

# China Business Briefing

Managing US Export Controls and other US Policies and Regulations Adversely Impacting Businesses in China

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# The Presenters

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Described by *The New York Times* as a “King of K Street,” Ed Newberry is Global Managing Partner, Public Policy, Compliance, Investigatory and Regulatory Solutions, and is a member of the firm’s Executive Leadership Group.

Trained by the legendary lobbyist Tommy Boggs, Ed is widely recognized as one of the leading lawyer-lobbyists in Washington DC. He is ranked by a leading magazine as one of the top 100 attorneys in the US and as a Leading Lawyer by *The Legal 500*, which noted he “is one of the most talented lawyers in Washington,” as well as “an excellent strategic thinker and tactician.” *The Silicon Review* identified Ed as one of the 30 Best Leaders of 2022 and he has been selected as a “Top Lobbyist” by *The Hill*. POLITICO ranked Ed as a top municipal lobbyist, and his work has been highlighted in mainstream news media, including *The Wall Street Journal*, *The New York Times*, the *National Journal*, *Roll Call* and others. *Forbes* wrote of Ed, “For those who truly understand the personalities and skill sets that comprise the ranks of a major law firm, the conclusion is an easy one: Newberry is a doer of deeds.”

## George Grammas

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**CFIUS.** George is among the most experienced practitioners before CFIUS, having practiced before CFIUS since 1990, the inception of notice filings of transactions before CFIUS, and representing investors, buyers and sellers in hundreds of transactions before CFIUS and assessing possible national security concerns.

**Export Controls and Sanctions.** George has experience in all export controls matters and controlled technologies regulated under the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR), including semiconductors, aerospace, military, security, dual-use and space export controls, as well as a comprehensive understanding of the trade restrictions imposed by the Office of Foreign Assets Control (OFAC).

**Thought Leadership.** Over the past three plus decades of practice, George served on numerous government and industry export controls committees, including as industry adviser to the US State Department. Annually, he delivers the US export controls report at the UK Government’s export controls symposium.

## Briefing topics

- US Trade Policy - Recent Developments in Legislation and Oversight & Investigations
- Developments in US Export Controls, Sanctions and other Regulations: Doing Business in or with China
- Chinese companies on US Black Lists – what does that mean?
- How combined Policy/legal solutions can help with US Policy and regulatory challenges



# “Competitive Bipartisanship”—US Political Sentiment on China & “Race to the Bottom”

*“People always call for bipartisanship in this country. We have a kind of **competitive bipartisanship** now when it comes to China policy, which of the two parties can be tougher on China.”*

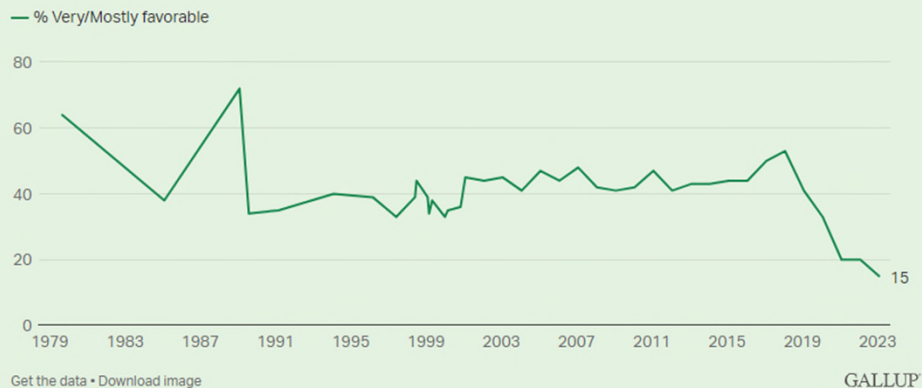
— **Richard Haass**

*President Emeritus of the Council on Foreign Relations  
and former Director of Policy Planning for the U.S. State Department*



## Americans' Favorable Opinion of China, 1979-2023

What is your overall opinion of China? Is it very favorable, mostly favorable, mostly unfavorable or very unfavorable?



“Competitive bi-partisanship” on US-China policy has been both informed by, and has influenced, US public sentiment on China.



# Counterpoint – Balancing National Security and Economic Priorities

*“It is my belief that a wide swathe of our economies can interact in ways that are uncontroversial to both governments. **The fact that despite recent tensions we set a record for bilateral trade in 2022 suggests there is ample room for our firms to engage in trade and investment.**”*

— **Janet Yellen**

*US Treasury Secretary*

*Before meeting with Chinese Vice Premier He Lifeng*



# Current State - “Competitive Bipartisanship” in the 118th Congress

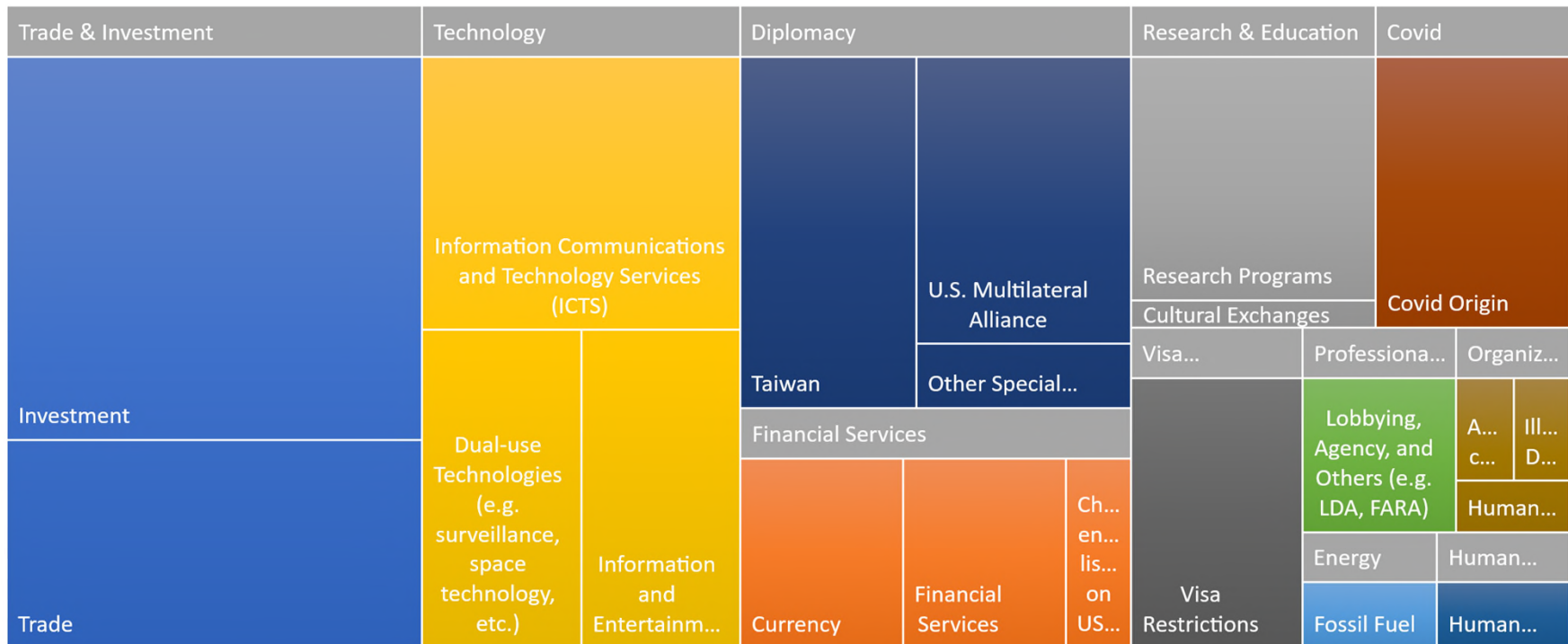
- To date Members of Congress filed a total of **269 pieces of China-related legislation** (155 in House and 114 in Senate).
- They reflect strong bipartisan and bicameral interest in **securing critical supply chains; protecting U.S. data privacy and security; scrutinizing Chinese investment in U.S. land; and tackling technology threats from China.**
- Prominent bills include:
  - *Restricting the Emergence of Security Threats that Risk Information and Communications Technology (RESTRICT) Act* (empowering Commerce to disapprove certain transactions and holdings associated with foreign ICTS on national security ground);
  - *Preventing Adversary Influence, Disinformation and Obscured Foreign Financing (PAID OFF) Act* (removing FARA’s commercial and LDA exemptions when principal is foreign adversary);
  - *Telling Everyone the Location of Data Leaving (TELL) Act* (empowering FTC to help let Americans know if their data is being stored, transferred, or exposed by/to CCP companies);
  - *National Critical Capabilities Defense Act* (establishing a screening process to review certain transactions by U.S. businesses in China); &
  - *Safe Innovation Framework for Artificial Intelligence (AI) Policy* (creating a structure to regulate AI).

# Current State - “Competitive Bipartisanship” in the 118th Congress

- Defense authorization reflects strong bipartisan interest in countering China:
  - House Armed Services Committee adopted **39 China-related amendments** during its markup of the National Defense Authorization Act (NDAA), including to:
    - Prohibit DoD from engaging in consulting contracts with firms that have provided consulting services to the Chinese government or certain other Chinese entities
    - Require DoD to report on reducing supply chain reliance on China and mitigating risks from collaboration with China
  - **11% (164) of the nearly 1,400 amendments** filed in connection with the full House consideration of the NDAA on the floor were China-related
  - Senate Armed Services Committee version of the NDAA provides significant resources to strengthen U.S. Indo-Pacific Command and support Taiwan’s defense capabilities
- House Republicans have inserted numerous provisions throughout the annual appropriations bills addressing China, seeking to address **national security risks from Chinese ownership of U.S. farmland** and certain real estate purchases, **prohibit funding to the Wuhan Institute of Virology**, **mitigate supply chain risks**, **prohibit the sale of oil from the Strategic Petroleum Reserve (SPR) to Chinese entities**, and “**deter the aggressive and malign actions**” of China

# Current State - “Competitive Bipartisanship” in the 118th Congress (House)

Portfolio of Issue Areas of Interest  
Reflected by China Bills Introduced in the 118th Congress (House)

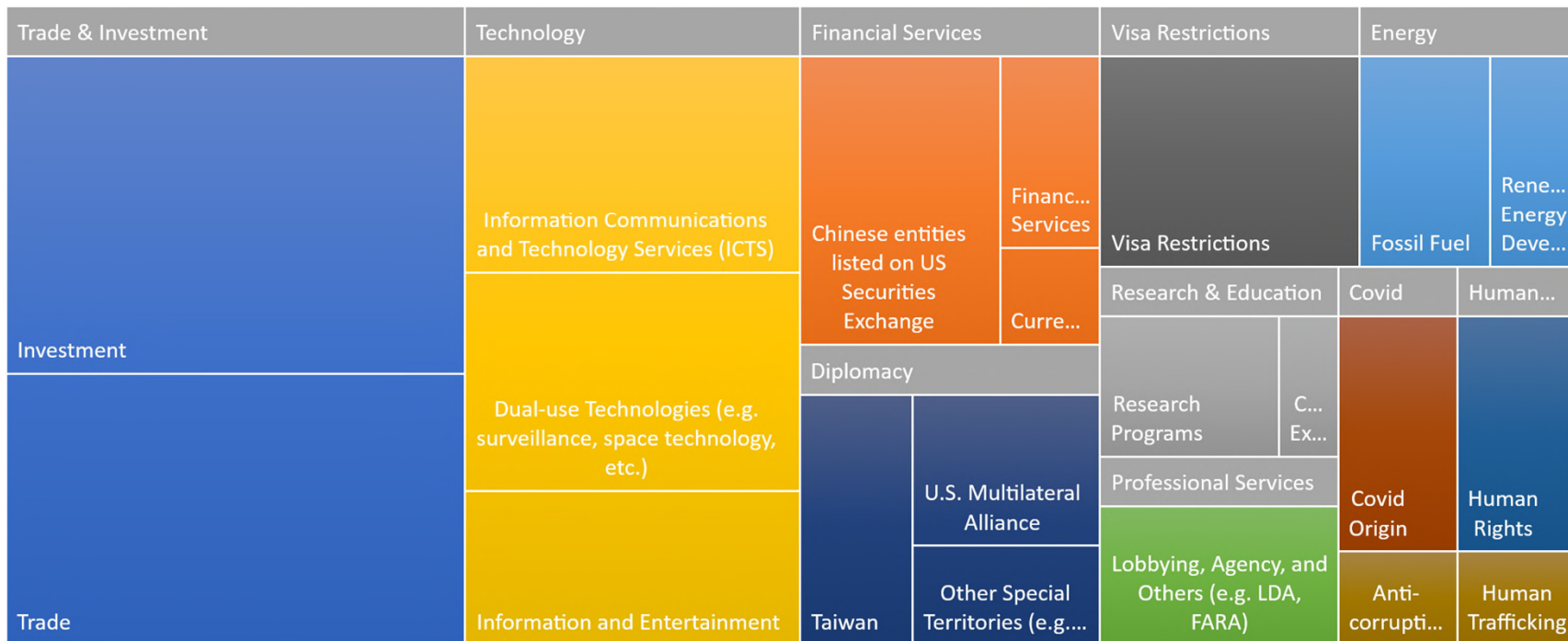


- Trade & Investment
- Technology
- Diplomacy
- Organized Crime and corruption
- Financial Services
- Energy
- Covid
- Human Rights Issues
- Research & Education
- Professional Services
- Visa Restrictions



# Current State - “Competitive Bipartisanship” in the 118th Congress (Senate)

**Portfolio of Issue Areas of Interest Reflected by China Bills Introduced in the 118th Congress (Senate)**



- Trade & Investment
- Technology
- Diplomatic
- Organized Crime and corruption
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- Human Rights Issues
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- Visa Restrictions

# Preliminary observations and findings – 118<sup>th</sup> Congress

- **Republicans dominate Congressional China agenda:** The China-related bills introduced in Congress were largely driven by the House Republicans' policy agenda. In the House, 17% of China-related bills were introduced by Democratic members as primary sponsors, and in the Senate 21% were introduced by Democrats as primary sponsors.
- **Senate Democrats launch “China Competition Bill 2.0”:** In May, Majority Leader Chuck Schumer announced an initiative that would build off of last year's CHIPS and Science Act and seek to “boost [U.S.] national security, help the U.S. compete, and counter the Chinese government's role throughout the world.” Leader Schumer tasked his **committee chairs to work with their respective Republican counterparts to craft pieces** of the broader legislation that include the following items of special interest:
  - **Items of Special Interest—Representational Services:** Both chambers have high interest in targeting such services for Chinese entities by proposing to amend or update LDA or FARA
  - **Items of special interest—Technology:** Vis-à-vis TikTok, congressional interest in targeting Chinese information and communications technologies & services (ICTS) and dual-use technologies remains notable. See, e.g., RESTRICT Act and Protecting Americans' Data From Foreign Surveillance Act
  - **Items of Special Interest—Visa Restrictions:** Congressional interest in tightening visa restrictions extends beyond sanctioning misconduct; for example, S.580, CCP Visa Ban Act, would prohibit the issuance of certain visas to CCP members and those who are affiliated with the CCP, and H.R. 688, CCP Visa Disclosure Act, would require the applicants to disclose if they have received funds from the Chinese government.

# U.S. Unprecedented Use of Economic Instruments of National Power (I)

## Pillar One – Export Controls

- On October 7, 2022, BIS released a rule titled, “Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modifications,” seeking to widen the gap between the U.S. and China on advanced chips and related tooling.
- On February 28, 2023, Undersecretary of Commerce Alan Estevez confirmed that he is re-assessing all export control rules regarding Chinese tech companies.
- Informed observers expect the White House to soon announce stricter restrictions on the export of semiconductor manufacturing equipment to China.
- On March 28, 2023, the BIS amended the EAR to clarify that violating human rights is a recognized basis for placement on the Entity List.
- Informed observers expect the October 7 rule to be formalized finalized soon, which will likely include an expansion to restrict the provision of U.S. cloud computing services that use advanced AI chips to Chinese end users

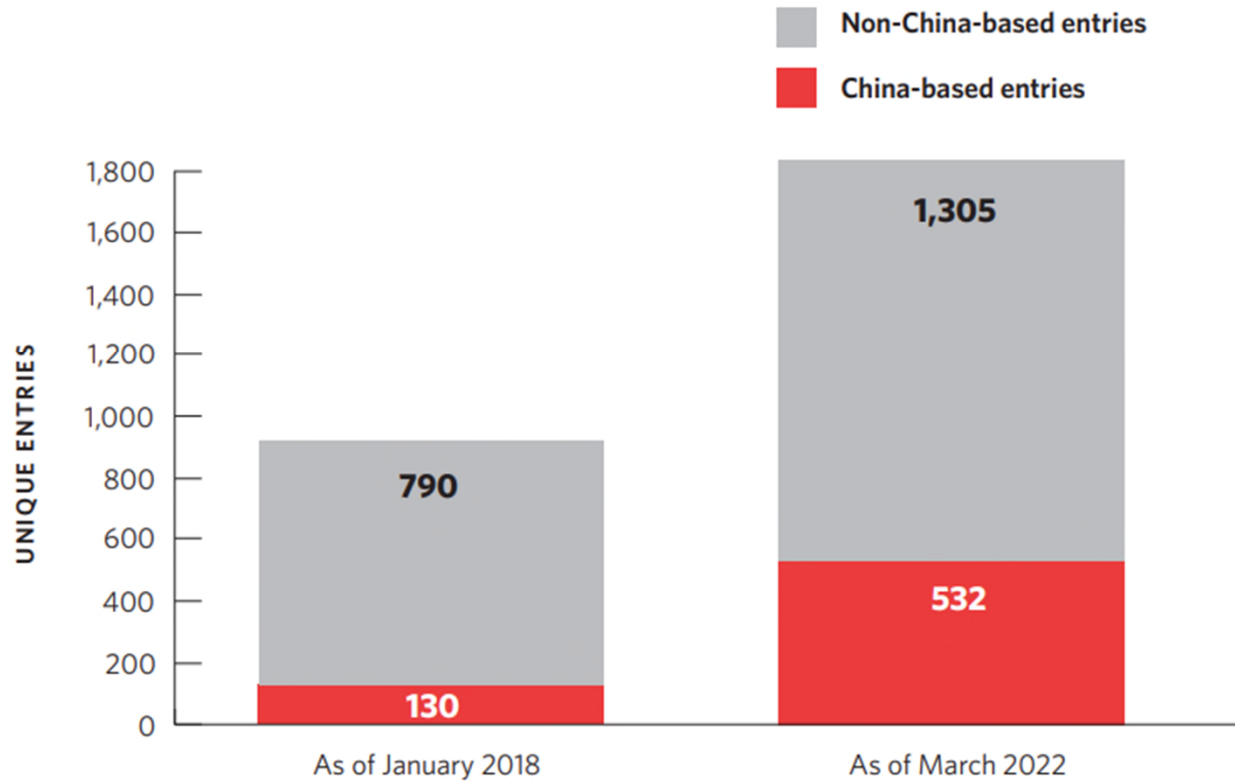
*“On export controls, we have to revisit the longstanding premise of maintaining “relative” advantages over competitors in certain key technologies. We previously maintained a “sliding scale” approach that said we need to stay only **a couple of generations ahead.***

*This has demonstrated that technology export controls can be more than just a preventative tool. If implemented in a way that is robust, durable, and comprehensive, they can be a new strategic asset in the U.S. and allied toolkit to impose costs on adversaries, and even over time degrade their battlefield capabilities.”*

*— **Jake Sullivan** (U.S. National Security Advisor), during the Special Competitive Studies Project Global Emerging Technologies Summit, September 2022..*

# Fig.1., The Entity List is Increasingly Focused on China

**Figure 1: The Entity List Is Increasingly Focused on China**



Note: From *U.S.-China Technological “Decoupling”—A strategy and policy framework*, by Jon Bateman (Carnegie Endowment for International Peace)

# U.S. Unprecedented Use of Economic Instruments of National Power (II)

## Pillar Two – Sanctions Policies

Bipartisan and bicameral interest in directing sanctions on China or Chinese entities is strong. The reasons cited include allegations that the Chinese government has engaged in human rights violations; arms transfers to Russia; aid in evading Iran oil sanctions; COVID origins; and alleged military hostility in the Indo-Pacific.

**Congressional Oversight & Investigations:** In various committees of jurisdiction, bipartisan interest is high for holding the Chinese government and companies accountable for alleged human rights violations and other sanctionable misconduct (see below) by presenting new facts that could be presented to the Office of Foreign Asset Control (OFAC) as a basis for new sanctions.

**Future Handling:** This warrants attention to developments on Capitol Hill that may suggest that a given committee will be doing this and, more importantly, a compliance assessment by PRC technology companies about which such allegations can be made.

| Sanction Authority   | Potential Allegations                       |
|--|---|
| The Global Magnitsky Act; the Uyghur Forced Labor Prevention Act (UFLPA), etc. | Alleged aid in severe human rights abuses   |
| Protecting Americans' Intellectual Property Act (PAIP)                         | Alleged theft of U.S. intellectual property |
| Iran Sanctions Act, etc.   | Alleged violations of Iran oil sanctions    |



# U.S. Unprecedented Use of Economic Instruments of National Power (III)

## Pillar Three – Investment and Research Security

### ▪ Heightened CFIUS Scrutiny

- **TIKTOK EXAMPLE:** The Committee on Foreign Investment in the U.S. (CFIUS) demands that China-based ByteDance sell its stake in TikTok or face a possible U.S. ban of the app. Under this approach, CFIUS would start a process to approve a buyer for TikTok's U.S. assets, aiming to find a purchaser that could reconstruct the algorithm for the U.S. operations, walling-off access by ByteDance to U.S. users and their data.

### ▪ RESTRICT Act

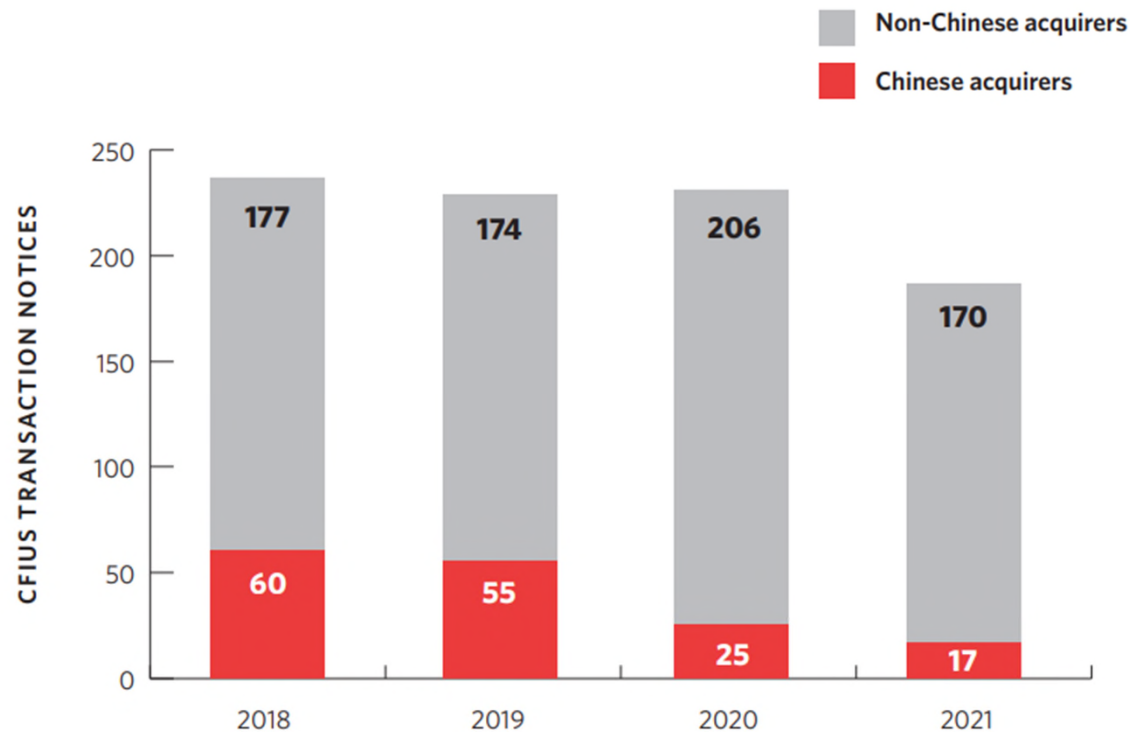
- On March 7, 2023, U.S. Sens. Mark Warner (D-VA) and John Thune (R-SD) introduced the *Restricting the Emergence of Security Threats that Risk Information and Communications Technology* (RESTRICT) Act. It would aim to comprehensively address the ongoing threat posed by technology from foreign adversaries by better empowering the Department of Commerce to review, prevent, and mitigate information communications and technology (ICT) transactions and holdings that pose undue risk to US national security. The probability that *some version* of this bill will be enacted in the 118<sup>th</sup> Congress, is high.

### ▪ Outbound Investment Security Executive Order & Potential Legislation

- On March 7, the U.S. Department of Commerce and Treasury Department outlined the potential “establishment of a program to address the national security threats emanating from outbound investments from the United States in certain sectors that are critical for U.S. national security.” Moreover, “Treasury will lead on administration of any program” and “Commerce will provide the core sector-specific technical expertise and industry connectivity necessary to accurately define, scope, and assess the appropriate sectors that may be covered by any regime.” We expect a new executive order (EO) on outbound investment security to create a simple (1) notification requirement and (2) express prohibition that would apply to covered investments in advanced semiconductors, quantum computing, and artificial intelligence. The EO is not expected to create a case-by-case system (“reverse CFIUS”) process.
- In the interim, Sen. Bob Casey (D-PA) filed a revised version of the *National Critical Capabilities Defense Act* to create a “reverse CFIUS” process to screen outbound investments in companies producing weapons systems, active pharmaceutical ingredients, and other critical goods, likely semiconductors, AI, large-capacity batteries, and quantum computing.

## Fig. 3., Chinese Companies Are Submitting Fewer CFIUS Notices

**Figure 2: Chinese Acquirers Are Submitting Fewer CFIUS Notices**



Sources: "Annual Report to Congress for CY 2020," CFIUS, July 2021, <https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2020.pdf>; and "Annual Report to Congress for CY 2019," CFIUS, July 2020, <https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2019.pdf>.

Note: From *U.S.-China Technological "Decoupling"—A strategy and policy framework*, by Jon Bateman (Carnegie Endowment for International Peace)

# U.S. Unprecedented Use of Economic Instruments of National Power (IV)

## Pillar Four – Procurement Restrictions

- **FCC bans equipment authorizations for Huawei and ZTE**

On November 25, 2022, the Federal Communications Commission (FCC) adopted new rules prohibiting communications equipment deemed to pose an unacceptable risk to national security from being authorized for importation or sale in the United States.

- **FY23 NDAA restricts government procurement of products that incorporate China-made chips**

The enacted FY23 NDAA contains an amendment that restricts the U.S. government from purchasing products or services that incorporate semiconductors made by certain Chinese chip manufacturers, including the Semiconductor Manufacturing International Corporation (SMIC), ChangXin Memory Technologies (CXMT), and Yangtze Memory Technologies Corp (YMTC), along with any of their successor and affiliate entities.

- **FY23 NDAA bans government use of Chinese drones**

Section 817 in FY23 NDAA prohibits the Defense Department and its contractors from using Chinese-made surveillance drones. One example of China's leading drone companies, DJI was banned by Army in 2017 because of cited cybersecurity concerns. In 2021, the Treasury Department's Office of Foreign Assets Control added DJI to its list of companies in the Chinese military-industrial complex on the ground of its alleged surveillance of Uyghurs, prohibiting Americans from buying or selling publicly traded securities tied to the company.

# House Select Committee on Strategic Competition Between the U.S. & the CCP

## Chairman Mike Gallagher (R-WI)



In the 117<sup>th</sup> Congress, Rep. Gallagher filed the most stand-alone bills on China-related issues. As Chair, he wants to “hold the Chinese Communist Party (“CCP”) accountable for alleged human rights abuses, protect US technology security, and support Taiwan.”

## Ranking Member Raja Krishnamoorthi (D-IL)



In the 117<sup>th</sup> Congress, Rep. Krishnamoorthi’s (D-IL) China policy interests focused on monitoring Chinese economic and security threats abroad, especially in Asia, and protecting Asian-Americans at home. As Ranking, he wants the Committee to be uniquely active –and bipartisan – on US-China issues.

Based on hearings and other activities, the Select Committee has so far shown keen interest in overseeing and influencing related legislation regarding, among other topics, U.S. business complicity in human rights violations against minorities in China as well as enhancing U.S. military support for Taiwan. Other areas of interest to the committee include:

- 1) Developing a bipartisan framework for “strategic de-risking” or “selective decoupling” from China;
- 2) Addressing the de minimis threshold vis-à-vis trade;
- 3) Combatting the CCP’s transnational repression and tactics of political persecution; and
- 4) Countering Chinese intellectual property theft and international influence.

Going forward, we anticipate the Select Committee will pivot to trade and economic issues, with a focus on U.S. companies doing business in China and emerging technologies.

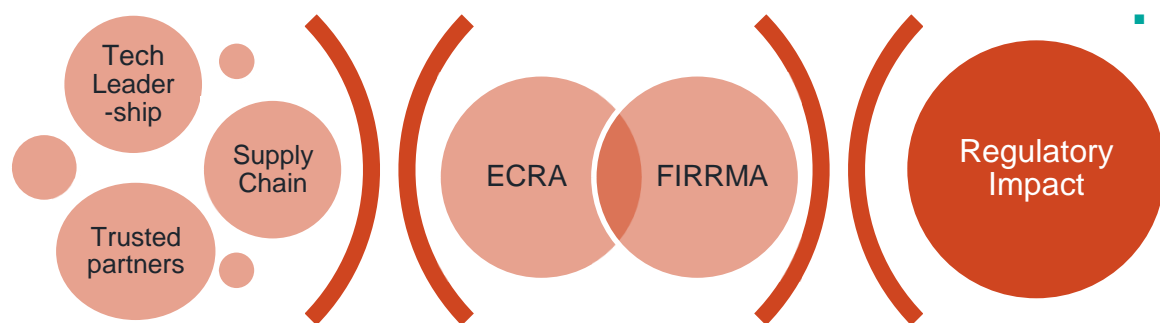
## Briefing topics

- US Trade Policy - Recent Developments in Legislation and Oversight & Investigations
- **Developments in US Export Controls, Sanctions and other Regulations: Doing Business in or with China**
- Chinese companies on US Black Lists – what does that mean?
- How combined Policy/legal solutions can help with US Policy and regulatory challenges





# US Policy and Impact for in or with China



## Policy Objectives

- Slowing down Chinese leadership in emerging technology
- Not supporting civil/military fusion
- Maintaining integrity of US supply chains
- Favor trusted partners aligned with US national security and foreign policy interests

## National Defense Authorization Act FY 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, including critical assessment of investor relations with China and retroactive review of investments in US
- Proliferation of restricted lists covering Chinese technology companies with any association with the Chinese military industrial complex
- Key companies in China targeted and banned
- Key industries in China targeted: semiconductors and advanced computing
- Efforts to ensure alignments of export controls and related measures among US allies and partners
- Prohibit non-US made products with US technology, software, or equipment from going to China
- Prohibit Chinese products use for US government procurements
- Expected restrictions on exports of cloud computing services that use advanced AI chips
- Expected restrictions on outbound investment in China
- Expected restrictions on ICTS transactions

## Defense Articles / Services

Government Agency:

US Department of State,  
Directorate of Defense Trade  
Controls (DDTC)

Legal Authority:

Arms Export Control Act (AECA)

Implementing Regulations:

International Traffic in Arms  
Regulations (ITAR)

Control List:

US Munitions List (USML)

Website (guidance):

[pmddtc.state.gov](http://pmddtc.state.gov)

## Other Items

Government Agency:

US Department of Commerce,  
Bureau of Industry and Security  
(BIS)

Legal Authority:

Export Control Reform Act (ECRA)

Implementing Regulations:

Export Administration Regulations  
(EAR)

Control List:

Commerce Control List (CCL)

Website (guidance):

[bis.doc.gov](http://bis.doc.gov)

## Dealings - Sanctioned Countries

Government agency:

US Department of the Treasury,  
Office of Foreign Assets  
Control (OFAC)

Legal authority:

International Emergency  
Economic Powers Act (IEEPA);  
Trading with the Enemy Act  
(TWEA)

Selected Programs:

Cuba, Syria, Iran, N. Korea,  
Ukraine Regions  
SDN/SSI-driven programs

Website (guidance):

[treas.gov/offices/enforcement/ofac](http://treas.gov/offices/enforcement/ofac)

# “The Beginnings of an Industrial Policy”— Continuity Across Administrations

*“[T]he Biden administration—with a few important exceptions—has continued along the path President Trump and I laid out ... **Biden’s team has continued to buck [World Trade Organization] rulings against America, refused to draw down the Section 301 tariffs on China, and enacted the beginnings of an industrial policy.**”*

— **Robert Lighthizer**

*Author of “No Trade is Free”  
and former US Trade Representative during the Trump Administration*



# Export Controls: China Developments

Trump  
Administration  
*relentless  
focus on  
China*

- **May 21, 2019** – BIS announces designation of Huawei Technologies Co., Ltd. and 68 non-US affiliated Huawei entities to Entity List.
- **August 21, 2019** – BIS announces addition of an additional 46 non-US affiliated Huawei entities to Entity List.
- **April 28, 2020** – BIS announces expansion of license requirements on exports, reexports, and transfers (in-country) of items intended for military end use or military end users in China, Russia, or Venezuela.
- **May 19, 2020** – BIS amends General Prohibition Three (FDP Rule) to create new Entity List FDP Rule.
- **December 22, 2020** – **BIS adds SMIC entities to Entity List**
- **December 23, 2020** – BIS removes Hong Kong as a separate destination from China under the EAR.
- **January 15, 2021** – BIS announces creation of license requirements on exports, reexports, and transfers (in-country) of items intended for military-intelligence end use or military-intelligence end users in China, Russia, or Venezuela.

Biden Administration - *multilateral response to Ukraine conflict*

Biden  
Administration  
*continues  
pressure on  
China*

- **October 13, 2022** – **BIS announces creation of additional export controls on certain advanced computing and semiconductor manufacturing items, supercomputer and semiconductor end use restrictions**
- **October 13, 2022** – BIS announces that companies on UVL could be put on Entity List due to non-cooperation by the host government
- **February 27, 2023** – BIS publishes the Iran FDP rule
- **February 27, 2023** – BIS expands the Russia luxury good list to include communication devices

# Advanced Computing and Semiconductor Rule Effective October 7, 2022, Published October 13, 2022

- Summary of Important Changes and Impacts of Changes
  - Expanded EAR jurisdiction over foreign produced items – Additional Foreign Direct Product (FDP) rule
    - Targeting companies (not necessarily bad actors)
    - FDP rules to prevent circumvention through third countries
  - Imposed additional licensing requirements on certain end-uses in China
    - Targeting companies in China (fn1 and fn4 on Entity List)
    - Targeting industries (not controlling advanced technologies)
    - Attempting to retard the progress of development and actually set back the industry by depriving it of needed equipment and materials
  - Imposed additional licensing requirements on activities US persons supporting China
    - Targeting US persons supporting Chinese semiconductor industry
    - New rule applies to US person supporting items not subject to the EAR – captures US person in non-technical positions: logistics and support functions
    - US persons in technical roles already captured because technology created by US persons most likely is subject to the EAR
  
- Final rule implementing October 7 interim rule is expected to be issued soon

Subject to the EAR

End-Use Controls

US Person Controls



# Export Controls: Next Developments

*“We previously maintained a ‘sliding scale’ approach that said we need to stay only a couple of generations ahead. That is not the strategic environment we are in today. **Given the foundational nature of certain technologies, such as advanced logic and memory chips, we must maintain as large of a lead as possible.**”*

— **Jake Sullivan**, National Security Advisor, SCSP Speech, September 16, 2022

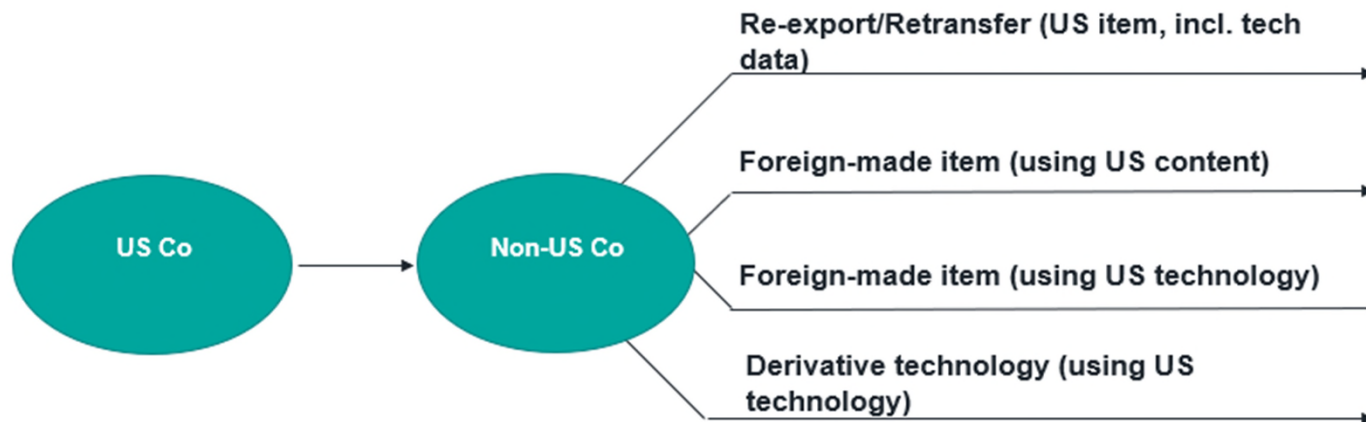
- Additional export controls targeting China coming soon
  - Final rule on advanced computing and semiconductors implementing October 7 rule
  - The Biden Administration plans to announce additional controls on semiconductor equipment
    - Significantly increase the number of licenses for China
- Japan and the Netherlands
  - In April, Japan proposed rules to control exports of 23 items used to make semiconductors
    - Trade Minister stated measures were to prevent military diversion of the items and that no single country would be targeted
  - In June, the Netherlands announced licensing restrictions on foreign sales of advanced semiconductor manufacturing equipment
    - Rule takes effect September 1, 2023
  - US industry fears that the end result of stringent unilateral US controls would be to make the US semiconductor industry less globally competitive (compare to satellite industry of 1990s)
- Longer term
  - AI, quantum, and biotech often discussed, but concerns that regulation could inhibit R&D and isolate US
    - Some consensus that biotech would be last because of concern that controls could stunt medical research, for example advanced cancer treatments
  - Rhetoric building on the Hill and even in Administration that less advanced chips also should be targeted to prevent China realizing dominance that could be choke point in global chip market

# Export Controls Cover Activities in China and Third Countries

Subject to the EAR (§734.3(a))

- All items in the US
- All US origin items wherever located
- Foreign-made items that incorporate controlled US-origin item
  - Unless the controlled US content qualifies as de minimis
- Certain foreign-made direct products of specified technology and software
- Certain foreign-produced direct products of a complete plant or any major component of a plant

- Products produced at China or other third country facility subsidiary may be subject to the EAR because products:
  - incorporate US content,
  - are the direct product of US technology or software, or
  - are produced with US equipment (or equipment based on US technology or software)



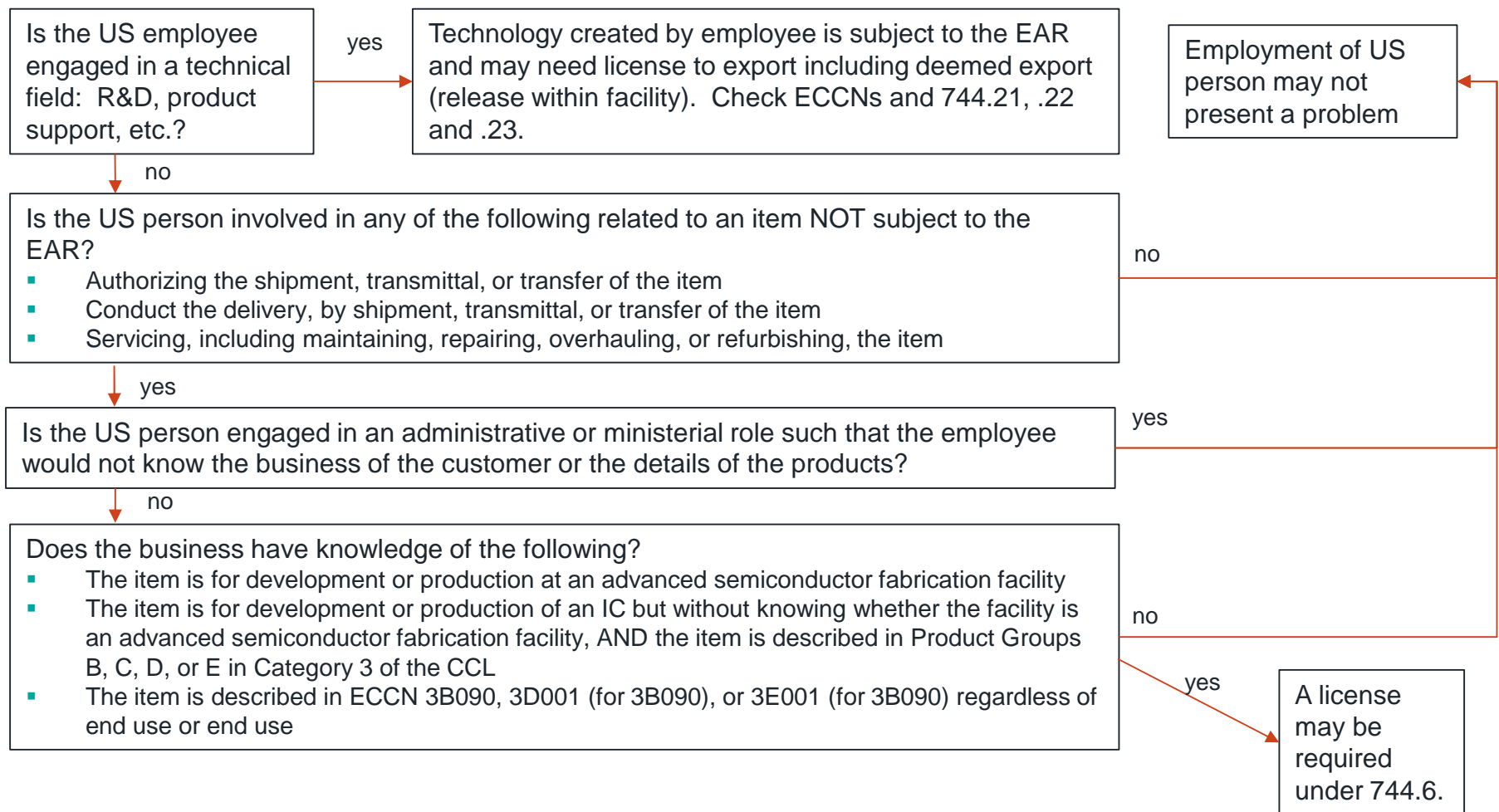
# Sales to, for or involving targeted companies or industries in China

- EAR General Prohibition Five—Export, reexport, or transfer (in-country) to prohibited end-uses or end-users (End-Use End-User).

You may not, without a license, knowingly export, reexport, or transfer (in-country) any item subject to the EAR to an end user or end use that is prohibited by part 744 of the EAR.

- Restrictions on dealings with persons on the Unverified List or the Entity List
  - Restrictions on transactions involving military end-users or end-uses
  - Restrictions on transactions supporting the semiconductor industry or supercomputers in China
- Possible options for subsidiary in China or third country
    - Discontinue business
    - Obtain a license from BIS (may not be possible)
    - Establish clean facility (may not be practical)
      - Does not trigger EAR jurisdiction
      - Confirm through audit of products, equipment, software, technology
      - Ring fence to avoid contamination

# Export Controls Impact US persons Working Abroad



# Key Differences between Export Controls and Economic Sanctions

|                       | Export Control (EAR)  | Economic Sanctions   |
|-----------------------|---|--|
| Targets               | US Content (Goods, Equipment, Software and Technology)  | Persons; Countries; Activities and Transactions  |
| Implication           | Sourcing, Sales, Co-development, etc.   | All kinds of activities  |
| Application           | <ul style="list-style-type: none"> <li>All exports from the United States</li> <li>Certain, not all, reexports and retransfers of US-EAR content</li> </ul>   | <ul style="list-style-type: none"> <li>Primarily US Person</li> <li>Sometimes Non-US Person</li> </ul>   |
| Black Lists           | <ul style="list-style-type: none"> <li>Entity List</li> <li>Military End User List</li> <li>Unverified List</li> </ul>  | <ul style="list-style-type: none"> <li>Specially Designated Nationals and Blocked Persons list ("SDN List")</li> <li>Non-SDN List</li> </ul>                   |
| Violation Consequence | <ul style="list-style-type: none"> <li>Blacklisted (interruption of supply chain, both US and non-US) – recently, more commonly used for Chinese companies</li> <li>Fine</li> <li>Imprisonment</li> </ul> | <ul style="list-style-type: none"> <li>Blacklisted (blocked from transactions involving US persons)</li> <li>Fine</li> <li>Imprisonment of officers</li> </ul> |

**Export controls and economic sanctions are parallel and can be applied to the same transaction.**

# Overview of US Sanctions

- OFAC administers and enforces US sanctions and embargoes programs.
  - These sanctions target terrorists, international narcotics traffickers, transnational criminal organizations, foreign sanctions evaders, foreign countries and regimes, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to U.S. national security, foreign policy, or the economy.
- Comprehensive
  - prohibit almost all exports to a certain destination and other transactions or dealings that involve property of the targeted destination that is in the US or within the possession or control of US persons.
- Selective
  - SDN List-based sanctions – target specific, listed individuals and entities
    - Blocking of all property and interests in property of those listed persons that are or come within the United States or the possession or control of a US person; or
    - Prohibit specific types of transactions and activities with listed persons.
  - The Non-SDN Chinese Military-Industrial Complex Companies List (NS-CMIC List)
- The term “US person”
  - means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.



- The OFAC “50 Percent Rule” applies the selective sanctions to subsidiaries not actually listed
  - The OFAC “blocking” cascades down a corporate chain
  - Once an entity’s assets are blocked because an SDN owns 50 percent or more of it, that entity is considered subject to blocking sanctions, and any entity that it owns 50 percent or more of (or jointly owns with one or more SDNs 50 percent or more of) is likewise considered subject to sanctions as if it was on the SDN List
- Example:
  - Blocked Person X owns 50 percent of Entity A
  - Entity A owns 50 percent of Entity B
  - Entity B is considered to be blocked
  - This is so because Blocked Person X's 50 percent ownership of Entity A makes Entity A a blocked person. Entity A's 50 percent ownership of Entity B in turn makes Entity B a blocked person

# Sanctions can extend to activities of non-US persons

- Facilitation
  - No US person, wherever located, may approve, finance, facilitate, or guarantee any transaction by a foreign person where the transaction by that foreign person would be prohibited if performed by a US person or within the United States
- Causation
  - A non-US person can violate the OFAC regulations by causing (or attempting to cause) a US person to violate the sanctions (e.g., by facilitation)
- Derivative Authority
  - The authority granted to OFAC to add foreign persons to the SDN list can be used to add other persons to the SDN list because of their significant contributions (in OFACs discretion) to the SDN
  - Not a violation, but results in listing
- Secondary Sanctions
  - US Secondary Sanctions target sanctioned countries (e.g., Iran) but do so by authorizing the imposition of US sanctions against third country (e.g. Chinese) companies for engaging in activities or transactions that US law declares “sanctionable.”
  - Not a violation, but results in sanctions

# Chinese Organizations Targeted by OFAC

**“We will continue to crack down on PRC entities engaged in harmful activities, such as those with ties to their military or those violating sanctions on Iran’s oil industry or that support Russia’s war against Ukraine.”**

— Wendy Sherman, Deputy Secretary Of State  
*Written Testimony before Senate Foreign Relations Committee*  
February 9, 2023

- Recent examples: supporting Russia in conflict with Ukraine
  - Supplying technology or components to Iran for production of drones that are then supplied to Russia
  - Supplying satellite imagery to Wagner group
  - Supplying microelectronics to Russia
  - Supplying cloud computing and data processing machines to Russia
- Other non-US companies supporting China’s activities contrary to US national security and foreign policy could be designated SDNs under OFAC’s derivative authority



## Takeaways: Challenges of Doing Business in or with China

- US-China geopolitical environment drives US trade and investment policy, even as it relates to trade and investment with other countries
- Investment in the US by foreign persons may result in prolonged review (or mitigation) by the Committee on Foreign Investment in the United States because of ties to China (by either party)
- US government is actively targeting Chinese key players and industries that threaten US national security and foreign policy interests
- US companies and their foreign subsidiaries must avoid prohibited transactions with targeted entities and industries
- Strategies are available to continue business in and with China, but companies must take care not to be undermining US national security and foreign policy interests even with respect to lawful activities

## Briefing topics

- US Trade Policy - Recent Developments in Legislation and Oversight & Investigations
- Developments in US Export Controls, Sanctions and other Regulations: Doing Business in or with China
- **Chinese companies on US Black Lists – what does that mean?**
- How combined Policy/legal solutions can help with US Policy and regulatory challenges



# US Restricted Parties Lists

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- Department of Commerce, Bureau of Industry and Security
  - Military End-User (MEU) List
  - Unverified List (UVL)
  - Entity List (EL)
- Department of the Treasury, Office of Foreign Assets Control
  - Specially Designated Nationals (SDN) List
  - Chinese Military Industrial Complex (CMIC or Non-SDN) List



# Impact of Doing Business with Organization on a List

## Practical problem

- Companies will have a match (“hit”) on their screening tool – “red flag”
- The transaction is placed on hold and escalated to upper level compliance – to resolve the red flag
- The transaction will not proceed until hit is understood and transaction determined in compliance with EAR/OFAC – red flag “cleared”
- Pending and future transactions will be delayed until the exporting organizations understand how to proceed under the EAR/OFAC
  - Transactions from the US
  - Transactions from non-US parties of items subject to the EAR, including foreign made items with US content or based on US technology or software

# Lists: Purpose and Impact

| List            | Reason for Listing  | Implication of Listing   |
|-----------------|---|--|
| MEU             | ERC determines entity represent an unacceptable risk of use in or diversion to a military end use or end-user   | Burma, Cambodia, China, or Venezuela: requires a license for items on Supp. 2 to Part 744. Russia and Belarus all items subject to EAR. Presumption of denial for license applications |
| UVL             | BIS cannot verify the <i>bona fides</i> (i.e., legitimacy and reliability relating to the end use and end user of items subject to the EAR) because an end-use check, such as a pre-license check (PLC) or a post-shipment verification (PSV), cannot be completed satisfactorily for reasons outside of the U.S. Government's control. | Requires a certification prior to export without a license. Case-by-case review for license applications   |
| EL              | ERC reasonably believes entity to be involved, or to pose a significant risk of being or becoming involved, in activities contrary to the national security or foreign policy interests of the United States. See part 744 (Control Policy: End-User and End-Use Based) and part 746 (Embargoes and Other Special Controls).            | Requires a license for some or all items subject to the EAR. Licensing policy as specified in the entry.<br>Fn1 and 4 trigger special FDP rule<br>Fn3 are Russia and Belarus MEUs      |
| SDN             | The reasons for listing vary based on the program used to list the person or entity<br>(Other relate to Russia Directives – less important now)   | Prohibits US person's dealings with organizations on the list and prohibits US person's dealings with their 50%+ owned subsidiaries  |
| CMIC or Non-SDN | Entity determined by OFAC to operate or have operated in the defense and related materiel sector or the surveillance technology sector of the economy of the PRC, or to own or control, or to be owned or controlled by, directly or indirectly, a person who operates or has operated in any such sector.                              | No trade restrictions, but may indicate military end-user  |

## Briefing topics

- US Trade Policy - Recent Developments in Legislation and Oversight & Investigations
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- Chinese companies on US Black Lists – what does that mean?
- **How combined Policy/legal solutions can help with US Policy and regulatory challenges**



# How Combined Public Policy/International Trade Legal Capability Can Help, p.1

- SPB's policy advisors and legal counsel have a deep understanding of the geopolitical landscape and business environment in both the U.S. and China. Their combined capability helps U.S. business navigate complexities and minimize potential risks by:
  - Staying informed and adapting
    - Stay updated on geopolitical developments, policy changes, and regulations that may impact business operations. Regularly monitor government announcements, industry news, and consult with legal and geopolitical experts to understand the implications and adapt business strategies accordingly.
  - Engaging in dialogue and diplomacy
    - Foster open and constructive dialogue with stakeholders, including government officials, industry associations, and local partners. Engaging in discussions and expressing concerns in a diplomatic manner can help address issues, clarify misunderstandings, and find mutually beneficial solutions.
  - Maintaining strong relationships
    - Build and maintain strong relationships with local partners, customers, and suppliers in China. Developing trust and fostering long-term partnerships based on shared interests and mutual benefits can help withstand geopolitical challenges.

# How Combined Public Policy/International Trade Legal Capability Can Help, p.2

- Continued
  - Focusing on compliance
    - Ensure strict compliance with all relevant laws, regulations, and export controls of both the U.S. and China. Adhering to legal requirements demonstrates a commitment to integrity and can help mitigate potential risks associated with geopolitical tensions.
  - Developing contingency plans
    - Have contingency plans in place to address potential disruptions or changes in the business environment due to geopolitical differences. This may include alternative sourcing options and diversifying manufacturing locations, markets and suppliers. With its global footprint, SPB can help U.S. businesses diversify their customer base and supply chain across different countries, thereby mitigating potential disruptions caused by geopolitical tensions and reduce their exposure to specific risks.



# Question and Answer

## Open Discussion





# Global Coverage

- Abu Dhabi
- Atlanta
- Beijing
- Berlin
- Birmingham
- Böblingen
- Bratislava
- Brussels
- Cincinnati
- Cleveland
- Columbus
- Dallas
- Darwin
- Denver
- Dubai
- Dublin
- Frankfurt
- Hong Kong
- Houston
- Leeds
- London
- Los Angeles
- Madrid
- Manchester
- Miami
- Milan
- New Jersey
- New York
- Palo Alto
- Paris
- Perth
- Phoenix
- Prague
- San Francisco
- Santo Domingo
- Shanghai
- Singapore
- Sydney
- Tampa
- Tokyo
- Warsaw
- Washington DC

- Africa
- Brazil
- Caribbean/Central America
- India
- Israel
- Mexico

- Office locations
- Regional desks and strategic alliances

