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United States Continues Expansion of Export Control Sanctions on Chinese Companies

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Ongoing tensions between the United States and China have resulted in an expansion of U.S. export controls and trade sanctions against China. The Biden Administration's October 2022 National Security Strategy ("2022 NSS") identified China and Russia as America's two strategic adversaries and emphasized the United States would be increasingly assertive in its use of export control policies in execution of that strategy:

We must ensure strategic competitors cannot exploit foundational American and allied technologies, know-how, or data to undermine American and allied security. We are therefore modernizing and strengthening our export control and investment screening mechanisms, and also pursuing targeted new approaches, such as screening of outbound investment, to prevent strategic competitors from exploiting investments and expertise in ways that threaten our national security, while also protecting the integrity of allied technological ecosystems and markets. We will also work to counter the exploitation of American's sensitive data and illegitimate use of technology, including commercial spyware and surveillance technology, and we will stand against digital authoritarianism.[1]

In the past few weeks, the U.S. Commerce Department's Bureau of Industry and Security ("BIS") has taken several steps against Chinese companies under the Export Administration Regulations ("EAR") that appear to be implementing forcefully this aspect of the 2022 NSS. BIS has stiffened both U.S. and multilateral export control measures and has further reduced opportunities for Chinese firms to use U.S. technology in ways deemed to be inconsistent with U.S. security interests.

A Technology Trade Embargo on Huawei

Huawei Technologies Co. Ltd. ("Huawei") is one of the world's leading telecommunications equipment suppliers and one of China's most successful and

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prominent technology companies. BIS had placed Huawei on its Entity List in May 2019, which would ordinarily have stopped most U.S. technology exports subject to the EAR from going to Huawei. However, BIS tempered that designation with a Temporary General License ("TGL") for certain activities (e.g., 5G standards development) and also continued to allow certain key U.S. firms such as Intel and Qualcomm to continue supplying Huawei less advanced chips under BIS export licenses. BIS now has begun to inform those U.S. firms that they will no longer receive such export licenses and so must stop exporting even those lower level technology products to Huawei, bringing about the virtual full force and effect of the original 2019 Entity List designation for Huawei.

Additionally, in May 2020, BIS adopted an expanded "foreign direct product" rule ("FDP Rule") in EAR Section 734.9 that was intended to curtail the ability of Chinese companies such as Huawei to obtain chips and other goods made in third countries through use of U.S.-origin software or technology. Following the Russian invasion of Ukraine in February 2022 and in line with the 2022 NSS, BIS reacted quickly by adding Russia and Belarus to the scope of the FDP Rule (see here for our update as to Russia and Belarus). BIS further bolstered the FDP Rule in October 2022 with revisions specifically aimed at the Chinese advanced computing and semiconductor industries, covering items made in third countries that may be used to benefit China's growing semiconductor and computer industries. Since the global electronics industry (e.g., in Taiwan, Korea, Japan and various European nations) remains reliant in varying degrees on U.S. software, technology and equipment, especially to design and to produce the most advanced chips, the FDP Rule creates a formidable obstacle to Huawei and other similarly situated Chinese companies from obtaining certain critical types of chips from third countries or even from foreign-owned production facilities within China itself when the end use is advanced computing within China.

More Multilateral Export Control Measures

While the FDP Rule enables the United States to assert some extraterritorial leverage through the EAR, other countries in Asia and Europe do possess their own indigenous chip design and production software and technology that fall outside the reach of the FDP Rule. The United States has therefore ramped up its efforts to persuade certain like-minded nations to adopt their own domestic export controls that parallel U.S. actions to stem the flow of advanced chips and other similar microelectronics products to Chinese firms, especially those that may be closely affiliated with the Chinese People's Liberation Army ("PLA") or its various security agencies.

In recent weeks, the United States apparently has succeeded, through closely guarded bilateral talks with both Japan and the Netherlands, to limit the exports of advanced chip production equipment and related electronics items and technology to China from those two key trading nations. While the precise details of these agreements are not yet known, this step seems to build in part upon an earlier announced decision by the Dutch government to limit the export of sensitive photolithography equipment to chip makers in China. It remains to be seen, however, if this further movement by the Netherlands will be followed more broadly across the other European Union ("EU") countries such that

there would eventually be a uniform and harmonized adoption among all the EU Member States of such more stringent export controls on advanced chip production equipment and other microelectronics products and technologies.

More Chinese Entities Placed on BIS Entity List

With the direct authorization of President Biden, U.S. Air Force fighter jets have recently scrambled from bases across the United States to shoot down a balloon from China and three more "objects" of unknown provenance or purpose flying over North American airspace. These incidents included a balloon with a payload the size of three school buses taken down near Myrtle Beach, South Carolina, on February 4; an object shot down near Deadhorse, Alaska on February 10; another object shot down at the formal request and authorization of Canadian Prime Minister Justin Trudeau over the Yukon Territory in Canada on February 11; and yet another object over Lake Huron, Michigan. Various press briefings by Department of Defense ("DoD") officials have suggested the Government has been aware for some time of these overflights of North American airspace by such "objects." However, the stakes seem to have escalated sufficiently with these recent incidents that warranted immediate military action, particularly when the three "objects" were detected floating at altitudes between 20,000 and 40,000 feet (approximately 6,100 – 12,200 meter) where commercial aviation routinely operates.

In response to these kinds of intrusions into U.S. air space, effective as of February 10, BIS named[2] six more Chinese entities to its Entity List because they are considered to be supporting China's efforts to modernize its aerospace programs, including PLA airships and balloons (and related materials and parts) directed toward for intelligence gathering and reconnaissance. The six newly added Chinese entities are:

- Beijing Nanjiang Aerospace Technology Co., Ltd.
- China Electronics Technology Group Corporation 48th Research Institute
- Dongguan Lingkong Remote Sensing Technology Co., Ltd.
- Eagles Men Aviation Science and Technology Group Co., Ltd.
- Guangzhou Tian-Hai-Xiang Aviation Technology Co., Ltd.
- Shanxi Eagles Men Aviation Science and Technology Group Co., Ltd.

As with Huawei and other companies that have been placed on the Entity List, such designated firms will not be allowed to receive any further exports of U.S. goods, software or technology unless authorized by BIS export licenses. These six Chinese entities will now all face that BIS export license requirement and, critically, will be subject to a presumption of denial by BIS of any applications filed for such licenses.

In apparent retaliation against these new Entity List designations, on February 16, China's Ministry of Commerce announced it was placing two leading U.S. aerospace firms – Lockheed Martin Corporation and the missile and defense division of Raytheon Technologies Corporation – on China's "unreliable entities list" and would prohibit them from engaging in any import or export activities with China and from being able to invest in China because these two firms had been involved in arms supply deals with Taiwan. The new Chinese sanctions on Lockheed and Raytheon also bar any senior corporate

officers of either firm from gaining a Chinese entry visa or from access to any permit to work in China. Finally, the Ministry of Commerce said it would be imposing large fines on the two U.S. firms equal to double the value of the armaments they had sold to Taiwan since late 2020.

Other Potential Export Control Measures

In addition to the direct U.S. security concerns about China that are outlined in the 2022 NSS, China remains closely engaged with Russia despite the latter's February 2022 invasion of neighboring Ukraine and the ongoing brutal war that is now nearing its first anniversary. In particular, China has continued to support the faltering Russian economy by massive purchases of petroleum and natural gas from Russia that it can no longer sell to European nations due to their trade sanctions programs. Moreover, Iranian President Ebrahim Raisi has just completed a three-day visit to China at the invitation of Chinese President Xi Jinping for high-level talks to reaffirm the ties between those two nations. Some Chinese companies continue to trade with both Russian and Iranian businesses and government purchasers that have been subjected to western sanctions programs.

The Biden Administration is likely to view China's continued close linkages to adversary nations such as Russia and Iran with concern and will likely continue to devote significant intelligence efforts to identify any Chinese firms that may be diverting or channeling U.S. goods, technology, or software to Russia or Iran contrary to U.S. law, including any items subject to the FDP Rule targeting Russia and Belarus. In that regard, it should be recalled that BIS initially named both Chinese telecommunications firms ZTE and Huawei to the BIS Entity List because they were alleged to be engaging in elaborate schemes to divert U.S.-origin telecommunications equipment to Iran in violation of U.S. sanctions. In a similar vein, there are various media reports that Ukrainian officials continue to find Russian munitions such as drones and missiles that contain U.S.-origin electronics parts and components that are prohibited from export or reexport to Russia. Undoubtedly, the U.S. intelligence community will continue to monitor these situations and BIS will then apply all available measures under the EAR to deal with such detected violations of U.S. law.

On February 16, Deputy Attorney General Lisa Monaco, the senior official who manages the law enforcement and counterintelligence functions of the U.S. Department of Justice, gave a policy address at Chatham House in London[3] regarding the geopolitical threats facing the United States and the United Kingdom, citing the particular risks posed by Russia and China. Among other things, she announced publicly

… the launch of a new initiative – the Disruptive Technology Strike Force. A collaboration of U.S. law enforcement – led by the Justice and Commerce Departments – the Strike Force brings together our top experts to attack tomorrow's national security threats today. We will use intelligence and data analytics to target illicit actors, enhance public-private partnerships to harden supply chains, and identify early warning of threats to our critical assets, like semiconductors. Our goal is simple but essential – to strike back against adversaries trying to siphon our best technology.

Such a high profile joint effort for a new strike force between the Commerce Department and the Justice Department will likely lead to even broader uses of the EAR and export controls in the future to deal with the diverse threats outlined in the Deputy Attorney General's speech. Moreover, it seems increasingly evident that such enhanced U.S. law enforcement and counterintelligence efforts will be directed toward controlling and limiting access by Russian or Chinese companies to many different emerging and foundational technologies – especially those that might be considered "disruptive."

[1] https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf (p. 33).

[2] 88 Fed. Reg. 9389 (February 14, 2023).

[3] https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-disruptive-technologies-chatham