



Best Practices for a Complex Industry

Managing GOVCON M&A with Confidence

Presented February 16, 2022



Meet the Panelists



Keith Coleman
Attorney Manager,
Accenture Federal Services

Keith Coleman provides legal counsel and support to Accenture's federal services operating group, while working closely with senior executives, clients, and outside counsel in structuring simple to complex agreements. His experience includes reviewing, drafting, and negotiating medium to complex transactions with federal agencies, contractors, and software providers within the corporate and federal environment. He regularly reviews and analyzes solicitation terms and conditions to determine risk and develop recommendations for risk mitigation. Keith also provides legal support for protest and claim litigation.

Keith earned a law degree from Howard University School of Law and Masters in Government Procurement Law from The George Washington University. He earned a bachelor's degree from Morehouse College.



Gunjan Talati
Partner, Kilpatrick Townsend

Gunjan Talati is an experienced government contracts practitioner who regularly represents contractors in a variety of sectors, including aerospace and defense, health care, and technology. His practice is a mix of regulatory compliance, transactional, and litigation matters. Gunjan's transactional experience includes serving as lead government contracts counsel in contractor M&A, as well as drafting and negotiating joint venture and teaming agreements. His experience also includes two secondments at Fortune 100 government contractors, giving him a unique perspective on working with particular types of government contractors.

Gunjan earned a law degree from Catholic University of America Columbus School of Law and a bachelor's degree from Georgia Institute of Technology.



Kelsey Donnalley
Partner, Kilpatrick Townsend

Kelsey Donnalley focuses her practice on domestic and cross-border mergers and acquisitions, divestitures, joint ventures, corporate restructurings, strategic transactions, and general corporate matters. She regularly advises strategic buyers, private equity funds and portfolio companies, and other corporate clients on M&A and strategic transactions as well as other financial, business, and legal issues. Kelsey has worked with companies in a variety of industries including building products, technology, healthcare, telecommunications, and consumer products.

Kelsey earned a law degree from University of Georgia School of Law and a bachelor's degree from University of North Carolina, Kenan-Flagler Business School.

Agenda

- Introduction to Government Contracting M&A
- Current M&A Trends
- “Typical” M&A Process
- Due Diligence
- Regulatory Filings
- CFIUS
- War Stories

This is Why I'm Hot

- Government contracting mergers and acquisitions continue to hit new records:
 - “Gov Tech Market Gains Steam, Breaks Records in 2021” Government Technology, January/February 2022
 - “Defense Industry Could See Another Wave of Mergers, Acquisitions” National Defense, Feb. 2, 2021

Reasons for Record Numbers

- Expand service and product offerings
- Obtain contracting vehicles
 - GSA Schedules
 - Agency programs
- Gain access to new customers
- Get access to new capabilities, i.e. cybersecurity compliance

Types of Government Contracting M&A

- Equity Purchase

- Purchase of entire entity
- Focus on change of control issues in contracts

- Asset Deals

- Purchase of certain assets and assumption of specific liabilities
- Focus on assignment issues in contracts

- Mergers

- Change of control by merger, either a reverse merger (effectively change of control) or forward merger (effectively assignment of assets)

Current M&A Trends

- 2021 saw highest levels of M&A since 2015
 - Largely a seller's market
 - Compressed timelines
 - Pressure to accept limited or no seller recourse deals
- Prevalence of reps and warranties insurance
 - Necessity of thorough diligence and written reports from third party advisors
- EBITDA multiples vary by industry but increasing across the board
 - Health care – 10x-30x
 - Software – 10x-15x
 - Manufacturing – 5x-7x

“Typical” M&A Process

- One-off negotiation or auction process
- LOI/term sheet
 - Exclusivity – maybe not in auction process
 - Binding vs. non-binding
- Diligence
- Negotiation of purchase agreement
- Gap period between signing and closing?
 - Third party or governmental consents
 - Notification of customers/suppliers/employees
- Closing

Due Diligence

- The homework on what you are buying
 - Increasingly important in RWI and limited or no seller recourse deals
 - Balancing with compressed timelines
- Process to better understand the target's business
 - Financial
 - Tax
 - Environmental/real estate
 - Legal – corporate records, contracts, employment, benefits, data security, IP
- Develop timing concerns and post-closing integration objectives
 - In gov con context, map out timeline to obtain any necessary consents, including contract assignments/novations or agency consents, i.e. CFIUS

Government Contracting Due Diligence

- Increased focus on some areas and some new areas all together
 - Classified programs
 - Extremely challenging because it must be conducted by folks with appropriate clearance
 - Limitations on what can be shared with deal teams
 - Advance agency coordination often required
- **Panel Hypothetical:** You represent the buyer of a company, Foreign Co., with both unclassified and classified government contracts. This is Foreign Co.'s first acquisition with classified contracts. Leadership asks you to explain how diligence will work.

Government Contracting Due Diligence

- Export Controls

- Important for a number of different reasons:
 - To identify whether the company has had an appropriate compliance program
 - Determine what obligations will be post-closing
 - Identify potential violations and determine potential successor liability
 - CFIUS crossover

- **Panel Hypothetical:** During diligence, Foreign Co. discovers that U.S. Target Co. does not have a formal export control compliance program. How would you structure this aspect of diligence based on that revelation?

Government Contracting Due Diligence

- Government Contracts Ethics & Compliance
 - FAR/DFARS/Agency Supplement clause compliance evaluation
 - What's in the agreements?
 - Unique GSA Schedule Risks
 - Price Reduction Clause
 - Trade Agreements Act
 - Mandatory Disclosure Rule
 - Internal processes?
 - Any disclosures made?
 - Any facts that require disclosure but not made?
 - Organizational Conflicts of Interest
 - Required to make sure you don't acquire yourself out of contracts!
 - False Claims Act Liability
- **Panel Hypothetical:** U.S. Target Co. misinterpreted SBA regulations and has been wrongly holding itself out as a WOSB when it does not qualify under the regulations. How does that impact the transaction?

Government Contracting Due Diligence

■ Gov Con Labor & Employment

- Prevailing wages
 - Service Contract Act
 - Davis Bacon
 - Walsh-Healey
- Anti-Human Trafficking
 - Commercial sex acts
 - Forced labor
 - Zero tolerance policy
- Equal Employment Opportunity & Affirmative Action Programs
 - Plans, reports, and audits, oh my!



- **Panel Hypothetical:** U.S. Target Co. has not been flowing down prevailing wage obligations in subcontracts. How can you address this as part of the transaction?

Government Contracting Due Diligence

■ Supply Chain & Cybersecurity

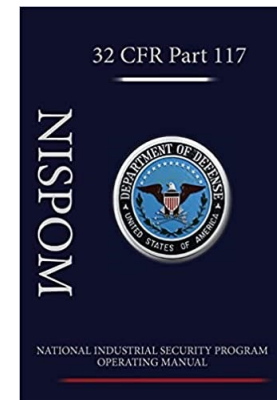
- Cybersecurity is an important and growing area of due diligence focus.
 - DFARS compliance
 - Appropriate NIST standards satisfied?
 - Any mandatory reports?
 - CMMC
- Supply Chain
 - Section 889
 - Counterfeit parts



Regulatory Filings

- NISPOM Notice

- National Industrial Security Program Operating Manual
- Notice and coordination with DCSA
- FOCI
 - Report foreign interests
 - Mitigation (Proxy/SSA)



- **Panel Hypothetical:** U.S. Target Co. holds a facility clearance and wants to continue performing contracts requiring this facility clearance after it is acquired by Foreign Co. What factors should it consider in determining whether a proxy agreement or SSA is appropriate for its needs?

Regulatory Filings

■ ITAR/EAR

- DDTC & BIS
- When is a 60-day notice to DDTC required? 22 C.F.R. § 122.4
- When is a 5-day notice to DDTC required?
- What happens to existing export applications?

- **Panel Hypothetical:** How far ahead of closing should U.S. Target Co. notify DDTC about the transaction?



CFIUS Generally 31 C.F.R. Part 800

- The Government has a history of reviewing foreign direct investment in the United States
- Currently, the Committee on Foreign Investment in the United States (CFIUS) is the governmental entity that reviews these investments
- Reviews were largely voluntary (but now mandatory in certain instances)
- CFIUS actively looks for transactions of interest that weren't submitted for review and can "invite" parties to file or initiate reviews directly

The Committee on Foreign Investment in the United States (CFIUS)

- Significant regulatory updates, i.e., filings are now mandatory in certain instances
- “Covered Transactions” scope has been expanded
- Substantial press coverage:
 - “\$1M CFIUS Fine is Rare Public Enforcement Flex” – Law360
 - “In New Slap at China, U.S. Expands Power to Block Foreign Investments” – The New York Times
 - “America and the EU are Both Toughening Up on Foreign Capital” – The Economist

Procedure

- FIRRMA also made a number of changes to CFIUS procedures:
 - Timelines
 - Document Request
 - Declarations
 - Filing Fees
 - Mitigation Agreements

Hypothetical

Acme Co., a Chinese technology company has been a 10% passive investor in a Wylie Coyote Co., a U.S. semiconductor company. The other shareholders (all U.S. citizens) of Wylie Coyote Co. decide to sell their interests so that they can purchase traps to help them catch an elusive Road Runner. Acme has generously offered to buy the other shareholders out at a fair market rate.

- Will a CFIUS filing be required? What additional information is needed to make that determination?
- Can Acme avoid CFIUS review by setting-up a U.S. subsidiary company and having the subsidiary buy the shares?

Novations

- When are novations required?
- What is required to novate?
- Many trees have given their lives:
 - List of affected contracts
 - Evidence of capability to perform
 - Authenticated copies of instrument transferring assets
 - Certified copies of resolutions and meeting minutes
 - Legal opinions
 - Novation agreement



War Stories

- Pitfall No. 1: Not identifying all the unique regulatory requirements: ITAR, NISPOM, CFIUS, FCC, at the beginning.
 - Negative impact to timelines
 - Potentially endangering transaction
 - Civil/criminal penalties
- Pitfall No. 2: Treating diligence as a “check the box” exercise instead of understanding unique risks.
- Pitfall No. 3: Not engaging regulatory bodies early and often.
- Pitfall No. 4: Failing to address outstanding proposals.

Additional Resources

- [Regulatory Considerations for M&A Investors During COVID-19 Era](#) (September 29, 2020)
- [Export Controls: ITAR and EAR Related Developments](#) (May 18, 2020)
- [Five Fast Facts: New CFIUS Regulations Implementing FIRRTMA Add a New Layer of Complexity to Foreign Investments in U.S. Businesses](#) (February 13, 2020)
- [Penalties for Failing to Make Mandatory CFIUS Declaration Filings Become a Reality in Just Days: Is Your Transaction Impacted?](#) (November 5, 2018)
- [CFIUS Reform is Here: What the Foreign Investment Risk Review Modernization Act of 2018 Means for Your Transaction](#) (August 3, 2018)

Contact Us



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Locations

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We help leaders create, expand, and protect the value of their companies and most prized assets by bringing an equal balance of business acumen, technical skill, and creative thinking to the opportunities and challenges they face.



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