

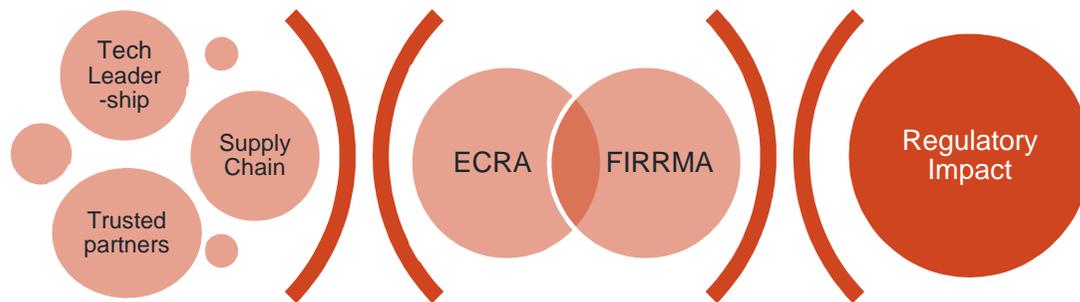


The People's Republic of China: the Application of US Secondary Sanctions (Extraterritorial Measures), Other International Attitudes Towards it, and the New Chinese Laws

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US Policy and Legislation Impacting Doing Business with China



■ Policy Objectives

- Slowing down Chinese leadership in emerging technology
- Maintaining integrity of US supply chains
- Favor trusted partners aligned with US national security and foreign policy interests

■ National Defense Authorization Act for Fiscal Year 2019

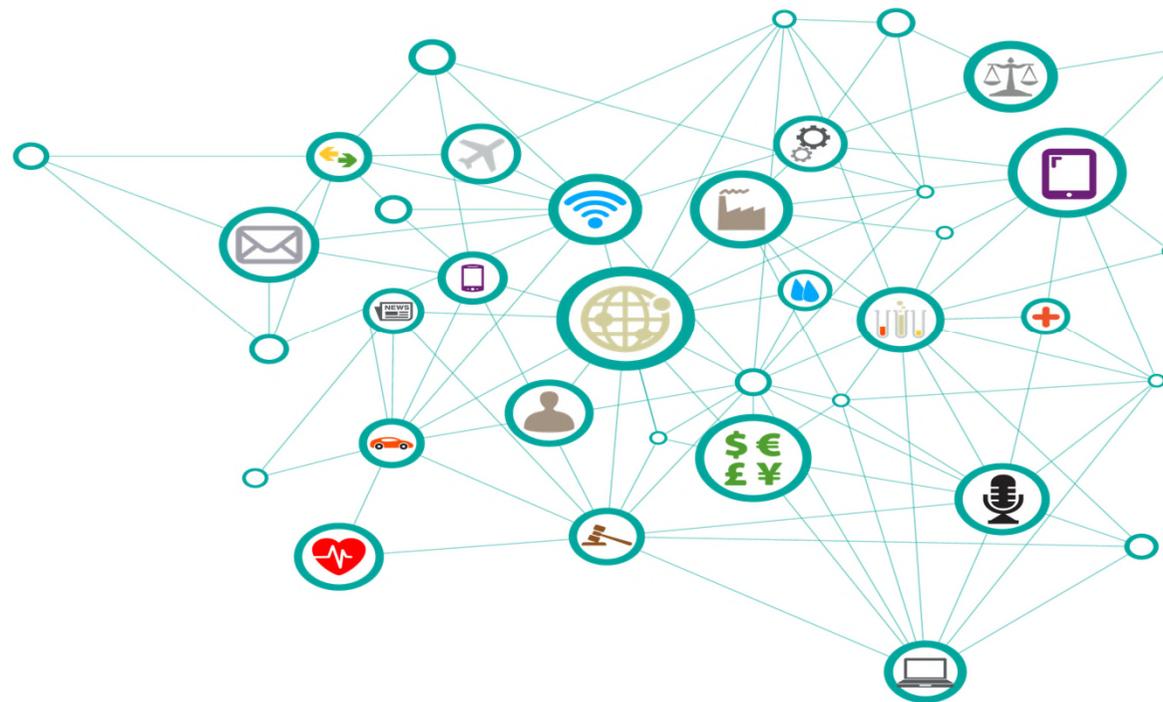
- Companion legislation: approaching the problem from different angles
- Export Controls Reform Act (**ECRA**)
 - **BIS** – Reviews exports, reexports and transfers (in country)
- Foreign Investment Risk Review Modernization Act (**FIRRMA**)
 - **CFIUS** – Reviews foreign investment in the US

■ Regulatory Impact

- Extreme scrutiny of Chinese interest investments in US
- Critical assessment of UK/EU relationships with China in connection with UK/EU investments in the US
- Retroactive review of investments in US
- Place key companies in China on a restricted party lists: Huawei, Tencent, SMIC, Sinochem and many others
- Control exports of emerging and foundational technologies (that are not even on the EU dual-use list)
- Control exports for military end-uses and end-users in China (of items not on EU dual-use list)
- Prohibit non-US made products with US technology, software or equipment from going to Huawei
- Treat Hong Kong like mainland China for export controls
- Prohibit Chinese products use for US government procurements
- Prohibit Huawei product in US telecom system
- Prohibit Chinese apps that collect personal data of US citizens

Agenda

- Emerging and Foundational Technology
- Targeted Entities
- Designated Entity Direct Product Rule
- Military End-use and End-user Rule
- Hong Kong Policy
- Reactions from China and Allies



Export Control Reform Act of 2018

Emerging Technology ANPRM

- Biotechnology, such as:
 - Nanobiology
 - Synthetic biology
 - Genomic and genetic engineering
 - Neurotech
- Artificial intelligence (AI) and machine learning technology, such as:
 - Neural networks and deep learning (e.g., brain modelling, time series prediction, classification)
 - Evolution and genetic computation (e.g., genetic algorithms, genetic programming)
 - Reinforcement learning
 - Computer vision (e.g., object recognition, image understanding)
 - Expert systems (e.g., decision support systems, teaching systems)
 - Speech and audio processing (e.g., speech recognition and production)
 - Natural language processing (e.g., machine translation)
 - Planning (e.g., scheduling, game playing)
 - Audio and video manipulation technologies (e.g., voice cloning, deepfakes)
 - AI cloud technologies
 - AI chipsets
- Position, navigation and timing (PNT) technology
- Microprocessor technology, such as
 - Systems-on-Chip (SoC)
 - Stacked Memory on Chip.
- Advanced computing technology (e.g., memory-centric logic)
- Data analytics technology, such as
 - Visualization
 - Automated analysis algorithms
 - Context-aware computing
- Quantum information and sensing technology
- Logistics technology (e.g., Mobile electric power, modeling and simulation, total asset visibility, or distribution-based Logistics Systems (DBLS)).
- Additive manufacturing (e.g., 3D printing)
- Robotics
- Brain-computer interfaces
- Hypersonics
- Specialized materials (for structures, sensors, etc.)
- Advanced materials (e.g., adaptive camouflage, functional textiles (e.g., advanced fiber and fabric technology), and Biomaterials)
- Advanced surveillance technologies (e.g., faceprint and voiceprint technologies)

- Items subject to control for military end-use or military end-user reasons under Supplement No. 2 to part 744
 - Many of these items, including semiconductor manufacturing equipment and associated software tools, lasers, sensors, and underwater systems, can be tied to indigenous military innovation efforts in China
- AT level or as EAR99 items
 - Items utilized or required for innovation in developing conventional weapons, enabling foreign intelligence collection activities, or weapons of mass destruction applications.
- Technologies that have been the subject of illicit procurement attempts
 - May demonstrate some level of dependency on US technologies to further foreign military or intelligence capabilities in China or development of weapons of mass destruction

Targeted Entities

- BIS Entity List – Prohibits exports, reexport or in-country transfers of some or all items subject to the EAR
 - Numerous Chinese companies, including Huawei
 - Will Semiconductor Manufacturing International Corp (SMIC) be added to Entity List?
- DoD List of “Communist Chinese military companies” operating directly or indirectly in the US
 - Notable examples: Sinochem Group; Aviation Industry Corporation of China (AVIC); Huawei; China Railway Construction Corporation (CRCC)
- Chinese financial institutions targeted
 - Bank of Dandong and Shanghai Pudong Development (SPD) Bank (both doing business with North Korea)
 - Looking at Ant Group and Tencent digital payment platforms
- Chinese apps that capture personal data about US citizens and their location
 - ByteDance (TikTok); Tencent (WeChat)

The Entity List

Control Policy: End-User and End-Use Based

Supplement No. 4 to Part 744 – page 74

COUNTRY	ENTITY	LICENSE REQUIREMENT	LICENSE REVIEW POLICY	FEDERAL REGISTER CITATION
	HiSilicon Optoelectronics Co., Ltd., Wuhan, Hubei, China.	For all items subject to the EAR, see §§ 736.2(b)(3)(vi) ¹ and 744.11 of the EAR, EXCEPT ² for technology subject to the EAR that is designated as EAR99, or controlled on the Commerce Control List for anti-terrorism reasons only, when released to members of a “standards organization” (see §772.1) for the purpose of contributing to the revision or development of a “standard” (see §772.1).	Presumption of denial.	84 FR 22963, 5/21/19. 85 FR 29853, 5/19/20. 85 FR 36720, 6/18/20. 85 FR 51603, 8/20/20.
	HiSilicon Technologies Co., Ltd (HiSilicon), Bantian Longgang District, Shenzhen, 518129, China.	For all items subject to the EAR, see §§ 736.2(b)(3)(vi) ¹ , and 744.11 of the EAR, EXCEPT ² for technology subject to the EAR that is designated as EAR99, or controlled on the Commerce Control List for anti-terrorism reasons only, when released to members of a “standards organization” (see §772.1) for the purpose of contributing to the revision or development of a “standard” (see §772.1).	Presumption of denial.	84 FR 22963, 5/21/19. 85 FR 29853, 5/19/20. 85 FR 36720, 6/18/20. 85 FR 51603, 8/20/20.

- A license is required, to the extent specified on the Entity List, to export, reexport, or transfer (in country) any item subject to the EAR when an entity that is listed on the Entity List is a party to the transaction
- License exceptions may not be used unless authorized in the Entity List entry for the entity that is party to the transaction
- Applications for licenses required by this section will be evaluated as stated in the Entity List entry for the entity that is party to the transaction
- Fn1 makes the entity subject to the “Designated Entity” direct product rule
- Fn2 refers to exception for ongoing security research critical to maintaining the integrity and reliability of existing and currently fully operational network and equipment.

Foreign Direct Product Rule (Entity List)

- Secretary of Commerce Wilbur Ross explained the expansion of the restrictions as necessary because earlier US Department of Commerce actions had “led them [Huawei] to do some evasive measures. They were going through third parties,” Secretary Ross added, “The new rule makes it clear that any use of American software or American fabrication equipment is banned and requires a license.”
- This rule prevents non-US organizations from exporting items to or for Huawei if:
 - Based on certain **Specified Technology or Software**
 - Produced using equipment based on certain **Specified Technology or Software**
- **Specified Technology or Software** = ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, or 5E991 of the CCL

Foreign Direct Product Rule (Entity List)

- You may not reexport, export from abroad, or transfer (in-country) without a license or license exception any foreign-produced item when there is “knowledge” that
 - The foreign-produced item will be incorporated into, or will be used in the “production” or “development” of any “part,” “component,” or “equipment” produced, purchased, or ordered by any **Designated Entity**; or
 - Any **Designated Entity** is a party to any transaction involving the foreign-produced item, e.g., as a “purchaser,” “intermediate consignee,” “ultimate consignee,” or “end-user.”

Designated Entity = any entity with a footnote 1 designation in the license requirement column of the Entity List

- AND the foreign produced item is
 - A direct product of **Specified Technology or Software**; or
 - Produced by any non-US plant or major component of a plant that itself is a direct product of **Specified Technology or Software**

BIS's Military End-use and End-user Rule

- Expansion of Military End-use and Military End-user Controls – Final Rule
 - Export, reexport or transfer in-country of Supp. 2 Items
 - Knowledge of military end-use or military end-user
 - “Military end-use” means incorporation into:
 - a USML defense article;
 - item classified under ECCNs ending in “A018” or under “600 series” ECCNs; or
 - any item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, “development,” or “production,” of military items described on the USML, or items classified under ECCNs ending in “A018” or under “600 series” ECCNs.
 - “Military end-user” means
 - national armed services (army, navy, marine, air force, or coast guard), as well as the national guard and national police, government intelligence or reconnaissance organizations, or
 - any person or entity whose actions or functions are intended to support military end uses
- Semiconductor Manufacturing International Corporation (SMIC) Letter
 - SMIC poses an unacceptable risk of diversion to military end use
 - License required to export, reexport or transfer Supp. 2 items to SMIC

Case Study.

UK Co. reexports US-origin 1C990 composite fabric to China Fabricator. China Fabricator manufacturers prepreg material. Some prepreg material is sold to another contractor in China that uses the material to produce parts for a military application in China.

1. China Fabricator has signed certification confirming no military end-use and not for military end-user. Has UK Co. complied with the rule?
2. China Fabricator knows the contractor in China supports both commercial and military applications, but does not know the ultimate end-use for this prepreg shipment. Has China Fabricator complied with the rule?
3. Has China Fabricator made a false statement to UK Co.? What are the implications if it has?

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- May 29, 2020 – President directed the heads of executive departments and agencies to begin the process of eliminating policy exemptions under US law that give Hong Kong differential treatment in relation to China.
- DDTC
 - DDTC will not process for approval any new licenses, agreements or amendments to current agreements for Hong Kong.
 - DDTC will not suspend or terminate any previously approved and non-exhausted licenses or agreements.
- BIS
 - BIS has not determined its policy as to future licenses or even as to the continuation of approved licenses involving consignees in Hong Kong.
 - BIS suspended license exceptions for exports to Hong Kong, reexports to Hong Kong, and transfer (in-country) within Hong Kong, of items subject to the EAR that provided differential treatment than those license exceptions available for use with exports, reexports and transfer (in-country) to China.
 - removes the availability of the following License Exceptions for all exports, reexports or transfers (in-country) of items to Hong Kong:
 - Shipments of Limited Value (LVS) (§ 740.3)
 - Shipments to Group B Countries (GBS) (§ 740.4)
 - Technology and Software under Restriction (TSR) (§ 740.6)
 - Computers, Tier 1 only (APP) (§ 740.7(c))
 - Temporary Imports, Exports, Reexports and Transfers (in-country) (TMP) (§ 740.9(a)(11), (b)(2)(ii)(C), and (b)(5))
 - Servicing and Replacement Parts and Equipment (RPL) (§740.10(a)(3)(viii), (a)(4), (b)(1) except as permitted by Country Group D:5, and (b)(3)(i)(F) and (ii)(C))
 - Governments (GOV) (§ 740.11(c)(1) – Cooperating governments only)
 - Gift Parcels and Humanitarian Donations (GFT) (§ 740.12)
 - Technology and Software Unrestricted (TSU) (§ 740.13)
 - Baggage (BAG) (§ 740.14) (except as permitted by § 740.14(d))
 - Aircraft, Vessels, and Spacecraft (AVS) (§ 740.15(b)(1), (b)(2), and (c))
 - Additional Permissive Reexports (APR) (§ 740.16(a) and (j))
 - Strategic Trade Authorization (STA) (§ 740.20(c)(2))

China Response: Unreliable List

- September 19, 2020 – PRC Ministry of Commerce (MOFCOM) published Unreliable Entity List (UEL) Regulations
- Foreign enterprises, other organizations or individuals may be included on the UEL if they:
 - Cause damage to China’s national sovereignty, security and interest of development, or
 - Violate normal market business principles, discontinue normal transactions with or take discriminatory measures against Chinese companies **and** seriously harm the legitimate rights and interests Chinese companies.
- If MOFCOM decides to initiate investigation
 - Public announcement
 - Target entity is given the opportunity to respond and defend itself
- MOFCOM may take one or more of the following measures against unreliable entity:
 - Restrict or prohibit the unreliable entity from importing and exporting to and from China
 - Restrict or prohibit the unreliable entity from investing in China
 - Restrict or prohibit the unreliable entity related persons or transportation vessels from entering territory of China
 - Restrict or cancel the work or residence permit of the unreliable entity or related personnel
 - Impose a fine

- Existing or planned measures at EU level which aim at curtaining China/China Inc. impact would include:
 - Europe has labeled China a 'strategic rival' in its revised EU-China Strategy in 2019
 - Heightened scrutiny of third country investments into the European Union (EU), in particular if coming from China.
 - The FDI scrutiny regime at EU level has recently been strengthened, including better information sharing and cooperation between affected EU Member States, as well as a coordinating role for the EU Commission, though decision-taking remains at national level and there are substantial variations in national procedures.
 - Some national EU Member States have additional scrutiny processes, in particular if the investment relates to sensitive/strategically relevant industries (a term which is defined at national level; in France in the past even the dairy industry was covered).
 - Planned heightened scrutiny of third country operators regarding potential market-distorting foreign subsidies they may receive in their countries of origin.
 - Ongoing debate at EU level (EC / BEREC guidelines on 5G equipment), as well as at national level which increasingly forbid or impede Chinese hardware providers such as Huawei or ZTE in selling their 5G equipment in Europe.
 - So far only Poland among EU member states, and the UK, has moved to bar Huawei from 5G networks, though the French government has achieved something similar without an explicit ban.
 - EU Digital Sovereignty debate: EU political leaders (e.g. Commissioner Breton) indicate that they wish, in the longer term, to proactively reduce Europe's dependence on third country technology providers – such as Huawei from China, but also from US tech giants – and to build up European alternatives.
 - These 'European alternatives' are being forcefully supported (e.g. GAIA-X cloud project) in order to get them off the start, or to help them reach critical mass.
 - At the same time, Europe does not want to preclude any specific third country firm from general market access in Europe – as long as these operators abide by the locally applicable EU rules (e.g. on data protection).

