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The Biden Administration's U.S.-China Policy Takes Shape

By [Scott M. Flicker](#), [Charles A. Patrizia](#), [Randall V. Johnston](#), [Quinn Dang](#), [Talya Hutchison](#), Jeremy Gordon & Mary E. Rogers

On March 17, 2021, the U.S. Department of Commerce [announced](#) that it had issued subpoenas to multiple Chinese companies that provide information and communications technology and services ("ICTS") in the United States, as part of the U.S. Government's review of the role of Chinese technology companies in the American supply chain. It did not name the targeted Chinese companies. Recently confirmed Secretary of Commerce Gina Raimondo said that the subpoenas, issued pursuant to Executive Order 13873 on ICTS, were a first step in conducting an investigation of the companies to determine whether the administration will take further action.

The timing of the announcement will not escape notice in Beijing. It came just a day before the U.S. Secretary of State and National Security Adviser met their Chinese counterparts in Alaska, the first high-level meeting between the two countries during the Biden Administration. And it follows a State Department announcement of new sanctions against two dozen Chinese and Hong Kong officials under the Hong Kong Autonomy Act for undermining the territory's semi-autonomy from Beijing.

Together, these actions demonstrate that the Biden Administration intends to use a whole-of-government approach to secure the U.S. ICTS supply chain and implement its broader human rights policies. The result will be the deepening of a trend toward the decoupling of the world's two largest economies.

The following provides an overview of the Commerce Department's ICTS regulations implementing the screening regime authorized under Executive Order 13873 and the Hong Kong Autonomy Act, under which sanctions were imposed against Chinese and Hong Kong officials and which provide the U.S. Government with the authority to sanction non-U.S. financial institutions who deal with such officials.

U.S. Department of Commerce ICTS Regulation

On January 19, 2021, the U.S. Department of Commerce ("Commerce"), under the outgoing Administration, published an interim final rule prohibiting or otherwise restricting U.S. transactions involving ICTS with persons from countries deemed to be "foreign adversaries."¹ ICTS is broadly defined, and includes hardware, software, and other relevant products or services, including cloud-computing services. The following have initially been designated as "foreign adversaries" under the rule: The People's Republic of China, including the Hong Kong Special Administrative Region (China); the Republic of Cuba (Cuba); the Islamic Republic of Iran (Iran); the Democratic People's Republic of Korea (North Korea); the Russian Federation (Russia); and the Venezuelan politician Nicolás Maduro (Maduro

Regime). Any covered transaction in which the relevant ICTS has been designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of one of these “foreign adversaries” can be a candidate for action under the rule.

According to the government, the rule is rooted in national security concerns, namely that the U.S. ICTS supply chain needs to be protected from theft of data or attacks that could more generally affect U.S. business and government. To address those risks, the rule creates a new screening regime headed by Commerce. Importantly, this screening body is empowered to examine not only acquisitions of U.S. businesses involving foreign adversaries—already the purview of the Committee on Foreign Investment in the United States (“CFIUS”)—but also other common business arrangements, such as transactions involving “importation,” “dealings in,” and “use” of technologies developed by said adversaries. Commerce implements the screening and review process on a case-by-case basis and will issue a determination that an ICTS transaction is either: (i) prohibited; (ii) not prohibited; or (iii) authorized with approved mitigation measures. Persons who violate determinations made by Commerce pursuant to a review process are subject to penalties under the International Emergency Economic Powers Act (“IEEPA”).

The rule becomes effective March 22, but the Secretary of Commerce’s public announcement that subpoenas have already been issued confirms that the Biden Administration is taking steps to act quickly under the new regime.

Hong Kong Autonomy Act

Congress passed the [Hong Kong Autonomy Act](#) (“HKAA”) in June 2020, in response to China’s enactment of its Hong Kong national security law, to punish Chinese and Hong Kong officials deemed to undermine the autonomy of Hong Kong and foreign financial institutions (“FFI”) that do business with them.

Section 5(a) of the HKAA required the Secretary of State submit to Congress a report identifying foreign persons that the Secretary of State, in consultation with the Secretary of the Treasury, determined are materially contributing to, have materially contributed to, or attempt to materially contribute to the failure of the Government of China to meet its obligations under the China-U.K. Joint Declaration or the Hong Kong Basic Law.

On March 16, the Biden Administration significantly expanded the number of PRC officials targeted, including 14 vice chairmen of the Standing Committee of the National People’s Congress, and officials from the Hong Kong Police Force, the Hong Kong and Macau Affairs Office, and the Office for Safeguarding National Security.² This addition of 24 persons targeted under the HKAA supplements the designation of 11 PRC and Hong Kong officials who were targeted under the HKAA in October 2020.³

Section 5(b) of the HKAA requires the Secretary of the Treasury, in consultation with the Secretary of State, to submit a report to Congress 30–60 days after the Section 5(a) Report is submitted, identifying any foreign financial institution that knowingly conducts a significant transaction with a foreign person identified in the Section 5(a) Report. These FFIs will be subject to a menu of sanctions identified in Section 7(a) of the HKAA, including prohibition on foreign exchange transactions and banking transactions. Treasury has committed to reaching out to an FFI before naming it in any Section 5(b) Report. In December 2020, Treasury issued its report stating that it had not identified any FFI that had knowingly conducted a significant transaction with any person identified under the Section 5(a) report; no report has yet been issued with regard to the identification of FFIs who have knowingly conducted a significant transaction with the newly designated individuals.

Conclusion

These recent actions by the Biden administration introduce new risks for Chinese ITCS companies and foreign financial institutions transacting in China. Paul Hastings is available to assist you in navigating these risks within the context of a rapidly changing U.S.-China business climate.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:

Scott M. Flicker
1.202.551.1726
scottflicker@paulhastings.com

Jeremy B. Gordon
1.202.551.1806
jeremygordon@paulhastings.com

Randall V. Johnston
1.202.551.1978
randalljohnston@paulhastings.com

Charles A. Patrizia
1.202.551.1710
charlespatrizia@paulhastings.com

Talya Hutchison
1.202.551.1930
talyahutchison@paulhastings.com

Mary E. Rogers
1.202.551.1833
maryrogers@paulhastings.com

Quinn Dang
1.202.551.1891
quinndang@paulhastings.com

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- ¹ <https://www.federalregister.gov/documents/2021/01/19/2021-01234/securing-the-information-and-communications-technology-and-services-supply-chain>.
 - ² <https://www.state.gov/update-to-report-on-identification-of-foreign-persons-involved-in-the-erosion-of-the-obligations-of-china-under-the-joint-declaration-or-the-basic-law/>.
 - ³ <https://www.state.gov/identification-of-foreign-persons-involved-in-the-erosion-of-the-obligations-of-china-under-the-joint-declaration-or-the-basic-law/>.

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