《国内税收法》第 409A 条（第 409A 条）的规范或符合其规定的期权。
- **普通收入的确认**。根据所采取的方法，期权持有人可能会失去控制应被课税的时间的能力。
- **激励股票期权**。涉及激励性股票期权 (ISO) 的期权重新定价会引发某些税务问题。首先，如果一个期权被重新定价，调整将被视为一个新的期权，并因《国内税收法》第 422 条规定的 ISO 持有期的目的将产生一个新的授予日期。其次，《国内税收法》第 422(d) 条规定，如果在任何日历年内首次可行使的 ISO 的总公平市场价值超过 100,000 美元时，则 ISO 将被视为非合格股票期权 (NQSOs)。在重新定价时，如果之前期权的可行使性被转移到新的期权时，新期权可能会导致当年归属的 ISO 的总额超过 100,000 美元的限制。
- **股东批准**。是否需要股东批准取决于所采取的方法和股权计划文件的条款。请另参阅以下有关股东考虑的内容。

- **要约收购**。美国证券交易委员会 (SEC) 的立场是，以允许员工放弃现有价外期权以换取新的较低行权价的期权的交换计划的股票期权重新定价形式涉及个人投资决定，因而构成发行人要约收购。因此，这些交换计划受规则 13e-4 （即发行人要约收购规则）的约束，除其他外，该规则要求向 SEC 提交附表 TO ，并向期权持有人分发规则规定的披露文件。此外，发行人还必须遵守第 14E 号条例的规定，而该条例对要约收购的进行进行了限制，并要求所有要约收购至少开放 20 个工作日。这些要求将大大增加进行这些交换计划的过程的成本和造成时间延迟。

但是，美国证券交易委员会针对出于薪酬补偿目的而进行的发行人交换要约发布了豁免令，这通常免除了以下的要约收购要求：

- “所有持有人”规则，该规则要求要约收购对其所含括的股份类别的所有持有人开放，以及
- “最优价格”规则，其要求要约收购中的所有持有人被支付相同的价格

为了有资格获得此豁免，交换要约必须满足以下四个条件：

- 发行人有资格使用表格 S-8、受交换要约约束的期权是根据员工福利计划发行的、且交换所提供的新期权将根据该计划发行
- 交换要约是出于薪酬补偿目的所作
- 发行人在收购要约中披露交换要约的重要特征和重要性
- 除命令豁免外，发行人遵守规则 13e-4 的所有要求

但是，如果重新定价只提供给少数高管，则重新定价不太可能被视为要约收购。

处理行权价格高于现价的价外期权

公司可以考虑以下选项 1-4 中的一个或数个的组合来解决不再具有价值的股票期权。

选项一：直接进行期权重新定价

机制。雇主将期权的行权价格降低至重新定价之日股票的公允市场价值。雇主通过修改未行使的期权以改变行权价或取消未行使的期权并发行具有较低行权价的新期权来实现这一点。

股东批准。公司应查看其股权计划文件，以确定是否可以在未经股东批准的情况下进行期权重新定价。如果公司是上市公司，则计划文件必须明确说明允许在未经股东批准的情况下重新定价；如果计划文件对这点没有作出规定，纽约证券交易所（NYSE）和纳斯达克上市标准将该未规定视为禁止。上市公司还必须提交一份委托书，如果新证券被授予给指定的高管和/或第 16 条的内部人员，公司必须分别提交表格 8-K 和/或表格 4。私人公司的计划通常不需要股东批准，但除计划文件外，还应审查股东协议。

税务影响。如果取消期权并发行新期权或者对原始期权重新定价，则不会发生课税事件。为了使新的期权或重新定价的期权仍然不受《国内税收法》第 409A 条的规范，该期权的行权价格必须至少等于或高于授予或重新定价时期权相关股票的公允市场价值(如适用)。[2]

会计。 FASB ASC 主题 718 – 股票薪酬补偿指出期权交换是对原始期权的修改。因为直接的期权重新定价增加了期权的价值（或用更高价值的期权代替期权），所以会产生会计费用。虽然这对私人公司来说可能不是一个问题，但这对上市公司来说可能具有意义。

选项二：价值交换

机制。雇主以低于一比一的比例发行新期权以换取水下期权。新授予的公允价值（使用 Black Scholes 等方法）等于或小于原始授予的价值。

股东批准。价值交换的股东批准要求与直接期权重新定价的要求相同。股东和（上市公司的）代理咨询公司更喜欢价值交换，因为稀释和补偿费用被最小化。

税务影响。价值交换的税收影响与直接期权重新定价的税收影响相同。

会计。由于期权的（总计）价值要么保持不变，要么下降，因此不应产生会计费用。

选项三：交换为其他股权

机制。雇主取消未行使的期权并授予另一个价值相等或更低的股权奖励（通常是限制性股票或限制性股票单位）作为替代。

股东批准。交换其他股权的股东批准要求与直接期权重新定价的要求相同。

税务影响。期权持有人通常在新授予的限制性股票或 RSU 归属时被征税。如果持有人就授予限制性股票做出 83(b) 选择，则持有人在授予日被课税。

会计。由于奖励的（总计）价值要么保持不变，要么减少，因此不会产生会计费用。

选项四：现金买断

机制。雇主取消已发行的期权以换取现金付款。

股东批准。不太可能需要股东批准。应审查计划文件和股东协议。

税务影响。期权持有人在收到现金时将被征税。

会计。公司将对期权的任何已归属部分（在未行使的范围内）等于结算公允价值或原始授予日公允价值中的较高者的费用承认为费用，并且对任何未归属部分的费用（在其尚未摊销的范围内）立即承认为费用。如果现金支付超过授予的期权的当前公允价值，超出部分记录为额外薪酬补偿成本。

委托书声明披露

受《证券交易法》第 14 条委托书要求约束的上市公司必须在任何包含高管薪酬信息的委托书中详细披露上一财年实施的期权重新定价，包括委托书中各种薪酬表中列出的高管（又称“指定高管”）。要求的披露包括：

- 薪酬委员会的报告，解释重新定价的条款和重新定价的依据
- 有关任何高管在过去 10 财年中持有的所有期权的重新定价的详细表格信息。

当然，如果期权重新定价计划不包括指定高管，则不需要披露。

根据 SEC 新的薪酬与绩效披露规则，公司需要仔细考虑期权重新定价或交换将如何影响他们计算股权奖励的价值。股权奖励的价值将包括在实际支付给指定高管的薪酬计算中。

股东及其他相关问题

期权重新定价计划的实施通常会引起股东（尤其是上市公司，但这也是私人公司的担忧）的负面反弹，他们看到其所持股份的价值下降，他们担心已发行的期权会进一步稀释，并且相信重新定价削弱了股东和管理层利益一致的目标。股东反对期权重新定价会产生股东诉讼的风险。这些诉讼通常会以公司没有从重新定价中获得任何好处为由，指控公司资产的浪费。

期权重新定价的其他负面影响包括：

- 向市场发出信号，表明公司预计不会达到之前的股价
- 向员工传达公司股票表现并不重要的信息，因为管理层总是可以在必要时降低期权行使价格
- 给人的印象是员工不会面临与公司股东相同的风险，因股东当然不能重新定价他们的股票

为了回应股东的担忧，决定实施重新定价计划的公司可能希望考虑实施以下一种或多种方法：

- 获得股东对任何特定重新定价计划或至少任何未来期权重新定价的外部界限条款的预先批准
- 将高管和董事排除在重新定价计划之外
- 为员工提供更少的重新定价期权，以换取他们的水下期权
- 仅对部分水下期权重新定价
- 调整新授予期权的归属条款

结论

虽然期权重新定价或股权奖励的类似重组可能是在低迷市场中重新调整和调整激励计划规模的非常有意义的方式，但任何重新定价或重组都应在考虑要求和所涉及的风险之后进行，以便发行人做好充分准备回应有关该决定的任何问题或争议。

如果您对贵公司的股权激励计划有任何疑问，请联系作者、Holland & Knight 高管薪酬和福利团队的另一名成员或您的主要 Holland & Knight 律师。

附注：

[1] 虽然听到上市公司重新定价期权的情况更为常见，但私人公司也可以并且确实为期权重新定价。

[2] 多次重新定价期权可能会产生风险，即行权价格被视为可变的，而不是出于守则第 409A 条的目的而固定的价格。

New Executive Order Creates Roadmap of Heightened CFIUS Scrutiny for Cross-Border M&A

By Antonia I. Tzinova, Robert A. Friedman, Marina Veljanovska O'Brien and Sergio A. Fontanez

HIGHLIGHTS:

- President Joe Biden signed an Executive Order (E.O.) on Sept. 15, 2022, clarifying and elaborating key U.S. industries and business sectors that should expect heightened regulatory scrutiny from the Committee on Foreign Investment in the United States (CFIUS).
- While the new E.O. does not change the review process, legal jurisdiction or scope of reviewed transactions, it provides definitive guidance to CFIUS so that the review of cross-border investments and acquisitions remains responsive to evolving national security risks that impact U.S. supply chains, U.S. technological leadership, cybersecurity and U.S. persons' sensitive data. The E.O. also addresses risks created by incremental or multiple investments by repeat foreign investors that, when considered together, may have consequences for U.S. national security.
- This Holland & Knight alert provides preliminary views on potential impacts for the business community.

President Joe Biden signed an Executive Order (E.O.) on Sept. 15, 2022, clarifying and elaborating key U.S. industries and business sectors that should expect heightened regulatory scrutiny from the Committee on Foreign Investment in the United States (CFIUS). Section 721(f) of the Defense Production Act of 1950 (50 U.S.C. App. 2170(f)), as amended by the Foreign Investment Risk Review Modernization Act (FIRRMA), sets forth a number of national security factors that guide the CFIUS review process.

The new E.O. – the first one issued since CFIUS was established in 1975 – provides definitive guidance to CFIUS so that the review of cross-border investments and acquisitions remains responsive to evolving national security risks, including by expanding on the factors identified in Section 721. In particular, the E.O. outlines five specific sets of factors that CFIUS is now directed to consider when reviewing transactions.

RESILIENCE OF CRITICAL U.S. SUPPLY CHAINS

First, CFIUS is directed to consider how a transaction will affect the resilience of critical U.S. supply chains that may have national security implications, including those outside of the defense industrial base. Foreign investment that shifts ownership, rights or control to a foreign person in certain manufacturing capabilities, services, critical mineral resources or technologies that are fundamental to national security may make the United States vulnerable to future supply disruptions of critical goods and services. These considerations include the degree of diversification through alternative suppliers across the supply chain, including suppliers located in allied or partner countries, supply relationships with the U.S. government and the concentration of ownership or control by the foreign person in a given supply chain.

Potential Impacts

CFIUS has long considered the vulnerabilities presented by an investment transaction on the supply and resiliency of the defense industrial base. U.S. government contractors involved in cross-border mergers and acquisitions (M&A) were frequent targets for CFIUS reviews when taking investment from or being acquired by a foreign person.

Supply chain shortages over the last three years in a variety of sectors ranging from public health (e.g., COVID-19 prevention and response materials) to micro-electronics (e.g., semiconductors) to energy (e.g., rare earth minerals) have widened the national security aperture.

CFIUS is expected to exercise greater scrutiny of foreign investments that touch on industries central to U.S. domestic capacity – whether or not the U.S. business is involved in the defense industrial base. To the extent a foreign investment or acquisition would shift control of critical goods and services – for example, where the U.S. business is a single qualified source for a U.S. government contract or provides an essential input or resource for a critical domestic manufacturing capacity – CFIUS is more likely to take interest.

U.S. TECHNOLOGICAL LEADERSHIP

Second, CFIUS is directed to consider the effect on U.S. technological leadership in areas affecting U.S. national security, including microelectronics, artificial intelligence (AI), biotechnology and biomanufacturing, quantum computing, advanced clean energy (such as battery storage and hydrogen), climate adaptation technologies, critical materials (such as lithium and rare earth elements) and elements of the agriculture industrial base that have implications for food security.

Potential Impacts

Retaining technological leadership is embedded in a range of statutory and regulatory regimes, including FIRRMA and U.S. export control laws. While the E.O. in no way presents an exhaustive list, it does place discrete industries on notice that foreign investments in these areas will likely be met with greater regulatory scrutiny.

Notably, the industries identified in the E.O. are a more definitive elaboration of broader topics that were previously the focus of FIRRMA – namely critical infrastructure and critical technology companies. In this regard, the recent biotechnology and biomanufacturing E.O. issued by President Biden,[1] which among other things, aims to spur government actions that will anticipate threats and vulnerabilities in this sector and mitigate related risks. Cross-border transactions involved in this industry sector should expect heightened scrutiny, as biotechnology is now considered critical technology subject to increased U.S. Department of Defense (DOD) investment and federal government analysis.

Finally, CFIUS is tasked with considering whether a covered transaction could reasonably result in future advancements and applications in technology that could undermine national security. In other words, CFIUS will be interested not only in the existing U.S. business that is the subject of a transaction but also how that same U.S. business's technology may be used in the future, including the plans and product road maps for early-stage technology companies. This is another example of CFIUS's more recent position that economic security is national security.

AGGREGATE INVESTMENT TRENDS OF REPEAT FOREIGN INVESTORS

Third, CFIUS is directed to examine investment trends that may have consequences on U.S. national security. Certain investments by the same foreign person in a sector or technology may appear to pose a limited threat when viewed in isolation, but when viewed in the context of previous transactions, it may become apparent that such investments can facilitate sensitive technology transfer in key industries or otherwise harm national security by having the foreign investor amass a significant market share in the specific industry sector.

Potential Impacts

For repeat foreign investors, the E.O. serves as a clarion call that CFIUS will consider the totality of an investment pattern, including incremental and add-on investments. While there may be a comparatively low threat associated with a foreign company or country acquiring a single firm in a sector, the E.O. notes that there may be a much higher threat associated with a foreign company or country acquiring multiple firms within the sector.

To respond to such threats, the E.O. directs CFIUS to consider the risks arising from a covered transaction in the context of multiple acquisitions or investments in a single sector or in related sectors by the same foreign investor.

CYBERSECURITY RISK

Fourth, CFIUS will closely monitor cybersecurity risks that threaten to impair national security. Investments by foreign persons with the capability and intent to conduct cyber intrusions or other malicious cyber-enabled activity may pose a risk to national security. The E.O. directs CFIUS to consider whether a covered transaction may provide a foreign person (or their relevant third-party ties) with access to conduct such activities in addition to the cybersecurity posture, practices, capabilities and access of all parties to the transaction that could allow a foreign person (or their relevant third-party ties) to manifest such activities.

Potential Impacts

The U.S. government's focus on cyber threats and vulnerabilities is well-established and long-standing. This prong of the E.O. merely memorializes several areas of emphasis that CFIUS practitioners have come to expect. CFIUS will closely review the cybersecurity posture, practices and capabilities of both the foreign buyer and the U.S. target.

Moreover, CFIUS will continue to pay special attention to third-party connections of the foreign buyer, which has several dimensions, including the relationship between a foreign buyer and foreign governments and potential threats posed by third-party cyber-related connections, including elements incorporated into the information and communications technology (ICTS) supply chain and the location where data is stored and processed.

RISKS TO U.S. PERSONS' SENSITIVE DATA

Fifth, the E.O. calls out the continued national security risks associated with U.S. persons' sensitive data.

Potential Impacts

National security vulnerabilities stemming from data exploitation have been on CFIUS's radar since long before they were codified in FIRRMA. The E.O. makes explicit the U.S. government's focus on how advances in technology, combined with access to large data sets, increasingly enable the re-identification or de-anonymization of what once was considered unidentifiable data. The E.O. states that CFIUS shall consider whether a covered transaction involves a U.S. business with access to U.S. persons' sensitive data and whether the foreign investor has, or the parties to whom the foreign investor has ties, have sought or have the ability to exploit such information to the detriment of national security, including through the use of commercial or other means.

CONCLUDING THOUGHTS

The E.O. does not change the legal or regulatory requirements for transaction parties in the context of CFIUS, but it does provide a roadmap for companies evaluating whether to make a voluntary CFIUS filing, including the likelihood that a non-notified transaction will be subject to a post-closing inquiry from CFIUS. The E.O. codifies recent CFIUS practice and concerns with supply chains, big data, critical technologies and cybersecurity, and provides insight into the types of transactions and industry sectors that are currently the focus of CFIUS and the Biden Administration. As CFIUS acts by consensus and ultimately requires a political sign-off from the heads of department of the agencies represented on CFIUS, the E.O. suggests which transactions will be subject to increased scrutiny and likely increased mitigation.

In light of the E.O. directives, the following trends are expected:

1. an uptick in the volume of voluntary filings as companies in affected industries that were on the fence about making filings now have presidential guidance to factor into the equation

2. repeat foreign investors in the U.S. economy will reconsider the impact of low-risk investments or acquisitions in the context of aggregate investments or acquisitions over time

3. a continual re-evaluation of national security vulnerabilities as the Office of Science and Technology Policy (OSTP), in consultation with other members of CFIUS, is tasked with periodically updating technology sectors that are fundamental to United States technology leadership in relevant areas of national security.

If you have any questions about this alert or seek assistance formulating a CFIUS strategy, reach out to the authors or another member of Holland & Knight's CFIUS and Industrial Security Team. Our attorneys have the knowledge and experience to conduct the necessary due diligence to identify covered transactions, prepare the necessary CFIUS risk assessments to equip business leaders with tools to evaluate regulatory risk and help navigate the evolving CFIUS landscape.

Notes

[1] "Executive Order on Advancing Biotechnology and Biomanufacturing Innovation for a Sustainable, Safe, and Secure American Bioeconomy" (Sept. 12, 2022).

新的行政命令制定了加强 CFIUS 对跨境并购的审查的路线图

原文作者：Antonia I. Tzinova 、Robert A. Friedman 、 Marina Veljanovska O'Brien 及 Sergio A. Fontanez

重点摘要：

- 拜登总统于 2022 年 9 月 15 日签署了一项行政命令（行政命令），澄清和详细阐述了美国外国投资委员会（CFIUS）应加强监管审查的关键美国行业和商业领域。
- 虽然新的行政命令不会改变审查流程、法律管辖权或审查交易的范围，但它为 CFIUS 提供了明确的指导，以便对跨境投资和收购的审查仍然能够对影响美国供应链、美国技术领先地位、网络安全和美国敏感数据的不断变化的国家安全风险作出反应。行政命令还解决了重复外国投资者的增量或多次投资所产生的风险，如果综合考虑，这些风险可能会对美国国家安全产生影响。
- Holland & Knight 的提示文章提供了行政命令对商界潜在影响的初步看法。

拜登总统于 2022 年 9 月 15 日签署了一项行政命令，澄清和详细阐述了美国外国投资委员会（CFIUS）应加强监管审查的关键美国行业和商业领域。经《外国投资风险审查现代化法案》（FIRRMA）修订的《1950 年国防生产法》（50 U.S.C.附录 2170（f））第 721（f）节规定了指导 CFIUS 审查过程的一些国家安全因素。

新的行政命令是自 1975 年 CFIUS 成立以来发布的第一个行政命令，为 CFIUS 提供了明确的指导，以便对跨境投资和收购的审查能够应对不断变化的国家安全风险，包括扩大第 721 节中确定的因素，尤其，行政命令概述了 CFIUS 在审查交易时需要考虑的五组具体因素。

美国关键供应链的韧性

首先，CFIUS 需要考虑交易将如何影响可能涉及国家安全的关键美国供应链（包括国防工业基地以外的供应链）的韧性。将对国家安全至关重要的某些制造能力、服务、关键矿产资源或技术的所有权、权利或控制权转移给外国人的外国投资，可能会使美国在未来面临关键货物和服务供应中断时变得脆弱。这些考虑因素包括通过供应链中的替代供应商实现多样化的程度，包括位于盟国或伙伴国的供应商、与美国政府的供应关系以及外国人在给定供应链中所有权或控制权的集中。

潜在影响

长期以来，CFIUS 一直在考虑投资交易在国防工业基础的供应和韧性方面存在的弱点漏洞。 在接受外国人士投资或被外国人士收购时，参与跨境并购的美国政府承包商经常成为美国外国投资委员会审查的目标。

过去三年，从公共卫生（如新冠肺炎预防和应对材料）、微电子（如半导体）到能源（如稀土矿物）等多个部门的供应链短缺扩大了国家安全的缝隙。

预计美国外国投资委员会将对涉及美国国内产能核心产业的外国投资进行更严格的审查，无论美国企业是否涉及国防工业基础。在某种程度上，外国投资或收购将改变对关键商品和服务的控制——例如，美国企业是美国政府合同的唯一合格来源，或为关键的国内制造能力提供必要的投入或资源——外国投资委员会更有可能感兴趣。

美国技术领先地位

其次，CFIUS 负责考虑在影响美国国家安全的领域对美国技术领导力的影响，包括微电子、人工智能、生物技术和生物制造、量子计算、先进清洁能源（如电池储能和氢气）、气候适应技术、，影响粮食安全的关键材料（如锂和稀土元素）和农业工业基础元素。

潜在影响

保持技术领先地位植根于一系列法律和监管制度中，包括 FIRRMA 和美国出口管制法。尽管行政命令并没有给出详尽的清单，但它确实提醒了个别行业，这些领域的外国投资可能会受到更严格的监管审查。

值得注意的是，行政命令中确定的行业是对更广泛主题的更明确阐述，这些议题以前是《外国投资风险评估现代化法案》的重点，即关键基础设施和关键技术公司。在这方面，拜登总统最近发布的生物技术和生物制造行政命令，[1] 除其他外，旨在刺激政府采取行动，预测该部门的威胁和脆弱性，并减轻相关风险。由于生物技术现在被视为关键技术，需要增加美国国防部（DOD）的投资和联邦政府的分析，因此该行业领域涉及的跨境交易应该受到更严格的审查。

最后，CFIUS 的任务是考虑受保护的交易是否会合理地导致未来技术的进步和应用，从而破坏国家安全。换句话说，CFIUS 不仅对作为交易标的的现有美国业务感兴趣，而且对同一美国业务的技术在未来的使用方式感兴趣，包括早期技术公司的计划和产品路线图。这是 CFIUS 最近立场的另一个例子，即经济安全是国家安全。

重复外国投资者的总投资趋势

第三，美国外国投资委员会负责审查可能对美国国家安全产生影响的投资趋势。同一外国人对某一部门或技术的某些投资，如果单独地看待，可能会造成有限的威胁，但如果结合以往的交易来看，很明显，此类投资可能会促进关键行业的敏感技术转让，或者通过让外国投资者在特定行业中积累大量市场份额，损害国家安全。

潜在影响

对于重复投资的外国投资者，行政命令作为一个响亮的号召，要求 CFIUS 考虑投资模式的整体，包括增量和附加投资。虽然外国公司或国家收购某一行业中的一家公司可能带来的威胁相对较小，但行政命令指出，外国公司或一个国家收购该行业中的多家公司可能会带来更大的威胁。

为了应对此类威胁，行政命令指示 CFIUS 在同一外国投资者对单个行业或相关行业进行多次收购或投资的情况下，考虑受保交易产生的风险。

网络安全风险

第四，CFIUS 将密切监控可能损害国家安全的网络安全风险。有能力和意图进行网络入侵或其他恶意网络活动的外国人的投资可能会对国家安全构成风险。行政命令指示 CFIUS 考虑，除了可能允许外国人（或其相关第三方关系人）展示此类活动的交易各方的网络安全姿态、做法、能力和访问权之外，涵盖的交易是否可以为外国人（或相关第三方关系人）提供进行此类活动的访问权。

潜在影响

美国政府对网络威胁和漏洞的关注由来已久。行政命令的这一做法仅仅是记录了执行 CFIUS 业务的从业人员所期待的几个重点领域。CFIUS 将密切审查外国买家和美国目标公司的网络安全态势、做法和能力。

此外，CFIUS 将继续特别关注外国买家的第三方关联，这涉及多个方面，包括外国买家与外国政府之间的关系以及第三方网络关联带来的潜在威胁，包括纳入信息和通信技术（ICTS）供应链的要素以及数据存储和处理的位置。

美国敏感数据的风险

第五，行政命令指出与美国的敏感数据相关的持续国家安全风险。

潜在影响

由于数据利用而导致的国家安全漏洞早在被编入 FIRRMA 之前就已经被 CFIUS 发现。行政命令明确表示，美国政府将重点放在技术进步以及对大型数据集的访问，如何越来越多地使曾经被认为无法识别的数据能够重新识别或取消匿名。行政命令规定，外国投资委员会应考虑受保交易是否涉及能够访问美国敏感数据的美国企业，以及外国投资者或与外国投资者有联系的各方是否寻求或有能力利用此类信息损害国家安全，包括通过使用商业或其他手段。

总结想法

行政命令不会改变 CFIUS 对交易方的法律或监管要求，但它确实为公司评估是否自愿提交 CFIUS 文件提供了路线图，包括未通知交易将受到 CFIUS 交割后调查的可能性。行政命令编纂了 CFIUS 最近的实践和对供应链、大数据、关键技术和网络安全的关注，并深入了解了目前 CFIUS 和拜登政府关注的交易类型和行业部门。由于 CFIUS 以协商一致的方式行事，最终需要 CFIUS 所代表机构部门负责人的政治签字，因此，行政命令建议对哪些交易进行更严格的审查，并可能增加缓解措施。

根据行政命令指令，预计将出现以下趋势：

1. 自愿申请数量的上升，因为受影响行业中的公司目前在总统的指导下，对申请持观望态度
2. 美国经济中的外国投资者将重新考虑低风险投资或收购对总投资或收购的影响
3. 科学技术政策办公室（OSTP）与美国外国投资委员会其他成员协商，负责定期更新对美国在国家安全相关领域的技术领导至关重要的技术部门，从而不断重新评估国家安全漏洞。

如果您对本提示文章有任何疑问或寻求制定 CFIUS 战略的帮助，请联系作者或 Holland & Knight 的 CFIUS 和工业安全团队的其他成员。我们的律师拥有知识和经验，能够进行必要的尽职调查，以确定涵盖的交易，准备必要的 CFIUS 风险评估，为商业领袖提供评估监管风险的工具，并帮助他们了解 CFIUS 的发展前景。

附注：

[1] 《关于推进生物技术和生物制造创新以实现可持续、安全和安全的美国生物经济的行政命令》（2022 年 9 月 12 日）。

CFIUS 2021 Annual Report: Considerations for Businesses

By Antonia I. Tzinova, Robert A. Friedman, Ronald A. Oleynik, Andrew K. McAllister, Mackenzie A. Zales and Sarah Kaitlin Hubner

HIGHLIGHTS:

- The Committee on Foreign Investment in the United States (CFIUS) recently published its Annual Report to Congress for Calendar Year 2021 (Annual Report), analyzing key information from the first full year in which its powers were expanded under the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA).
- This Holland & Knight alert identifies important trends from the Annual Report that businesses should consider when pursuing foreign investment in, or acquisition of, U.S. businesses.

The U.S. Department of the Treasury, in its role as chair of the Committee on Foreign Investment in the United States (CFIUS), released the public version of its Annual Report to Congress for Calendar Year 2021 (Annual Report) on Aug. 2, 2022. Notably, the 2021 Annual Report captures data for the first full calendar year in which its authority was expanded under the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA).[1] New CFIUS regulations under FIRRMA of February 2020 put in action the broadened CFIUS jurisdiction over certain foreign investments in U.S. businesses involved in critical technologies, critical infrastructure, sensitive personal data (TID U.S. Businesses) and certain real estate transactions.

The Annual Report provides helpful insights into the largely confidential operations of CFIUS while making clear that companies should continue to prioritize diligent planning and adequate preparation in order to successfully navigate the CFIUS review process. This Holland & Knight alert identifies five important trends in the Annual Report that will be of interest to dealmakers.

1. A RECORD NUMBER OF REVIEWED TRANSACTIONS IN 2021

CFIUS reviewed a record 436 transactions in 2021. This includes 164 declarations (an increase of 30 percent from the 126 declarations in 2020) and 272 notices (an increase of 45 percent from the 187 notices in 2020). The largest number of declarations involved Canadian investors (22), and the largest number of notices involved Chinese investors (44). These numbers include increasingly complex transactions across a variety of industry sectors. Notably, a combined 83 percent of the notices fell into either the Finance, Information and Services, or Manufacturing sectors. Additionally, unlike in prior years, no reviews were ended by presidential action. Overall, the Annual Report indicates that the number of transactions submitted for CFIUS review has been consistently increasing over the last few years and particularly since the enactment of FIRRMA.

2. INCREASED USE OF THE SHORT-FORM DECLARATION

The use of the short-form declaration has been increasing consistently since its inception. Parties submitted 164 declarations in 2021, up from 126 in 2020, 94 in 2019, and 20 in 2018, the year when it was introduced. The declaration process provides for an expedited review, and the numbers suggest that most of the growth in overall transactions reviewed has been with respect to declarations.

Significantly, less than a third of declarations filed in 2021 were subject to mandatory requirements (47 of 64 total declarations), indicating that parties are increasingly seeing value in filing a voluntary declaration for clearing a transaction. The majority of these declarations involved investors from U.S.-allied countries (e.g., Canada, Japan, Germany, France, the United Kingdom, South Korea, Australia and New Zealand), indicating a perceived advantage for friendly nations in utilizing the declaration process, particularly for less complex transactions or repeat investments by the same investor.

Importantly, the clearance rate for declarations increased substantially from 64 percent in 2020 to 73 percent in 2021, indicating that CFIUS is becoming more comfortable with the processing of declarations (for perspective: CFIUS clearance of declarations increased from less than 10 percent in 2018, to 37 percent in 2019, to 64 percent in 2020, and to 73 percent this past year). The declaration process has many benefits for dealmakers, including fewer filing requirements, a shorter review timeline and no filing fees. Nevertheless, it is important to strategically consider whether to make use of the declaration process, as the filing option is not appropriate for all transactions and can entail risks for the parties, including the potential for CFIUS to invite the filing of a full notice at the conclusion of the declaration review period. Though the clearance rate for declarations in 2021 was 73 percent and the review timeline was expedited (30 days on average), CFIUS requested that the parties to 30 declarations file a full notice. Submitting a declaration and then having to file a full notice eliminates many of the perceived time and cost-related benefits of the declaration process. Several factors – including the activities of the U.S. business, the origin of the investor, the complexity of the transaction and whether the deal involves a controlling or non-controlling foreign investment – can affect whether CFIUS can review a deal and successfully address national security concerns within the 30-day review timeline. For this reason, dealmakers are advised to proceed with caution and think critically, including conducting a thorough CFIUS risk analysis, before pursuing a declaration.

3. SUBSTANTIAL INCREASE IN FILINGS FROM CHINESE INVESTORS

After a significant decrease in the number of reviewed transactions featuring Chinese investors from 25 in 2019 to 17 in 2020, the number of notices originating from China increased significantly to 44 in 2021.[2] The large majority of these notices fell in the Finance, Information and Services, and Manufacturing sectors. While the relatively small number of reviewed Chinese transactions in recent years highlights growing scrutiny over Chinese acquisitions of U.S. businesses and Chinese exposure to U.S. supply chains, the reversal in direction also is indicative of a more nuanced approach to Chinese investment in the U.S. economy under the Biden Administration. Additionally, it appears that Chinese investors have gravitated towards industry sectors that may be less controversial. To contrast the increased number of notices, only one declaration filed in 2021 involved a Chinese investor, demonstrating that investors from high-risk jurisdictions like China continue to shy away from the declaration process, surmising correctly that is less likely for CFIUS to approve a Chinese investment through a declaration review.

4. LARGER NUMBER OF NON-NOTIFIED TRANSACTIONS UNDER SCRUTINY

Since the enactment of FIRRMA, CFIUS has devoted substantial resources and hired dozens of staff to monitor and investigate non-notified transactions. This trend continued in 2021. The Annual Report notes that CFIUS employed a number of methods to identify non-notified transactions (e.g., interagency referrals, tips from the public, media reports, commercial databases and congressional notifications) and will likely continue to do so as CFIUS seeks improved and more coordinated tactics to identify such transactions. In 2021, CFIUS identified 135 non-notified transactions of interest, up from 117 in 2020. While CFIUS identified more non-notified transactions in 2021 compared to 2020 – fewer transactions resulted in a request for filing – 17 resulted in a request for filing in 2020 versus just eight requests for filing in 2021.

U.S. businesses with foreign investors should be aware of efforts by CFIUS to identify non-notified transactions, as there is no statute of limitations for CFIUS jurisdiction. And even if CFIUS ultimately decides not to request a filing following a non-notified inquiry, the time and cost associated with navigating the non-notified process can be significant. In light of enhanced scrutiny of non-notified transactions and the value of having an expert assessment in hand supporting a decision not to make a CFIUS filing, it is recommended that companies include CFIUS-related considerations in their standard due diligence process for all cross-border transactions and determine whether a CFIUS risk assessment is appropriate to fully vet all CFIUS considerations.

5. CONTINUED PRIORITY TO PROTECT CRITICAL TECHNOLOGIES

While CFIUS was unable to provide significant unclassified information regarding transactions involving critical technologies (a classified list was provided to the United States Intelligence Community, or USIC), it is clear that the protection of U.S. critical technology remains of utmost concern for CFIUS. Specifically, the Annual Report notes that much of the USIC believes that foreign governments are extremely likely to use a range of collection methods to obtain U.S. critical technologies. CFIUS reviewed 184 covered transactions involving acquisitions of U.S. critical technology companies in 2021, compared to 122 in 2020. Though the top critical technology acquirers in 2021 were U.S. allies, with Germany and the United Kingdom tied for first place with 16 covered transactions each, several deals involved investors from high-risk jurisdictions, including 10 deals coming out of China and five out of Russia. As greater emphasis is placed on the resilience and security of U.S. supply chains, as well as the expanded scope of "critical technologies" through regulatory changes by U.S. government agencies and the rise of geopolitical tensions with countries like China and Russia, it is anticipated that focus on such transactions by CFIUS will only increase.

CONCLUSION

Data from the CFIUS 2021 Annual Report confirms that the enactment of FIRRMA has undoubtedly brought more cross-border transactions for review by CFIUS. Consequently, it is essential that investors include evaluations of CFIUS jurisdiction and risk in their due diligence processes and that sellers consider their technology, critical infrastructure and data under the CFIUS regulations to help move a transaction to closing most efficiently and with the least disruption to the business objective of the parties.

If you have any questions about this trade alert or seek assistance formulating a CFIUS strategy, reach out to the authors or another member of Holland & Knight's International Trade Group.

Notes

[1] For more information on the passing and subsequent enactment of FIRRMA, see Holland & Knight's previous alerts, "FIRRMA Expands CFIUS Jurisdiction in 2 Major Ways" (Aug. 16, 2018) and "New CFIUS Regulations Finally Take Effect" (Feb. 13, 2020).

[2] Please note that data for China from 2021 includes notices involving investors from Hong Kong. Prior to 2021, notices involving investors from Hong Kong were included in a separate category.

CFIUS 2021 年度报告：企业应考虑的事项

原文作者：Antonia I. Tzinova 、Robert A. Friedman 、Ronald A. Oleynik 、Andrew K. McAllister 、Mackenzie A. Zales 及 Sarah Kaitlin Hubner

重点摘要:

- 美国外国投资委员会（CFIUS）最近向国会发布了其 2021 年度报告（年度报告），分析了根据 2018 年《外国投资风险审查现代化法案》（FIRRMA）扩大其权力后的第一个完整年度的关键信息。
- 本 Holland & Knight 提示文章从年度报告中发现了企业在寻求外国投资或收购美国企业时应考虑的重要趋势。

美国财政部作为美国外国投资委员会（CFIUS）主席，于 2022 年 8 月 2 日向国会发布了其 2021 年度报告（年度报告）的公开版本。值得注意的是，《2021 年度报告》收集了根据 2018 年《外国投资风险审查现代化法案》（FIRRMA）扩大其权限后的第一个完整日历年的数据。[1] 根据 FIRRMA 在 2020 年 2 月所作成的新的 CFIUS 规定将扩大 CFIUS 对涉及关键技术、关键基础设施、敏感个人数据（TID 美国企业）和某些房地产交易的美国企业的某些外国投资的管辖权。

《年度报告》对 CFIUS 大部分秘密性的运作提供了有益的见解，同时明确指出，各公司应继续优先考虑勤勉地计划和充分地准备以便顺利通过 CFIUS 的审查流程。本 Holland & Knight 提示文章指出了交易方感兴趣的年度报告中的五个重要趋势。

1. 2021 审查交易数量创纪录

2021 年，美国外国投资委员会审查了创纪录的 436 起交易。其中包括 164 起声明（比 2020 年的 126 起声明增加 30%）和 272 起通知（比 2020 的 187 起通知增加 45%）。涉及加拿大的投资者的声明数量最多（22 起），涉及中国投资者的通知数量最大（44 起）。这些数字包括各种行业部门日益复杂的交易。值得注意的是，总计 83%的通知属于金融、信息和服务或制造业业。此外，与往年不同，没有任何审查因总统行动而结束。总的来说，年度报告显示，在过去几年中，特别是自《外国投资风险评估现代化法案》（FIRRMA） 颁布以来，提交给美国外国投资委员会审查的交易数量一直在增加。

2. 增加使用简式声明

自其创建以来，简式声明的使用一直在不断增加。2021 年，缔约方提交了 164 起声明，高于 2020 年的 126 起、2019 年的 94 起和当其被引入使用的 2018 年的 20 起。声明流程提供了快速审查，且数字显示所审查的总体交易增长部分大多与声明有关。

值得注意的是，2021 年提交的声明中只有不到三分之一受到强制性要求的规范（164 起声明中有 47 起），这显示各方越来越认识到提交自愿声明以完成交易的价值。这些声明大多涉及来自美国盟国（例如加拿大、日本、德国、法国、英国、韩国、澳大利亚和新西兰）的投资者，这显示友好国家在利用声明程序方面具有明显优势，特别是对于不太复杂的交易或同一投资者的重复投资。

重要的是，声明的批准率从 2020 年的 64%大幅提高到 2021 的 73%，这显示美国外国投资委员会对声明的处理越来越满意（从长远来看：美国外国投资委员会对声明的批准从 2018 年的不到 10%增加到 2019 年的 37%、2020 年的 65%，以及去年的 73%）。声明过程对交易方有很多好处，包括更少的申请要求、更短的审查时间和无申请费。然而，重要的是要从战略上考虑是否使用声明流程，因为声明选择并不适用于所有交易，可能会给各方带来风险，包括 CFIUS 在声明审查期结束时邀请提交完整通知的可能性。尽管 2021 年声明的批准率为 73%，审查时间表也加快了（平均 30 天），但美国外国投资委员会要求 30 起声明的各方提交完整通知。提交声明但之后必须提交完整通知消除了声明过程中许多与时间和成本相关的好处。几个因素——包括美国企业的活动、投资者来自何地、交易的复杂性以及交易是否涉及控制性或非控制性外国投资——可能会影响外国投资委员会是否能够在 30 天的审查时间内审查交易并成功解决国家安全顾虑。因此，建议交易方在进行声明之前谨慎行事并进行批判性思考，包括进行彻底的 CFIUS 风险分析。

3. 中国投资者的申请大幅增加

在中国投资者参与的审查交易数量从 2019 年的 25 件大幅减少至 2020 年的 17 件后，来自中国的通知数量大幅增加至 2022 年的 44 件。[2]这些通知中的绝大多数属于金融、信息和服务以及制造业。虽然近年来审查的中国交易数量相对较少，突显出对中国收购美国企业和中国在美国供应链中的风险敞口的审查越来越严格，但方向的逆转也显示拜登政府对中国在美国经济中的投资采取了更微妙的方式。此外，中国投资者似乎已转向争议较小的行业。与越来越多的通知形成对比的是，2021 提交的只有一起声明涉及中国投资者，这显示来自中国等高风险司法管辖区的投资者继续回避声明过程，正确地猜测外国投资委员会通过声明审查批准中国投资的可能性较小。

4. 审查中未通知交易数量增加

自《外国投资风险审查现代化法案》（FIRRMA）颁布以来，美国外国投资委员会投入了大量资源，雇佣了数十名员工来监督和调查未经通知的交易。这一趋势在 2021 年继续。年度报告指出，美国外国投资委员会采用了许多方法来识别未经通知的交易（例如，机构间转介、公众提示、媒体报道、商业数据库和国会通知），随着美国外国投资委员会寻求改进和更协调的策略来识别此类交易，美国外国投资者委员会可能会继续这样做。2021 年，美国外国投资委员会确定了 135 件未通知的利益交易，高于 2020 年的 117 件。与 2020 年相比，2021 年美国外国投资委员确定了更多的未通知交易——更少的交易导致了申请——在 2020 年导致要求提出申请的有 17 起，而 2021 年只有导致 8 起。

与外国投资者合作的美国企业应了解美国外国投资委员会（CFIUS）为识别未经通知的交易所做的努力，因为 CFIUS 的管辖权没有法定限制。即使 CFIUS 最终决定在未通知的查询后不申请备案，但与未通知流程相关的时间和成本可能会很高。鉴于加强了对未通知交易的审查，以及手头有专家评估支持不进行 CFIUS 备案决定的价值，建议各公司在所有跨境交易的标准尽职调查过程中纳入与 CFIUS 相关的考虑因素，并确定 CFIUS 风险评估是否适合全面审查所有 CFIUS 考虑因素。

5. 继续优先保护关键技术

虽然美国外国投资委员会无法提供有关涉及关键技术的交易的重要非解密信息（已向美国情报机构提供了一份保密清单），但很明显，美国关键技术的保护仍然是美国外国投资委员会最关心的问题。具体来说，年度报告指出，美国国家统计局的许多人认为，外国政府极有可能使用一系列收集方法来获取美国的关键技术。CFIUS 审查了 2021 年涉及收购美国关键技术公司的 184 笔受监管交易，而 2020 年为 122 起。虽然 2021 的最大关键技术收购者是美国的盟友，德国和英国并列第一，各自有 16 笔受监管交易。但有几项交易涉及来自高风险司法管辖区的投资者，包括 10 笔来自中国的交易和 5 笔来自俄罗斯的交易。随着人们越来越重视美国供应链的弹性和安全性，以及通过美国政府机构的监管变化扩大"关键技术"的范围，以及与中国和俄罗斯等国的地缘政治紧张局势加剧，预计外国投资委员会对此类交易的关注只会增加。

结论

CFIUS 的 2021 年的年度报告的数据证实，《外商投资风险管理法案》(FIRMMA)的颁布无疑为 CFIUS 带来了更多的跨境交易供其审查。因此，至关重要的是，投资者应在尽职调查过程中评估 CFIUS 的管辖权和风险，卖家应根据 CFIUS 规定考虑其技术、关键基础设施和数据，以帮助最有效地完成交易，并尽量减少对各方业务目标的干扰。

如果您对本贸易**提示文章有任何疑**问或寻求制定 CFIUS 战略的帮助，请联系作者或 Holland & Knight **国**际贸易业务组**的其他成**员。

附注：

[1] 有关《外国投资审查机制法》的通过和后续颁布的更多信息，请参阅 Holland & Knight 之前的提示文章，"外国投资审查机构法以两种主要方式扩大了外国投资委员会的管辖权"（2018 年 8 月 16 日）和"新的外国投资委员会条例最终生效"（2020 年 2 月 13 日）。

[2] 请注意，自 2021 起的中国数据包括涉及香港投资者的通知。在 2021 之前，涉及香港投资者的通知被归入一个单独的类别。

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

Lindsey R. Camp defends companies, fiduciaries and executives throughout the United States in Employee Retirement Income Security Act of 1974 (ERISA), employee stock ownership plans (ESOP), labor and employment, and business disputes. She has experience litigating complex cases involving ERISA, federal securities laws, federal whistleblower statutes, anti-discrimination laws, trade secrets and business disputes. During the course of her career, she has defended a number of class actions and ERISA breach of fiduciary duty actions. She also has experience with matters involving medical benefit plans, ESOPs, securities fraud, and trade secrets and covenants-not-to-compete.

Sergio A. Fontanez focuses his practice on international regulatory and compliance matters. A former presidential management fellow with the U.S. Department of State, he brings in-depth knowledge of foreign affairs and national security to address complex legal, regulatory and policy issues.

Robert A. Friedman is a former official with the U.S. Department of State and helps clients address a range of complex legal, regulatory and policy issues that involve international trade and investment, government regulation of cross-border transactions and compliance with U.S. laws based on foreign policy and national security. He advises businesses, entrepreneurs, investors and trade associations on matters related to economic sanctions, export controls, foreign direct investment, supply chain security, customs laws, data privacy and cybersecurity, market access, anti-corruption and national security regulations.

Peter N. Hall helps his clients solve novel, complex and challenging legal problems, including defense of bet-the-company litigation and class actions. He primarily focuses his practice on the representation of businesses in all facets of labor and employment law, with an emphasis on litigation matters. His substantive litigation experience runs the gamut but includes significant experience with Employee Retirement Income Security Act (ERISA) litigation, including class actions, U.S. Department of Labor (DOL) investigations and multiemployer pension plan disputes, as well as wage/hour class and collective actions and trade secret/restrictive covenant matters.

John D. Martini is the co-practice group leader of the Tax, Executive Compensation and Benefits Practice, and focuses his practice on executive compensation, corporate governance and employee benefits. He frequently represents public companies, private equity firms and management teams in connection with all phases of the employment relationship. He assists employers and executives in assessing the market value and market terms of management compensation arrangements, while ensuring that those arrangements are delivered under a beneficial tax structure.

Nicole F. Martini focuses her practice on employee benefits and executive compensation matters. She represents clients in a wide range of employee benefits matters, including design, drafting, operation, compliance, government filings, communications and administration of tax-qualified benefit plans, nonqualified deferred compensation plans, executive and equity compensation arrangements, and welfare benefit plans.

Andrew K. McAllister focuses on export controls, sanctions, customs, antidumping (AD) and countervailing duties (CVD), anti-corruption and industrial security. He advises clients on U.S. export controls laws, such as the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR). He has extensive experience with U.S. trade embargoes and economic sanctions administered by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) and the U.S. Department of State, particularly with respect to Cuba, Iran, Russia, Ukraine and Syria.

Dane McKaughan is an energy attorney and currently serves as the chair of the State Bar of Texas Public Utility Law Section. He primarily focuses on litigation matters involving regulated entities, including electric utilities, gas utilities and pipelines, and transmission providers. He has extensive experience representing clients before state regulators, such as the Public Utility Commission of Texas and Railroad Commission of Texas.

Marina Veljanovska O'Brien focuses on regulatory compliance, with an emphasis on aviation and international trade law. She advises airlines, airports, aviation service providers and pilots on compliance with applicable state, federal, foreign and international transportation, and trade-related laws and regulations. These include economic licensing, consumer protection, airport sponsors' obligations, airport privatization issues, transportation safety standards, antitrust and competition compliance, and risk assessment.

Ronald A. Oleynik is co-head of the firm's International Trade Practice, and practices in the area of international trade regulation. His experience includes a broad range of industrial security, customs, export control, trade policy, and public and private and international trade matters. He has substantial experience in assisting clients in complying with U.S. trade embargoes and economic sanctions programs involving countries such as Cuba, Iran, North Korea, Russia and Syria. He works frequently with the U.S. Department of the Treasury's Office of Foreign Assets Control, which is responsible for implementing, administering and enforcing sanctions regulations that restrict business transactions involving designated countries and their nationals.

Timothy Taylor represents employers in employment litigation, employment investigations and employment defense vis-à-vis government regulators. He also has significant experience representing clients in a variety of civil cases and appeals as well as enforcement-defense matters, particularly under the False Claims Act (FCA). He serves clients in highly regulated industries, especially government contractors. He previously served as Deputy Solicitor of Labor, the second-in-command legal officer for the federal government's second-largest litigation department, housed in the U.S. Department of Labor (DOL). In that position, he oversaw a wide portfolio of litigation, enforcement, rulemaking and legal counseling for the agency's more than 450 attorneys. Laws under his purview included the Fair Labor Standards Act (FLSA), Occupational Safety and Health Act (OSHA), Employee Retirement Income Security Act (ERISA) and numerous antidiscrimination and whistleblower protection laws.

Antonia I. Tzinova 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. She regularly represents clients before the Committee on Foreign Investment in the United States (CFIUS) and advises on measures to mitigate Foreign Ownership, Control, or Influence (FOCI) in cross border mergers and acquisitions of U.S. government and defense contractors. She counsels foreign investors on structuring investments in the defense, high-tech and critical infrastructure sectors of the U.S. economy.

Mackenzie A. Zales focuses her practice on international regulatory and compliance matters as well as civil actions in the U.S. Court of International Trade (CIT). She handles a broad range of corporate issues, including foreign direct investment, industrial security, export control, sanctions and customs matters.

Victoria H. Zerjav provides sophisticated client counseling as an executive compensation and employee benefits attorney. She has extensive experience in executive compensation, employee benefits and employee relations, including in connection with mergers and acquisitions and other strategic transactions. She regularly represents Fortune 1000 companies, private equity-backed businesses and venture capital entities with respect to complex employee benefit plan and compensation issues.

Sarah K. Hubner is a paralegal for the Corporate – Trade Regulation practice in Washington, D.C.

Holland & Knight
美国霍兰德奈特律师事务所

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
New York | +1.212.513.3415
San Francisco | +1.415.743.6968
mike.chiang@hklaw.com

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

Leonard A. Bernstein | Philadelphia
+1.215.252.9521
leonard.bernstein@hklaw.com

Christopher W. Boyett | Miami
+1.305.789.7790
christopher.boyett.@hklaw.com

Vito A. Costanzo | Los Angeles
+1.213.896.2409
vito.costanzo@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

Enrique Gomez-Pinzon | Bogotá
+57.601.745.5800
enrique.gomezpinzon@hklaw.com

Paul J. Jaskot | Philadelphia
+1.215.252.9539
paul.jaskot@hklaw.com

Adolfo Jimenez | Miami
+1.305.789.7720
adolfo.jimenez@hklaw.com

Roth Kehoe | Atlanta
+1.404.817.8519
roth.kehoe@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

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

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

Francisco J. Sanchez | Tampa
+1.813.227.6559
francisco.sanchez@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

Shawn M. Turner | Denver
+1.303.974.6645
shawn.turner@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

Charles A. Weiss | New York
+1.212.513.3551
charles.weiss@hklaw.com

Jose V. Zapata | Bogotá
+57.601.745.5940
jose.zapata@hklaw.com

Office Locations 办公室地点

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