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Customs and International Trade Bar Association
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Upcoming Programs

January 29, 2020 - CITBA Winter Trade Luncheon

CITBA will welcome Stephen Vaughn, Former General Counsel, USTR, to speak at its annual Winter Trade Luncheon at noon at:

The Willard Hotel
11401 Pennsylvania Avenue NW
Washington, DC

Register and find more information on CITBA's events page (https://citba.org/citba-news-events/events/).

April 29, 2020 - Annual Meeting

Save the Date for CITBA's Annual Meeting. It will be held this year in New York, NY. Additional information and details coming soon.

Please visit the CITBA website (www.citba.org) for information about upcoming programs.

Past CITBA Events

November 18, 2019 - 20th CIT Judicial Conference

CITBA wrapped a day full of educational programming and insight at the 20th CIT Judicial Conference in Washington D.C. with it's semi-annual meeting and reception honoring Dick Belanger with CITBA's Barbara S. Williams Lifetime Achievement Award.

November 6, 2019 - Unpacking FP&F: Inside View of CBP's Fines, Penalties, & Forfeitures Process

CITBA welcomed a panel of CBP HQ and Port Operations representatives and Private Practitioners to discuss CBP's administrative enforcement process.

Announcements

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CITBA PRESENTS BARBARA S. WILLIAMS LIFETIME ACHIEVEMENT AWARD TO RICHARD BELANGER

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Presentation Comments by John Peterson

On behalf of the Board and members of the Customs and International Trade Bar Association, it is my privilege to present this year's Barbara Williams award to Richard Belanger of the law firm of Sidley and Austin.

In preparing for this evening's presentation, I tried to remember the first time I met Dick. As I recall, we were young associates, working for different New York-based firms, who were being dragged along by partners to a conference. Nothing special about that, we've all been there. This happened to be a conference regarding the margins in an antidumping investigation. Most of us have done that. This conference, however, was at the Main Treasury Building and was under the Antidumping Act of 1921. Looking around the room, I can say with some assurance that not many gathered here today have done that.

This lifetime achievement award honors the memory of Barbara S. Williams, a former board member of the Customs and International Trade Bar Association and the former Attorney in Charge of the International Trade Field Office of the U.S. Department of Justice. During her tenure, Ms. Williams served the United States with great distinction, integrity, and honor, defending the interests of the government while heeding the legitimate concerns of its citizens seeking redress. She was admired for her dedication, work ethic, generosity, and candor. Barbara was an active member of the Advisory Committee for the U.S. Court of International Trade, was the first U.S. government Board Member of the Customs and International Trade Bar Association, and served as the first law clerk to the Hon. Richard W. Goldberg of the U.S. Court of International Trade. Ms. Williams' career exemplifies the ideals of this award.

Award Criteria:

A strong candidate for the award should have demonstrated one or more of the following criteria:

- Substantial and long-term contributions to the practice of international trade and/or customs law. A "substantial and long-term contribution" shall be considered to be one demonstrating a level of dedication and achievement beyond that expected in the normal course of an individual's or organization's work.
- Service and support to the U.S. Court of International Trade and its legal community.
- Creation, influence or expansion opportunities in the practice of international trade and customs law for the next generation of lawyers.
- Service to the development of the international trade and customs legal profession.
- Service to the bar.
- Advanced ethical practice and professional responsibility in the field of international trade and customs law.

This Year's Awardee - Richard Belanger

Dick Belanger, a retired Partner and now Senior Counsel at Sidley Austin LLP, has been widely widely recognized for many years as perhaps the leading customs practitioner in the United States. He features prominently in the international trade rankings of the leading bar publications such as Chambers, The Legal 500 and Who's Who Legal. In the 2015 edition of Chambers, clients praise Dick's ability to combine technical facility with strategic oversight, saying: "He knows the politics and history of a situation but can also get down to the technical level, and moves easily between those two realms." In 2017, The Legal 500 added Dick to the Hall of Fame within the International Trade category.

Dick is a leader among trade law professionals, having served as a member of the Court of International Trade's Advisory Committee on Rules, the Board of Directors of the Customs and International Trade Bar Association (CITBA), and the Advisory Board for Georgetown University's International Trade Update. Dick is also a member of the Trade Support Network (TSN), a private sector group that provides input to the U.S. government on the design and development of modernization systems, such as the Automated Commercial Environment (ACE). Dick has also served as counsel to the Business Alliance for Customs Modernization (BACM), and as a member to two advisory bodies to the World Customs Organization (WCO).

Dick began his professional career at a customs brokerage, and later served in government as an attorney-advisor at the predecessor agency to U.S. Customs and Border Protection. He also served his country in the U.S. Army as a medical corpsman, being attached to the Americal Division in Vietnam in 1969-1970. And Dick's contributions to society don't end at the courthouse steps. He currently serves on the Board of Directors of Everybody Wins! DC, the largest children's literacy and mentoring organization in the Washington, D.C. metropolitan area. He chaired that board from 1999 to 2005, and prior to that served as general counsel of the organization.

It is with the greatest pride that I am happy to present this award to Dick Belanger this evening. Please join with me in congratulating him and celebrating his career in the law.

NEWS FROM THE CLERK OF THE COURT OF INTERNATIONAL TRADE

By Stephen Swindell and Scott Warner*

**Stephen Swindell is the Supervisor and Scott Warner is the Operations Manager for Case Management at the Court of International Trade.*

'Tis the Season for Samples

On September 24th, the Court approved amendments to Rule 73.1 to provide clarification on the filing of samples and statements regarding samples in 1581(a) and (b) cases. As a result of these amendments, effective October 21st, U.S. Customs and Border Protection is now required to file a statement on whether samples were taken from the entry itself and/or provided to them with the protest before the case was filed with the Court. This statement is to be filed at the same time as the protests and entries are filed in the case, within 90 days after the filing of the summons.

Furthermore, if such samples were taken or received, U.S. Customs and Border Protection is now required to file at least one exemplar of each sample within 90 days after the filing of the protests and entries in the case.

For Whom the Customs Case Management Calendar Tolls

Thanks to the amendments made to Rule 83 on October 23, 2017, the Court began dismissing cases that were not removed from or had their time extended on the Customs Case Management Calendar. To date, dismissal orders have been issued in over twenty 1581(a) cases. So if you have any customs cases and are unsure when their time on the calendar may be up, it might be a good idea to look into it sooner rather than later!

Pace for Impact: A Change in PACER Fees

On September 17, the Judicial Conference approved an amendment to PACER usage fees, effective January 1, 2020. Previously, if your quarterly PACER bill was $15 or less, it would be waived. Now your quarterly bill will be waived if it is $30 or less. Further information regarding this change can be found on the PACER website at: www.pacer.gov.

Federal Circuit and CIT Case Summaries

By Claudia Burke*

* *Claudia Burke is an attorney with the Department of Justice, Civil Division, National Courts Section. These summaries are not a document of the U.S. Department of Justice, nor do they represent the official views of the Department of Justice.*

Trade Remedies

Court of International Trade Preliminarily Enjoins USTR's Withdrawal of Exclusion for "Safeguard" Tariffs on Solar Products. *Invenergy Renewables LLC v. United States, et al.* (Ct. Int'l Trade) [Katzmann, J.]. On December 5, 2019, the Court International Trade entered a preliminary injunction to prevent the United States Trade Representative from implementing the withdrawal of a previous decision granting an exclusion of certain products from the Presidential solar safeguard duties. The President imposed "safeguard" duties under section 201 of the Trade Act of 1974, to remedy injury sustained by domestic solar manufacturers stemming from a surge in imports of competitive products. The President directed USTR to issue procedures for excluding products from the measure so long as the exclusion does not undermine the safeguard's purpose of protecting the domestic industry from "serious injury" from imports. USTR issued notice and comment procedures for requesting exclusions, and certain importers and installers requested an exclusion for "bifacial" panels, which have cells on both sides of the panel. The domestic industry did not oppose the request but, after USTR granted the exclusion, new entrants to the domestic industry objected and requested that USTR withdraw the exclusion. USTR held ex parte meetings with the domestic producers but never informed the requestors of the pending withdrawal of the exclusion. USTR

ultimately withdrew the exclusion without notice and comment. The requestors sued, claiming that USTR was required to follow notice and comment before withdrawing previously granted exclusions. The Court agreed and preliminarily enjoined the withdrawal, holding: (1) domestic installers of solar products had standing to sue; (2) the withdrawal process was an Administrative Procedure Act "rulemaking"; and (3) USTR had violated rulemaking procedures.

Antidumping/Countervailing Duties

Federal Circuit Affirms Judgment Dismissing Chinese Antidumping Challenge for Lack of Jurisdiction *Juancheng Kangtai Chemical Co., Ltd., and NAC Group, Ltd. v. United States*, No. 2018-2298 (Fed. Cir.) [Reyna, Wallach, and Taranto, JJ.]. On July 15, 2019, the Court of Appeals for the Federal Circuit affirmed the judgment of the Court of International Trade, dismissing the complaint of Juancheng Kangtai Chemical Co., Ltd., and NAC Group, Ltd. (collectively, Kangtai) for lack of subject-matter jurisdiction under 28 U.S.C. § 1581(i), the Court's residual jurisdictional provision. In general, jurisdiction is available under section 1581(i) only when jurisdiction is not and could not have been available under another subsection of section 1581, or when another subsection provides an inadequate remedy. The Federal Circuit held that an adequate remedy had been available undersection 1581(c) because Kangtai challenged the Department of Commerce's antidumping results. The Court further rejected Kangtai's claim that it lacked sufficient notice to challenge specific aspects of Commerce's results. Finally, the Court concluded that Kangtai had failed to meet its burden of demonstrating that relief under section 1581(c) would have been manifestly inadequate.

Court of International Trade Remands Countervailing Duty Decision to Commerce to Reconsider China's Export Buyer's Credit Program. *Yama Ribbons and Bows, Inc. v. United States* (Ct. Int'l Trade) [Stanceu, C.J.] In a decision issued on December 30, 2019, the Court of International Trade remanded the Department of Commerce's use of an adverse inference in Commerce's annual review of a countervailing duty order covering narrow woven ribbons, based on the People's Republic of China's (China) failure to provide information about the Export Buyer's Credit Program, which provides loans. The Court held that the Chinese producer/exporter had presented considerable evidence that it did not receive a loan, but that Commerce had improperly failed to consider that information, and, instead, used adverse inferences to find that the producer/exporter had benefitted from the program. The Court rejected the United States' position that, pursuant to *KYD, Inc. v. United States*, 607 F.3d 670 (Fed. Cir. 2010), which involved an antidumping duty proceeding, Commerce has authority to apply an adverse inference when a foreign government does not cooperate, even if the company does. The Court remanded the matter to Commerce and instructed it to examine whether the producer/exporter had received a loan without using adverse inferences.

Court of International Trade Holds That Commerce Abused Its Discretion When Assessing Antidumping Duties on Mechanical Tubing from India. *Goodluck India Limited v. United States* (Ct. Int'l Trade) [Katzmann, J.]. On August 13, 2019, the Court of International Trade granted judgment for an exporter of cold-drawn mechanical tubing from India, agreeing that the Department of Commerce should have accepted minor corrections of data submitted at verification. In response to Commerce questionnaires issued as part of an antidumping investigation, Goodluck submitted sales data on tubing sold in both its home market of India and in the United States and, as required, applied particular product characteristic codes to the underlying data. After Goodluck submitted its initial response, Commerce revised certain product characteristic codes and extended Goodluck's deadline so that it could resubmit the data. On the first day when

Commerce began its process to verify the data submitted, Goodluck provided Commerce with corrected databases because, as Goodluck informed Commerce, Goodluck had failed to revise its product coding in accordance with Commerce's revised characteristics, resulting in cascading errors in Goodluck's home sales and cost databases. Commerce then rejected all of Goodluck's submitted data and issued a final dumping margin based on total adverse facts available. The Court found that the corrected databases submitted by Goodluck at verification did not constitute "untimely new factual information," but rather were "correctible importer errors," and that Commerce improperly rejected the data.

Court of International Trade Vacates *Ex Parte* TRO and Denies Preliminary Injunction in Countervailing Duty Challenge Covering Softwood Lumber from Canada. *Committee Overseeing Action for Lumber International Trade Investigations or Negotiations v. United States* (Ct. Int'l Trade) [Barnett, J.]. On July 26, 2019, the Court of International Trade rejected a domestic lumber industry group's (COALITION) request to enjoin implementation of a Department of Commerce decision that certain Canadian lumber exporting companies did not receive countervailable subsidies from the Canadian government or were subsidized at a rate much lower than the amount of subsidization enjoyed by the remainder of the Canadian industry. The Court reasoned that this case differed from certain international trade cases in which irreparable harm is presumed because implementation of Commerce's decision would not render COALITION's action moot. Accordingly, the Court rejected the requested injunction because plaintiff had proffered no evidence that any member company would suffer irreparable harm stemming from denial of injunctive relief.

Court of International Trade Sustains Imposition of Antidumping and Countervailing Duties on Chinese Steel Despite Finishing in Third Countries. *Bell Supply Co., LLC v. United States* (Ct. Int'l Trade) [Kelly, J.]. After five years of litigation, in July 2019, the Court of International Trade sustained a Department of Commerce decision holding that Chinese steel tubular goods for oil and gas producing countries are subject to antidumping and countervailing duties, even when the merchandise is finished in third countries prior to importation into the United States. Relying upon Commerce's fact-intensive analysis, the Court reasoned that the essential physical and chemical characteristics of the merchandise from China are unchanged by the downstream processing in third countries.

Court of International Trade Denies Mexican Tomato Growers' Application for a Temporary Restraining Order and Motion for a Preliminary Injunction. *Confederacion de Asociaciones Agricola del Estado de Sinaloa, A.C., et al., v. United States* (Ct. Int'l Trade) [Choe-Groves, J.]. On June 6, 2019, the Court of International Trade denied an application for a temporary restraining order and motion for a preliminary injunction filed by plaintiffs, which are organizations representing approximately 750 growers and exporters of tomatoes from Mexico. In 1996, the Department of Commerce initiated an antidumping investigation to determine whether tomatoes from Mexico were being sold in the United States at less than fair value and issued an affirmative preliminary determination. Over the course of the next 23 years, the parties entered into a series of agreements suspending the investigation. Commerce withdrew from the suspension agreement in May, resumed the investigation, suspended liquidation, and began requiring importers to pay cash deposits or post a bond at the rates identified in the preliminary determination. Following Commerce's withdrawal from the agreement, the plaintiffs filed a complaint challenging Commerce's actions in resuming the investigation. The Court held that that the plaintiffs were unlikely to succeed on the merits of their claim because the antidumping statute required Commerce to resume the 1996 investigation. And the Court held that the plaintiffs

failed to establish that they would be irreparable harmed absent an injunction.

Customs

Federal Circuit Rejects Importer's Claim that Customs' Denial of Untimely Request for Retroactive GSP Refund Is A Protestable Decision. *Industrial Chemicals, Inc. v. United States*, Appeal No. 19-1176 (Fed. Cir.). On November 8, 2019, the Court of Appeals for the Federal Circuit affirmed the Court of International Trade's decision dismissing an importer's claim for a retroactive refund under the Generalized System of Preferences (GSP). The importer filed its request for retroactive GSP treatment with U.S. Customs and Border Protection after the statutory deadline. Customs denied the importer's untimely request, and the importer filed an administrative protest. The Court of appeals held that Customs' application of the deadline to the importer's refund application was ministerial and, therefore, not protestable under 19 U.S.C. § 1514(a), because Customs had no authority to grant the requested relief after the statutory deadline. Accordingly, the Court of appeals sustained the trial court's decision that it lacked jurisdiction to hear the importer's claim because Customs's denial of the retroactive GSP refund was not a protestable decision.

Court of International Trade Grants Motion for Summary Judgment in Customs Penalty Case, Holding that United States may Recover $2.2 Million in Lost Duties. *United States v. Aegis Security Ins. Co., et al*. (Ct. Int'l Trade) [Eaton, S.J.]. On December 17, 2019, the Court of International Trade granted the government's motion for summary judgment for $2.2 million in lost customs duties based on an importer's misrepresentations that its imported fabric from Canada qualified for duty free treatment under the North American Free Trade Agreement. The Court had previously dismissed the penalty claim as defective because U.S. Customs and Border Protection had failed to exhaust statutory administrative procedures remedies. However, the Court granted the government's later motion seeking lost customs duties of $2.2 million, concluding that there was no exhaustion requirement to collect lost revenue, as opposed to a penalty, and that the government had demonstrated that the importer violated the customs penalty statute resulting in a loss of that amount.

Court of International Trade Dismisses Challenge to Department of Commerce's Procedures for Assisting Customs and Border Protection in Fraud Investigations. *Wanxiang America Corp. v. United States* (Ct. Int'l Trade) [Katzmann, J.]. On August 19, 2019, the Court of International Trade rejected an importer's request to hold unlawful advice regarding the amount of antidumping duties allegedly owed on imported merchandise provided to U.S. Customs and Border Protection by the Department of Commerce. CBP was investigating the importer for customs fraud and sought Commerce's advice regarding the antidumping duties lost due to the importer's alleged violations. After CBP informed the importer that it was under investigation and provided Commerce's advice, the importer brought suit under the Administrative Procedure Act pursuant to the Court's residual jurisdiction. The Court dismissed the complaint on two grounds. First, the Court reasoned that the importer could have advanced its claim under a different, specific, jurisdictional provision had it sought review of its imports from Commerce and, thus residual jurisdiction was unavailable. Second, the court held that the inter-agency advice was not a final agency action reviewable under the APA.

Court of International Trade Affirms Government's Rejection of Duty Drawback Claim as Untimely. *EchoStar Technologies L.L.C. v. United States* (Case No. 16-00074 [Katzmann, J.]. On June 17, 2019, the Court of International Trade granted summary judgment for the government, finding that plaintiff failed to timely file complete duty

drawback claims within the three-year statutory timeframe under 19 U.S.C. § 1313(r). Accordingly, plaintiff was not entitled to a refund of duties and fees paid on goods imported into the United States that plaintiff subsequently exported. The Court rejected plaintiff's primary argument that submitting certain, albeit incomplete, information electronically within three-years satisfied the statutory requirement that a "complete claim" must be submitted within that timeframe. The Court also rejected plaintiff's alternative claim that U.S. Customs and Border Protection was responsible for the untimely filed claims.

Feature Articles

Does the Recent Review of Section 301 Retaliatory Tariffs on the EU Pursuant to the "Large-Civil Aircraft" Dispute Indicate a New Era of "Carousel" Tariffs?

by Spencer Toubia*

**Spencer Toubia is an Associate in Crowell & Moring's International Trade Group, resident in the firm's Washington D.C. office. He can be reached at: SToubia@crowell.com.*

Ms. Ban's article in CITBA's Spring 2019 Newsletter accurately predicted that the next item on the Trump Administration's to-do list may be the European Union. This prediction also ended up being the perfect segue for this quarter's article because the Administration's sights clearly moved towards the EU after it instructed the United States Trade Representative's ("USTR") to implement two recent actions; the first action being the publication of the notice of proposed Section 301 tariffs against France following the USTR's investigation of France's Digital Service Tax. This article covers the second action-the USTR's recent notice that it will be reviewing the retaliatory tariffs it implemented following the WTO's ruling in the "Large-Civil Aircraft" subsidy case. This review comes only two months after the USTR originally implemented those retaliatory tariffs-this timing may or may not indicate the mechanism and motive of the review including whether this review is the beginning of a tariff "carousel."

Rumors circulated after the initial implementation that the tariffs will be applied to a continually revolving product-list in a process informally known as "carousel" tariffs. The Administration has stated that it has the authority to revise the tariff lists. It left open the possibility that it may further review the list after it published the original implementation notice. Specifically, the USTR noted that it "will continue to consider the action taken in this investigation" and that it may consider "whether future modifications may be appropriate." The USTR made several minor "technical adjustments" to the tariff list on October 18, 2019.

"Carousel" tariffs stem from a 2018 amendment to the Trade Act of 1974 (the Act) which requires the USTR to periodically review retaliatory tariff lists arising from WTO dispute settlement decisions and to "periodically revise the [retaliatory tariff] list or action to affect other goods of the country or countries." Section 306(b)(2)(C) the Act calls for the USTR conduct this review "120 days after the date the retaliation list or other section 301(a) action is first taken, and every 180 days thereafter." The USTR previously enacted "carousel" retaliatory tariffs after the USTR modified the retaliation list related to the U.S.-EU beef hormone dispute in January, 2009. However, the USTR did not make any major changes to that final tariff list and it did not complete its first

review because the U.S. and EU negotiated a settlement which led to the removal of the tariffs. Section 307 of the Act provides another mechanism for the USTR to modify a retaliatory tariff list which allows for the USTR to modify a retaliatory tariff list following a notice and comment period and a determination that certain requirements were met.

The USTR did not cite to Sections 306 or 307 of the Act in this current notice and the review was initiated well before the 120 day period noted in Section 306(b)(2)(C) so the mechanism for the review and its reasons are not entirely clear. The swift turnaround between the implementation of the final list and the review notice may indicate that the USTR intends to continually "carousel" tariffs on a semi-annual, quarterly, or *ad hoc* basis. However, the fact that the review was initiated immediately after the proposed Section 301 Tariffs related to France's Digital services tax might indicate that the review is only an attempt to increase pressure against France and has nothing to do with the USTR's plans to regularly review and carousel tariffs. Therefore, it is too early to know whether this notice signals a new era of carousel tariffs-i.e. an era where the USTR continually, regularly, and actively revises retaliatory tariff lists on more than an annual or semi-annual basis.

Commerce Set to Release Proposed Rules for Emerging Technologies

by Meaghan Vander Schaaf*

**Meaghan Vander Schaaf is a Senior Associate in the Chicago office of Barnes, Richardson & Colburn. She can be reached at: mvanderschaaf@barnesrichardson.com.*

The Commerce Department has revealed plans to release the first set of proposed rules for emerging technologies. These regulations are expected to be issued on a rolling basis, with the first set of six to include restrictions on items involving quantum technology, semiconductor design, chemicals, biotechnology, artificial intelligence and 3D printing.

The proposed controls are required under the Export Control Reform Act of 2018 (ECRA), effective August 13, 2018. ECRA is a permanent statutory authority for the EAR, to be administered by Department of Commerce's Bureau of Industry Security (BIS), and codifies established BIS policies. ECRA specifically authorizes Commerce to identify and establish appropriate controls on the export, reexport, or in-country transfer of emerging and foundational technologies. These emerging and foundational technologies are to be defined through an interagency process. However, generally speaking, emerging and foundational technologies are those essential to the national security of the United States.

With respect to emerging technologies, in November 2018 BIS published an advance notice of proposed rulemaking seeking public comment on emerging technology that should be subject to U.S. export controls. (83 FR 58201) The notice included a list of 14 categories of emerging technology including:

- Biotechnology;
- Artificial intelligence and machine learning technology;
- Position, Navigation, and Timing technology;
- Microprocessor technology;
- Advanced computing technology;
- Data analytics technology;
- Quantum information and sensing technology;

- Logistics technology;
- Additive manufacturing;
- Robotics;
- Brain-computer interfaces;
- Hypersonics;
- Advanced Materials; and
- Advanced surveillance technologies.

These categories encompass technology that the U.S. has important policy reasons for regulating. For example, the artificial intelligence necessary to produce commercial and industrial driverless cars can be deployed in autonomous weapons with military and defense implications. The regulation of advanced surveillance technologies, including faceprint technology, has recently been the subject of worldwide debate as the protests in Hong Kong raise questions about the use of facial recognition to suppress political speech. (Paul Mozur, *In Hong Kong Protests, Faces Become Weapons*, The New York Times, July 26, 2019, https://www.nytimes.com/2019/07/26/technology/hong-kong-protests-facial-recognition-surveillance.html.) The forthcoming proposed rules for emerging technologies are important because these technologies will be subject to U.S. controls and possible license requirements. The impact may even extend into multilateral controls by other countries through international agreements such as The Wassenaar Arrangement.

The definitions of emerging and foundational technologies are also significant because they will be considered part of "critical technology" under the pilot program implemented by the Committee on Foreign Investment in the United States (CFIUS). This pilot program calls for CFIUS to review transactions where there is investment by foreign persons in U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more "critical technologies" used with or designed for any of the 27 pilot program industries. These pilot program industries include, for example, guided missile and space vehicle manufacturing, ball and roller bearing manufacturing, and research and development in nanotechnology.

Parties must notify CFIUS of pending transactions involving U.S. critical technology at least 45 days prior to closing. CFIUS may impose enforcement measures for failing to submit this notification, including civil fines up to the value of the transaction in addition to the forced unwinding of the transaction. Consequently, Commerce's final definition and identification of emerging technologies will impact foreign investment in U.S. companies involved with these technologies.

With respect to foundational technologies, the identification and definition process is expected follow the process for emerging technologies. While BIS has not yet made the initial advance notice of proposed rulemaking seeking public comment on the definition of foundational technologies, representative categories for foundational technologies are expected to be forthcoming.

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