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Insights

ONE ADMINISTRATION TO THE NEXT: CHANGES AFFECTING U.S. SANCTIONS AND EXPORT CONTROLS

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While the Trump Administration ended with a continuing flurry of activity affecting U.S. sanctions and export controls, with several actions affecting parties in China and Hong Kong SAR, the Biden Administration is taking a slower approach to changes regarding a range of export control and economic sanctions measures.

Changes Introduced in the Waning Days of the Trump Administration

Among the last activities of the Trump Administration affecting economic sanctions and export controls were several additional designations of parties in China and Hong Kong SAR. Six additional Hong Kong SAR and Chinese officials were designated as Specially Designated Nationals and Blocked Persons ("SDNs") on 15 January 2021 pursuant to Executive Order ("EO") 13936. In addition, the U.S. Department of Commerce added China National Offshore Oil Corporation (CNOOC) to the Entity List and Chinese company Skyrizon to the Military End-User (MEU) List. These designations subject each party to additional license requirements under U.S. export controls. Furthermore, nine additional entities were designated by the U.S. Department of Defense on 14 January 2021 as "Communist Chinese military companies" (CCMCs), including Xiaomi Corporation and state-owned plane maker Commercial Aircraft Corporation of China, Ltd. (COMAC). While the addition of parties to the list of CCMCs does not trigger prohibitions under export controls or sanctions that are immediate, inclusion on the CCMC list does raise a red flag under the MEU restrictions pursuant to Section 744.21 of the Export Administration Regulations that can trigger additional license requirements. Moreover, such listing triggers investment restrictions for U.S. persons that go into effect 60 days after the date of listing, although there is a one year period to allow U.S. persons to divest from such parties if they are already invested.

Two days after the first round of investment restrictions went into effect under EO 13959 on 11 January 2021, Executive Order 13974 was issued to correct and clarify certain aspects of the original order. Specifically, EO 13974 corrected the definition of "transaction" to include purchases as well as sales of covered securities. Moreover, the latter order made clear that all U.S. persons must fully divest their interest in any publicly traded securities of CCMCs by the date 365 days after the entity was originally covered by the order. Continued possession of such securities after the expiration of that one year period is expressly prohibited.

The Office of Foreign Assets Control ("OFAC") issued new regulations on 15 January 2021 to implement the sanctions imposed pursuant to EO 13936, "The President's Executive Order on Hong Kong Normalization." The publication of these regulations follows agency practice to issue regulations to further its implementation of the sanctions programs it administers. The regulations currently published do not introduce additional sanctions.

Furthermore, on 5 January 2021, President Trump issued Executive Order 13971 targeting additional software applications and other software developed or controlled by parties in China based on concerns about access to sensitive personally identifiable information and other private information. The targeted applications are Alipay, CamScanner, QQ Wallet, SHAREit, Tencent QQ, VMate, WeChat Pay, and WPS Office. The specific prohibited transactions have not yet been identified, but the Executive Order requires the Department of Commerce within 45 days (i.e., by 19 February 2021) to identify the prohibited transactions, as well as the persons that develop or control the designated software applications. Whether the transactions targeted under this order will parallel those of EOs 13942 and 13943 affecting TikTok and WeChat, remains to be seen, as does the question of whether the restrictions will be challenged in court just as the TikTok and WeChat restrictions have been.

What to Expect from the Biden Administration on Economic Sanctions

The Biden Administration has demonstrated that they are capable of swift action, having issued numerous Executive Orders and Directives in the first few days upon taking office, including a number of which directly repeal actions taken by the Trump Administration. But such swift actions are unlikely to be seen from this Administration when it comes to economic sanctions. Based on comments from Treasury Secretary nominee Janet Yellen, it is likely that the Biden Administration will continue to rely on economic sanctions as a key foreign policy tool. Yellen indicated, however, that she will have a review of sanctions policy conducted to ensure that the sanctions are being used strategically and that their use is effective.

With respect to sanctions and export controls affecting China and Hong Kong SAR, it is likely that the Administration may try to seek additional multilateral cooperation to achieve its policy goals. Regardless of Administration, there remain concerns about the actions of China on several fronts that create continuing U.S. national security concerns and continue to give rise to concerns about suppressing democratic activities in Hong Kong SAR. While the fundamental concerns that led to implementation of various sanctions and other measures by the Trump Administration are not going away, we may see more measured steps going forward and more collaboration with other countries in order to effect change.

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