

2021 Export Control Recap

by the CITBA Export Control Committee

Welcome to what is, optimistically, the CITBA Export Control Committee's inaugural annual recap of major developments in export controls. 2021 ushered in a new presidential administration, but all signs point to continuity in the export control space. If an overall theme can be distilled, it is that the new administration will likely dole out new export controls more methodically than its predecessor, but that it is unlikely to scale back any of the existing controls in the near term.

President Biden's export control nominees

President Biden's nominee for Undersecretary of Commerce for Industry and Security, Alan F. Estevez is still awaiting confirmation, though a major hurdle was removed on November 2, 2021, when Senator Tom Cotton (R-AR) removed his "hold" on Mr. Estevez's nomination after receiving a letter from the nominee responding to Senator Cotton's concerns regarding China. In that letter, Mr. Estevez pledged to accelerate new rules on emerging technologies and take any appropriate actions to restrict exports of advanced semiconductor technology to China. However Senator Menendez (D-NJ) has also held up the confirmation based on his concerns regarding the prior administration's transfer of certain firearms from ITAR to the EAR.

Meanwhile, on December 14, 2021, Thea D. Rozman Kendler was confirmed as Assistant Secretary for Export Administration. Assistant Secretary Kendler previously served as in the Counterintelligence and Export Control Section at DOJ, where she notably worked on the prosecution of Huawei CFO Meng Wanzhou and the broader criminal case against Huawei.

Entity List updates

[December 17, 2021](#) – BIS added 37 entities located in China, Georgia, Malaysia, and Turkey to the Entity List for allegedly providing U.S. technology to the Chinese and Iranian military.

[November 26, 2021](#) – BIS added 27 entities and individuals located in China, Japan, Pakistan, and Singapore to the Entity List, primarily for allegedly providing U.S. technology to the Chinese military and Pakistan's nuclear and ballistic missile programs.

[November 4, 2021](#) – BIS added 4 entities located in Israel, Russia, and Singapore to the Entity List due to their alleged involvement in malicious cyber activities.

[July 19, 2021](#) – BIS added 6 entities located in Russia to the Entity List for allegedly participating in harmful activities by the Russian government.

[July 12, 2021](#) – BIS added 34 entities located in Canada, China, Iran, Lebanon, the Netherlands, Pakistan, Russia, Singapore, South Korea, Taiwan, Turkey, the UAE, and the UK to the Entity List, primarily for allegedly providing U.S. technology to the Chinese, Iranian, and Russian militaries or supporting repressive activities in the Xinjiang Uyghur Autonomous Region.

[July 6, 2021](#) – BIS added 4 entities located in Burma to the Entity List for allegedly supporting the Burmese military’s coup.

[June 24, 2021](#) – BIS added 5 entities located in China to the Entity List for allegedly supporting repressive activities in the Xinjiang Uyghur Autonomous Region.

[June 16, 2021](#) – BIS removed Satori Corporation, located in France and the UAE, from the Entity List.

[June 1, 2021](#) – BIS added 8 entities located in Pakistan and the UAE to the Entity List for allegedly engaging in nuclear proliferation activities. BIS also removed IKAN Engineering Services, located in Pakistan, from the Entity List.

[April 9, 2021](#) – BIS added 7 entities located in China to the Entity List for allegedly providing U.S. technology to the Chinese military.

[March 8, 2021](#) – BIS added 4 entities located in Burma to the Entity List for allegedly supporting the Burmese military’s coup.

[March 4, 2021](#) – BIS added 14 entities located in Germany, Russia, and Switzerland to the Entity List for allegedly supporting Russia’s development of chemical weapons.

[January 15, 2021](#) – BIS added China National Offshore Oil Corporation Ltd., located in China to the Entity List for allegedly assisting in China’s efforts to assert its unlawful maritime claims in the South China Sea.

Country updates

On January 14, 2021, BIS amended the EAR to remove Sudan from the list of State Sponsors of Terrorism, formalizing the end of AT controls on exports to the country. Sudan has been moved from Country Groups E:1 to Country Group B. As a result, the *de minimis* threshold for Sudan has been raised to the general 25% and license applications for exports to Sudan are no longer subject to a general presumption of denial—and will instead be assessed by BIS pursuant to the licensing policy applicable to the specific control at issue. Adding Sudan to Group B also frees Sudan from certain restrictions on exports (including the foreign direct product rule) and relaxes the licensing policy applicable to exports of NS items. Sudan will also be eligible for most license exceptions available to Group B countries, except for license exceptions GBS and TSR.

Back on December 28, 2020, BIS moved Ukraine from Country Group D to Country Group B, making Ukraine eligible for a bevy of EAR license exceptions, freeing Ukraine from certain restrictions on exports (including the foreign direct product rule), and relaxing the licensing policy applicable to exports of NS items. At the same time, BIS added Mexico and Cyprus to Country Group A:6, meaning that license exception STA, such as it is, is now available for

exports of less sensitive NS-controlled items to these countries. Cyprus however remains in Country Group D:5.

Huawei-related export enforcement

On November 8, 2021, BIS announced its administrative settlement with Pennsylvania company SP Industries, Inc. The company agreed to a \$80,000 penalty and two annual audits of its compliance program after making four unlicensed export shipments of EAR99 items—with a total value of approximately \$180,000—to Huawei and two of its subsidiaries, Huawei Device Co., Ltd. and HiSilicon Technologies Co., Ltd.

The SP Industries settlement marks the first evidence of BIS enforcement related to Huawei's addition to the Entity List in May 2019 and may be a sign that BIS considers Huawei an enforcement priority. However, the violations at issue appear to involve straightforward applications of the Entity List's general prohibitions against exports of EAR99 items and not potentially more complex issues such as application of the Huawei-specific foreign direct products rule found in Footnote 1 to the Entity List.

On that front, the minority staff of the Senate Commerce Committee leveled accusations against California-based Seagate Technology on October 27, 2021. The Committee minority staff claimed that Seagate exported items subject to Footnote 1 to Huawei without a license “for more than one year,” contributing to the significant growth of Huawei's storage business, and called on BIS to investigate.

China's blocking rules

On January 9, 2021, China's Ministry of Commerce (MOFCOM) issued its Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures, better known as the “blocking rules,” in response to China's perception that the United States is applying its sanctions and export control laws extraterritorially. The MOFCOM blocking rules, which are modeled on the blocking statute adopted by the EU in 2018, allow Chinese agencies to block any foreign measure that restricts the activities of a Chinese person or entity in a third country, which the Chinese agency deems to be “unjustifiable” and contrary to “international law and the basic principles of international relations.”

The blocking rules build on MOFCOM's creation of an Unreliable Entity List last year, which would impose various restrictions on entities found to be endangering Chinese interests—presumably through their compliance with foreign export control regimes or sanctions the Chinese government deems unlawful.

To date no foreign laws or measure—including no US sanctions or export controls—have been designated by China under the blocking rules, and no entities have been added to the Unreliable Entity List. But these enactments remain a threat for multinational companies navigating U.S. and foreign sanctions and export control regimes.

100-day review reports

Perhaps the most significant indications of the Biden Administration’s trade policy and enforcement priorities can be found in the four reports issued by the White House on June 8, 2021, documenting the 100-day interagency reviews of U.S. supply chain vulnerabilities—for (1) semiconductor manufacturing and advanced packaging, (2) large capacity batteries, (3) critical minerals and materials, and (4) pharmaceuticals—and the White House fact sheet accompanying the reports.

The report on semiconductor manufacturing, for which BIS was the lead author, is of special interest to export control practitioners. Its policy recommendations include export controls to “address vulnerabilities in the semiconductor manufacturing and advanced packaging supply chain,” and call on the administration to collaborate with allies on multilateral export controls.

Changes to encryption controls

On March 29, 2021, BIS overhauled its mass market encryption rules with three significant changes. First, BIS moved mass-market encryption components, related executable software and tools from paragraph (b)(3) of § 740.17 to paragraph (b)(1), allowing such items to take advantage of license exception ENC based on self-classification. Second, BIS amended paragraph (e) of that section to exempt mass-market toolsets and toolkits subject to paragraph (b)(1) from the annual self-classification report. Third, publicly available encryption source code no longer needs to be notified via email to BIS and the ENC Encryption Coordinator in order to be released from control under the EAR.

At the same time, BIS made several other changes to the EAR’s encryption rules, including relaxing controls on wireless personal area network devices and gateways.