Sanctions/Export Controls Trends in 2021

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March 16, 2021

This is the second in our First 100 Days series examining important trends in white collar law and investigations in the early days of the Biden administration. Our previous entry discussed SEC enforcement. Up next, anti-corruption trends.

The recent change in administrations has generated much discussion about what to expect in the worlds of export controls and sanctions in 2021. In general, we expect many of the same priorities from 2020, including a focus on China and Russia, to continue in 2021, but with a more measured and multi-lateral approach.

Hot Spots Around the Globe

China. The Trump administration continued to take numerous significant export controls and sanctions-related measures against China in 2020. On April 28, 2020, the Department of Commerce's Bureau of Industry and Security ("BIS") issued a new rule under the Export Administration Regulations ("EAR"), expanding the export, re-export, and transfer controls related to military end use and military end users in China. The result is that many more items will require a license to export to China, with a presumption that those license applications will be denied. On December 23, 2020, BIS issued a list of some 102 entities that it has determined constitute military end users, which includes 57 Chinese entities. There are certain to be more entities named to the list in 2021. BIS also added numerous Chinese companies to its Entity List, including additional Huawei affiliates and companies constructing artificial islands in the South China Sea.

In response to China's restrictions on Hong Kong's autonomy, on June 29, 2020, the State Department announced that the U.S. will end the export of U.S.-origin defense equipment to Hong Kong and will impose the same restrictions on the export of U.S. defense and dual-use technologies to Hong Kong as it does for China. On July 31, 2020, BIS published a Final Rule implementing changes (announced on June 30) to the EAR that suspend the availability of all license exceptions for exports or re-exports to Hong Kong, or transfers within Hong Kong, that provided preferential treatment for exports to Hong Kong as compared to China. On July 14, 2020, President Trump signed the Hong Kong Autonomy Act ("HKAA") into law. The HKAA enables sanctions on foreign persons who materially contribute to the Chinese government undermining the autonomy of Hong Kong, as well as foreign financial institutions that engage in "significant" transactions with such persons. President Biden has publicly stated there would be "repercussions" for China's human rights abuses and he specifically raised the "crackdown in Hong Kong" during a tense initial call with China's Xi Jinping. It is reasonable to believe that such "repercussions" will include additional sanctions.

Close scrutiny of Chinese investment in the United States continued throughout 2020 and we expect this focus to remain in 2021. Following a review by the Committee on Foreign Investment in the United States ("CFIUS"), on March 6, 2020, President Trump ordered the divestment, on national security grounds, of StayNTouch, Inc. ("StayNTouch") from Beijing Shiji Information Technology Company ("Shiji"). StayNTouch, a U.S. company that provides cloud-based software to hotels used to track reservations and room inventory, was acquired by Shiji in 2018. Restrictions on U.S. investment in Chinese companies were also imposed. The Treasury Department's Office of Foreign Assets Control ("OFAC") published its own list of Chinese entities that it considers to be connected to the Chinese military and prohibiting U.S. persons from investing in these companies. These include very large publicly traded companies, such as China Telecom and China Mobile, which are listed on the New York Stock Exchange.

On its side, China has been taking parallel actions including reviewing and impeding U.S. transactions with Chinese companies (including blocking the sale by the U.S. Government of luxury housing in Hong Kong and impeding the sale of TikTok's U.S. operations to Oracle and

Walmart), sanctioning U.S. officials, including former Secretary of State Mike Pompeo, strengthening its own export control laws, and enacting a European-style Blocking Statute to limit extra-territorial application of U.S. law. It is clear China's government wants to show that sanctions as well as export and investment controls are games that two can play and this seems unlikely to change in 2021.

During his confirmation hearing, Secretary of State Anthony Blinken stated that, "President Trump was right in taking a tougher approach to China. I disagree very much with the way that he went about it in a number of areas, but the basic principle was the right one." Expect the Biden Administration to continue to take a firm, but more measured and multi-lateral approach to China in 2021.

Russia. The Trump Administration continued to impose sanctions on Russian entities and individuals throughout 2020. Notable sanctions include those issued by OFAC on February 18, 2020, against Rosneft Trading S.A., a Russian-owned oil brokerage firm, for serving as the primary broker for the sale and transport of Venezuela's crude oil. In addition, on October 23, 2020, OFAC designated a Russian government research institution known as TsNIIKhM, which is directly connected to Triton malware. TsNIIKhM was responsible for building customized tools that enabled an August 2017 cyberattack against a petrochemical facility in the Middle East.

The Trump Administration also tightened export controls on Russia in 2020. On February 24, 2020, BIS amended the EAR to revise the Country Group designation for Russia downgrading Russia from the more favorable Group A:2 and A:4 to Group D:2 and D:4. This change was based on national security and foreign policy concerns, including nuclear proliferation-related concerns. As a result of the changes, certain license exceptions may no longer apply to exports to Russia, and licenses are now required for the export, re-export, and in-country transfer of certain controlled items. As noted above, on April 28, 2020, BIS amended the EAR to restrict exports, re-exports, and in-country transfers of items intended for military end use or military end users in Russia. In addition, the amendment adds Electronic Export Information filing requirements in the Automated Export System for exports to Russia. As noted above, on December 23, 2020, BIS issued a list of some 102 entities that it has determined constitute military end users, including 45 Russian entities.

The Biden Administration has been immediately confronted with multiple foreign policy challenges from Russia that have not fully been addressed from an economic sanctions perspective. The first is the alleged Russian sponsorship of the massive SolarWinds hack on U.S. Government and private industry networks. The second is the arrest of opposition leader Alexei Navalny along with thousands of pro-democracy protesters. Secretary of State Blinken stated that the U.S. "will coordinate closely with our allies and partners to hold Russia accountable for failing to uphold the rights of its citizens." Indeed, on March 2, 2021, in coordination with European allies, the Treasury Department imposed sanctions on Russian officials involved with the poisoning and jailing of Navalny and the Department of Commerce added 14 Russian entities linked to the production of chemical and biological weapons to its Entity List. It seems likely that the Biden Administration will further expand sanctions against Russia in coordination with allies.

Iran. The Trump Administration continued to tighten sanctions on Iran throughout 2020, particularly related to its metals, petroleum, and petrochemical industries and those alleged to have assisted Iran's military activities. The U.S. sanctioned numerous entities and individuals in China, Iraq, Iran, Russia, Singapore, Turkey, and the United Arab Emirates for engaging in prohibited transactions related to Iranian oil and gas, petrochemical products, and providing support for Iran's missile program and other destabilizing activities.

Other sanctions targeted a variety of industries and malign behavior. The U.S. sanctioned entities engaged in cyber attacks including the imposition of sanctions on September 17, 2020, on Iranian cyber threat group Advanced Persistent Threat 39, 45 associated individuals, and a front company, Rana Intelligence Company based on the support these entities gave Iran's government in tracking dissidents, journalists, and international companies, as well as for computer attacks and malware campaigns. Human-rights related sanctions were also imposed on various Iranian officials, including Iran's Interior Minister and senior officials of Iran's Law Enforcement Forces and Islamic Revolutionary Guard Corps ("IRGC"). The Trump Administration also imposed sanctions on five Iranian military and state-owned media entities (including the IRGC and its Quds Force) for attempting to influence U.S. elections. Iran's financial sector was targeted by OFAC, which designated 18 Iranian banks in October 2020 pursuant to EO 13902.

The U.S. also pursued civil and criminal penalties to enforce Iran sanctions. On August 14, 2020, the Department of Justice and the Department of Homeland Security, seized over one million barrels of Iranian gasoline intended for shipment to Venezuela. The Department of Justice also filed a criminal complaint against an Iranian individual and Parthia Cargo alleging that they facilitated the shipment of U.S.-origin goods to Iran in violation of U.S. law. OFAC also announced settlements with two U.S.-based companies related to unauthorized trade with Iran. Keysight Technologies Inc. was targeted for re-exporting EAR-controlled goods to Iran without a license, and Berkshire Hathaway, Inc. ("Berkshire") and its Turkish subsidiary agreed to settle potential civil liability for 144 apparent violations of the Iranian Transactions and Sanctions Regulations by the Turkish subsidiary, which allegedly shipped items to Turkish distributors knowing that such goods would be shipped to a distributor in Iran for resale to Iranian end-users, including the Iranian government. Despite the tightening of sanctions and their active enforcement during 2020, some limited humanitarian-based relief from sanctions was also granted to assist Iran in dealing with the impact of COVID-19.

In August 2020, the U.S. also tried to trigger the re-imposition of UN sanctions on Iran (the so-called "snapback" provision of the Joint Comprehensive Plan of Action ("JCPOA")), but the UN Security Council rebuffed the move. On February 18, 2021, the Biden Administration rescinded the Trump administration's re-imposition of U.N. sanctions on Iran and formally offered to restart nuclear talks with Iran. However, while the Biden administration's stated intent is to rejoin the JCPOA, which would presumably be accompanied by a significant easing of U.S. sanctions against Iran, President Biden has also indicated he will not lift sanctions until Iran stops enriching uranium while Iran has refused to do so until sanctions are lifted. Even if this standoff can be resolved, it is unclear whether rejoining some form of the JCPOA will be politically feasible given potentially bipartisan opposition in Congress and objections from U.S. allies in the Middle East.

Cuba. The Trump administration took an aggressive approach to Cuba, rolling back many of the Obama-era exemptions that previously allowed for limited travel and commercial transactions with Cuba. On September 23, 2020, OFAC amended the Cuban Assets Control Regulations ("CACR") to restrict lodging at certain properties in Cuba, prohibit the import of Cuban-origin alcohol and tobacco products into the U.S., and to remove a general authorizations that previously allowed travel to Cuba for the purpose of attending or organizing professional meetings or conferences, public performances, clinics, workshops, competitions, and exhibitions in Cuba. On October 27, 2020, OFAC again amended the CACR to remove any transactions relating to the collection, forwarding, or receipt of remittances involving entities or sub-entities identified on the State Department's Cuba Restricted List ("CRL") from the scope of certain remittance-related general authorizations. This targeted Cuban military-run institutions, such as FINCIMEX, which was previously added to the Cuba Restricted List on June 3, 2020, along with seven other military-owned entities, including hotels and a marine park for tourists. These changes were part of the Trump administration's efforts to counter Cuba's financial support of Venezuela. We expect that the Biden administration will likely try to return to the thaw in U.S.-Cuba relations as seen under the Obama administration.

Venezuela. The Trump administration's maximum pressure campaign on Venezuela continued through 2020 and into 2021 as incumbent President Nicolás Maduro refused to yield power to opposition leader Juan Guaidó. On December 18 2020, OFAC imposed sanctions on two executives and a firm that administered legislative elections on December 6, 2020 for providing material support to the Maduro regime. As discussed above, OFAC also actively sanctioned Russian and Chinese entities for doing business with designated Venezuelan entities. In addition to new designations, OFAC narrowed the scope of existing general licenses, including restricting an authorization in General License 8 that allowed certain engagements with PdVSA, a state-owned oil company that was designated in 2019, and revising General License 31A to specify that the authorizations for certain transactions with the Venezuelan National Assembly apply only to members of the National Assembly elected prior to the December 2020 election. The Biden administration is expected to continue to take a hard-line stance against the Maduro government (and a representative of the provisional government was invited to attend Biden's inauguration), so more sanctions are likely in 2021 as long as the power struggle continues.

Human Rights. 2020 saw the robust use of multiple mechanisms to sanction individuals and entities for human rights violations. The Trump administration used the Global Magnitsky Act, the Countering America's Adversaries Through Sanctions Act ("CAATSA"), and Withhold Release Orders ("WROs," which block the entry of products made with forced labor into the U.S.) to target human rights violations. Consistent with the Trump administration's focus on China, the vast majority of the human rights related actions relate to actions by Chinese entities, specifically the human rights abuses perpetrated against Uighurs and other ethnic minorities in the Xinjiang region. As reported earlier in our Review of CBP Actions on Forced Labor in 2020 and Outlook for 2021, on January 13, 2021, U.S. Customs and Border Protection ("CBP") issued a WRO on all cotton and tomato products produced in Xinjiang, including all downstream goods made with these products. While WROs usually target a specific producer or manufacturer, this WRO applied to all producers of cotton or tomatoes in an entire region in China. In July 2020, a State Department advisory warned businesses of the risk of forced labor in Xinjiang and CBP issued a WRO in November 2020 on all cotton products made by the massive Xinjiang Production and Construction Corps. Additionally, BIS added multiple Chinese entities to the entity list for human rights violations related to the mass arbitrary detention, forced labor, involuntary collection of biometric data, and genetic analyses of minority groups in Xinjiang, focusing on entities that produce surveillance technology for the Chinese government.

Beyond China, on September 24, 2020, the State Department announced sanctions pursuant to CAATSA on Iranian officials for human rights violations. In 2020, the U.S. designated 35 individuals and entities pursuant to the Global Magnitsky Act, which resulted in the individuals and entities being added to the SDN List. Global Magnitsky sanctions were used in 2020 against Chinese government officials for human rights violations in Xinjiang; corrupt actors in South Sudan; and Ugandan officials involved in an adoption scam. While we expect that President Biden will continue to focus on China and sanction entities involved in human rights violations against Uighurs, we also expect that the Biden administration will focus on defending and promoting human rights globally, and we will likely see human rights-related sanctions and WROs issued more broadly.

We can already see this use of sanctions in response to human rights violations in Burma. In February 2021, the Biden administration launched a new sanctions regime, which responds to the Burmese military coup and violent crackdown against pro-democracy protestors. Under new Executive Order 14014, asset blocking and visa sanctions were imposed on the Burmese government, military and defense sector as well as on persons responsible for undermining democratic processes, violating freedoms of assembly or expression, or committing human rights violations in Burma. In addition, on February 17, 2021, BIS issued a notification that it will apply a presumption of denial for export and re-export license applications related to proposed exports to Burma's military and security services.

International Criminal Court Sanctions. In June 2020, President Trump signed Executive Order ("EO") 13928 authorizing the imposition of sanctions on foreign persons determined to have engaged in or assisted efforts by the International Criminal Court ("ICC") to investigate or prosecute international crimes allegedly committed by Americans or personnel of certain United States allies, or to have materially assisted persons designated pursuant to EO 13928. On September 2, 2020, the Trump administration designated the ICC's Chief Prosecutor, Fatou Bensouda, and the ICC's Head of Jurisdiction, Complementarity, and Cooperation Division, Phakiso Mochochoko to the SDN List. On September 30, 2020, OFAC issued regulations to implement EO 13928.

Even though the Biden administration has not yet taken any action in response to the designations or the EO, a State Department spokespersons recently announced in a press briefing on March 3, 2021 that "the administration … [is] thoroughly reviewing sanctions pursuant to Executive Order 13928 as [it] determine[s] … next steps."

The EO is currently the subject of a lawsuit filed by Foley Hoag in October 2020 in the U.S. District Court for the Southern District of New York on behalf of several plaintiffs, including Open Society Justice Initiative and four law professors, arguing that EO 13928 violates constitutional rights, including the plaintiffs' freedom of speech. To read more about the lawsuit, see here and here.

Emerging and Foundational Technologies

On January 3, 2020, BIS temporarily imposed export controls on software specially designed to automate the analysis of geospatial imagery based on the "significant military or intelligence advantage" of this emerging AI technology. BIS extended these temporary controls for another year in January 2021. Pursuant to the Export Control Reform Act ("ECRA") and in conjunction with international partners, on June 17, 2020, BIS formally designated the first emerging technologies that included three categories of items: 24 precursor chemicals that can be used to develop chemical weapons including chemical mixtures composed of at least 30% of one of the precursors; Middle East respiratory syndrome-related coronavirus due to its potential use in biological weapons; and single-use cultivation chambers with rigid walls and related technology that can be used for chemical or biological weapons purposes. These items will now be subject to licensing requirements for export to most countries.

In addition, on October 5, 2020, BIS, again in coordination with international partners, added six new emerging technologies to the CCL focusing on semiconductor, surveillance, and spacecraft technologies. In particular, the items include: machines having additive manufacturing capability in addition to a turning, milling or grinding capability; computational lithography software specially designed for the development of patterns on Extreme Ultraviolet-Lithography masks or reticles; technology required for the slicing, grinding, and polishing of certain silicon wafers; certain digital forensics or investigative tools; software specially designed or modified for use by law enforcement to analyze the content of communications acquired from a handover interface; and sub-orbital aircraft.

On August 27, 2020, BIS published an advance notice of proposed rulemaking ("ANPRM") seeking public comment on the definition of, and criteria for, identifying "foundational technologies." The ANPRM provided examples of technologies that would be subject to additional controls as foundational technologies, including: semiconductor manufacturing equipment and associated software tools, lasers, sensors, and underwater systems. BIS also noted that items currently controlled for anti-terrorism reasons only or as EAR99 may nevertheless constitute foundational technologies essential to national security.

It seems highly likely that additional "emerging technologies" will be identified by BIS in 2021. In many ways, it will be easier for BIS to identify and control such technologies than it will be to identify "foundational technologies," which, as the term suggests, are likely to be in widespread use and have already been exported around the world with limited restrictions in the past. Expect proposals for "foundational technologies" to meet significant resistance from U.S. companies concerned that such a designation will put them at a competitive disadvantage against non-U.S. rivals.

Enforcement Trends: Sanctions and Export Control Enforcement to Remain a Top Priority for Regulators in 2021

Enforcement of U.S. sanctions continued to be strong in 2020. OFAC brought 15 public enforcement actions focusing on the ecommerce, banking, shipping, and insurance industries. OFAC has also been focusing on transactions involving the tech sector and the use of digital currencies to evade sanctions (including through ransomware attacks). Expect this trend to continue in 2021.

DOJ's National Security Division was also very active in 2020, bringing 50 cases with the majority involving violations of Iranian sanctions or unauthorized transactions with Chinese persons (including violations of export control laws). The most significant corporate enforcement action for both DOJ and the State Department's Directorate of Defense Trade Controls ("DDTC") was against Airbus SE for FCPA violations as well as violations of the ITAR including: false statements on authorization requests; the failure to accurately report, pursuant to Part 130 of the ITAR, political contributions, commissions, or fees that it paid, or offered or agreed to pay, in connection with sales of ITAR-controlled items; recordkeeping violations; and the unauthorized re-export and retransfer of defense articles. The fact that DDTC's action against Airbus was the only Consent Agreement it entered into in 2020 was unusual and it is likely that 2021 will see higher levels of enforcement. The Department of Commerce's Office of Export Enforcement secured the same number of convictions as in 2019 (35 individuals and one corporation, a Lebanese company that exported EAR-controlled items to Syria without a license). Overall, strong enforcement of sanctions and export control laws is expected to continue in 2021.

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