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New Statute of Limitations Impacts M&A and International Trade Compliance

Client Bulletins

Authors: **Jonathan R. Todd**, **Megan K. MacCallum**

New developments in international trade laws will have tangible and far-reaching impacts on transactions as well as day-to-day business operations. President Biden's signing of HR 815 means that once time-barred historic events are now fair game. Our team see two immediate points of response for savvy general counsel and their internal clients: (1) company investors and buyers in mergers or acquisitions now must diligence ten years of trade risk rather than five; and (2) compliance leadership and operations managers now must consider voluntary self-disclosures of events within the same long-passed window.

President Doubles SOL Periods

President Biden signed into law H.R. 815 effective on April 24, 2024. The bill amends in part the statute of limitations ("SOL") for the civil and criminal proceedings from five to ten years for violations of economic sanctions and export controls. Simply put, the bill expressly doubles the SOL for violations under both International Emergency Economic Powers Act ("IEEPA") and the Trading with the Enemy Act ("TWEA").

This change expands the enforcement window for agencies with jurisdiction over international trade activities which may apply the SOL retroactively. As a narrow point, the U.S. Department of Treasury's Office of Foreign Assets Control ("OFAC") administers and enforces many of its sanctions programs under the authority granted to it by the IEEPA and also the TWEA. OFAC sanctions programs under the IEEPA authority include the Global Magnitsky Sanctions Program, the Ukraine/Russia Related Sanctions, and Russia Harmful Foreign Activities Sanctions. The U.S. Department of Commerce's Bureau of Industry and Security ("BIS") also administers and enforces certain export control programs under the TWEA authority such as its embargo against Cuba under TWEA authority.

Mergers and Acquisitions Impact

International trade compliance diligence is an important part of any investment, acquisition, or arms-length merger. Pragmatic counsel or specialist co-counsel can assess the veracity of compliance programs and activities to date in the interest of assessing risk for a target's operations, the potential risk exposure, and meaningful mitigation. These risks can attach under equity and asset transactions alike depending on the facts and deal structure. Now that zone of risk is twice as broad as it was earlier this year – even for closed deals.

In response, counsel for buyers and investors will expand the scope of their diligence requests from the past five years of activity to ten years. Lengthier windows for diligence questions are just the start. The quality of a target's compliance program, relative risk of its business, and credibility of its documentary responses and information set the tone for what follows in the deal process. Expect lengthier representation and warranty periods, possibly special indemnity, and swift post-close action items to address perceived risks. As facts develop through diligence, situations may arise where voluntary self-disclosures are advisable prior to close particular for asset transactions.

International Trade Compliance Impacted by New SOL

An important part of day-to-day operational compliance and periodic risk assessments is the determination of potential violations. This determination requires exercise of discretion over whether to file a voluntary self-disclosure ("VSD") with the agencies having jurisdiction. The ideal benefit of a VSD is to achieve a mitigating effect to reduce liability exposure, in some cases to zero consequence. Many of our clients who choose to file VSDs also do so in the conservative interest of simply "closing the book" on the issue rather than weathering years of uncertainty while hoping to run out the SOL clock.

OFAC and BIS both permit U.S. persons and entities to make a VSD of a violation that has not yet been investigated or reviewed by another agency. Now under the longer SOL, parties considering a VSD filing will need to look back ten years rather than five so that all related violations are indeed disclosed at the same time. Failing to do so could eliminate the mitigating benefit of the VSD for those earlier years. Similarly, any VSDs filed recently may also benefit from examination of the same issue over the complete ten-year period with the possibility of further filings to disclose additional violations.

OFAC has a two-phase VSD process but no set days are proscribed for filing either phase. Instead the process simply requires an initial notification followed by a "report of sufficient detail" to completely understand the circumstances within a "reasonable time" of making the initial notification (Appendix A to 31 CFR Part 501). As with BIS VSDs, parties making OFAC VSDs will likely expand the scope of their internal reviews and request that the "reasonable time period" to make a final report be extended in light of the new SOL. BIS also has a two-phase VSD process where an initial notification is made followed by supplemental disclosures made within 180 days of the initial notification. This 180-day period may be extended. It is likely that businesses who have not yet completed their VSDs will expand the scope of their internal reviews to a 10-year period and bolster their supplemental disclosures or request extended time to file the same.

Looking Ahead to Updating Practices

The practical challenge this change presents for enterprises and their counsel is in effectively implementing the transition. New M&A deals can of course implement this new ten-year SOL. Deals currently in process, or those recently closed, are the hard case since they will require reasonableness in updating diligence or purchase agreement terms on the one hand and possibly post-close assessments on the other. Trade compliance on a forward-looking basis can similarly implement a new ten year SOL. However, active internal investigations and assessments may now need to dig deeper and pending VSDs may need attention before the respective agencies.

The Benesch Team is experienced with the international trade matters that affect parties across the supply chain as well as the lifespan of enterprises. We handle specialty international trade diligence, internal compliance risk assessments, VSDs, defense of enforcement actions, and the development or updating of internal programs and practices for import compliance, export controls, and economic sanctions.

Jonathan Todd is a partner in and Vice-Chair of Benesch's Transportation & Logistics Practice that provides supply chain, export controls, economic sanctions, and import compliance counsel across a wide range of industries. You may reach him at (216) 363-4658 or jtodd@beneschlaw.com. Megan K. MacCallum is an associate in the Transportation & Logistics Practice Group and may be reached at (216) 363-4185 and mmaccallum@beneschlaw.com.

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Jonathan R. Todd
Vice-Chair, Transportation & Logistics Practice Group
Corporate & Securities

T. 216.363.4658
jtodd@beneschlaw.com

Megan K. MacCallum
Associate
Litigation

T. 216.363.4185
mmaccallum@beneschlaw.com