

SEPTEMBER 26, 2021

Senate confirmation hearing for BIS head underway; why it matters

As we've been reporting for the last couple weeks, the Biden Administration has ramped up the volume of nominations for key positions, and the Senate confirmation process is underway. We've covered recent nominations for terrorism post at Treasury and international security at Commerce; this week we'll look at another role: The Under Secretary for Industry and Security, Department of Commerce.

The Under Secretary of Commerce for Industry and Security at the Department of Commerce acts as the principal advisor to the Commerce Secretary on matters pertaining to the export of sensitive technologies and products.

In this role, the Under Secretary is ostensibly the principal officer at Commerce responsible for advancing national security and foreign policy,

primarily by maintaining an effective export control regime. That regime includes regulations, restrictions, anti-boycott enforcement, etc.

Importantly, the individual who serves as Under Secretary acts as the leader of the Bureau of Industry and Security. The BIS is primarily responsible for ensuring effective export control and treaty compliance, thereby advancing national security and foreign policy, as well as economic objectives.

As such, the BIS — among other things — regulates the export of sensitive goods and dual-use technologies, and enforces export controls, often cooperating with other countries on strategic trade issues.

THE NOMINEE

Alan Estevez was nominated by Pres. Biden back in July to lead the BIS as



Alan Estevez, Nominee for Under Secretary for Industry and Security, Department of Commerce

Under Secretary of Industry and Security at Commerce.

Well-known in the defense and aerospace communities, Estevez spent more than three decades with the Department of Defense, serving most recently as Principal Deputy Under

Secretary of Defense for Acquisition, Technology & Logistics (which also required Senate confirmation). Previously, he had served other key positions in the DoD, including Assistant Secretary of Defense for Logistics and Materiel Readiness.

Most recently, Estevez has been serving as a national security and logistics executive at Deloitte Consulting.

CFIUS CONNECTION

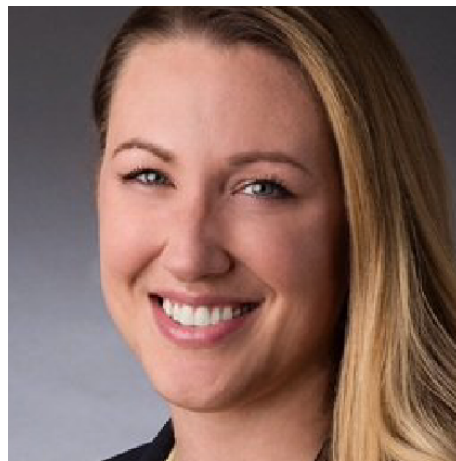
Most Foreign Investment Watch readers are probably asking, so what? What's the connection to CFIUS and the foreign investment regime?

In two words: Export controls.

As we reported back in [August 2020](#), the Bureau of Industry and Security is the entity that is responsible for identifying “emerging” and “foundational” technologies. That's important, because these technologies are not only subject to enhanced export controls, but they are now considered “critical technologies” by CFIUS.

According to Sidley Austin partner Jen Fernandez, BIS — one of two agencies within Commerce involved in the CFIUS process — is tasked with evaluating the export controls and industrial base impact in a given transaction before CFIUS. “BIS's role is not limited to reviews of

specific transactions,” says Fernandez. “As a result of FIRRMA, BIS defines a large share of the ‘critical technologies’ that trigger expanded CFIUS jurisdiction and, in some cases, mandatory filings.”



Jen Fernandez, member of the Global Arbitration, Trade and Advocacy group at Sidley Austin.

Fernandez notes that BIS — in coordination with other export agencies such as the Directorate of Defense Trade Controls at State and the Defense Technology Security Administration at the DoD — is actively reviewing new and existing technologies for additional controls, which will directly impact the number of cases before CFIUS. “Although we rarely see Commerce as a CFIUS co-lead agency,” adds Fernandez, “export

controls have become a centerpiece of any CFIUS analysis.”

That alignment of CFIUS and export controls — with a focus on TID businesses — was codified under new rules that replaced NAICS codes with export control authorization requirements.

This convergence of definitions and regimes has made the relationship to BIS and CFIUS more relevant. Estevez referred to this in the opening remarks of his Senate confirmation hearing. “In addition to export controls, I will support the Bureau's other important equities, including continued efforts to address risks in critical supply chains, reviewing transactions before CFIUS, and enforcing our antiboycott requirements.”

It's worth noting that Estevez is already very familiar with CFIUS, having played a role with the Committee in his prior positions. “I also represented the DoD on the Committee for Foreign Investment in the United States,” said Estevez in the open remarks of his Senate confirmation, “where I advocated for and helped produce robust responses to attempts to access critical technologies.”

Rosalyn Layton, an industry consultant and cofounder of the conservative think tank China Tech Threat, believes that Estevez has an “unparalleled understanding of defense technology,

supply chain security and foreign investment,” all of which should be an asset for him at BIS. “Placing Mr. Estevez at the helm of BIS signals that the Biden administration understands the threat posed by China and is taking it seriously,” she added.

MORE INFORMATION

The full text of Estevez’s opening remarks at his Senate confirmation hearing are available.

For now, Estevez can still be reached at his Deloitte: alanestevez@deloitte.com.

Jen Fernandez, a partner in the Global Arbitration, Trade and Advocacy group at Sidley Austin (quoted above) can be reached at jen.fernandez@sidley.com or 202-736-8824.