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Regulatory Outlook for International Trade Following the 2024 Election

Navigating turbulent waters in the face of an impending storm.

Using President-elect Trump's first term as a guide, we assess it as highly likely that the next four years will see a fast-paced, aggressive, and far-reaching use of international trade tools to further the administration's national security and foreign policy goals. These measures will be paired with diplomatic and other instruments of both soft and hard U.S. power. Companies, individuals, and organizations must stay abreast of changes in international trade rules in the United States and in any jurisdiction in which they have exposure to navigate what could be uncharted waters.

The second Trump administration, supported by a Republican-controlled Congress, is poised to deploy expansive international trade tools to respond to national security concerns and to achieve foreign policy goals. Based on our analysis of the first Trump administration's trade practices, trends and developments under the Biden administration over the last four years, and President-elect Trump's campaign promises and early personnel appointments, this alert explores key international trade issues and how they might unfold in the second Trump administration. While we assess that there will be some consistency—in particular with respect to the view that the People's Republic of China ("China") is a core focus and concern—in many respects the Trump administration is poised to deploy international trade measures in potentially radical ways.

In this note, we focus on seven key areas we assess to be among the most relevant to clients that have international exposure and that are involved in cross border investments and transactions: tariffs, the new outbound investment program, U.S. foreign direct investment review under the Committee on Foreign Investment in the United States (CFIUS), economic sanctions, export controls, the bulk sensitive personal data proposed rule, and the connected vehicles proposed rule. While many of these areas have a China focus, we also assess it as highly likely that the new administration will use these tools to address other national security and foreign policy issues, including with respect to the Middle East and Latin America.

Of course, the overview of the seven areas discussed below is not a comprehensive listing of likely international trade matters. There are many other international trade and investment issues that will almost certainly arise—both on the federal and state levels and emanating from not just the executive branch of government but also the legislative and judicial branches which have become increasingly involved, respectively, in promulgating and adjudicating on international trade. Moreover, other jurisdictions, in Europe, Asia, and the Americas may also deploy these tools either in opposition to U.S. measures or in pursuit of their own unrelated interests.

Understanding the trends in these and other key areas and monitoring ongoing developments will be critical for clients to successfully navigate the turbulent waters of a change in presidential administrations amid persistent and ever-growing national security threats.

1. Tariffs

Tariffs will be a key feature of international trade policy in the new administration. President-elect Trump has proposed to establish a universal baseline tariff of up to twenty percent on nearly all goods imported into the United States (the “Proposed Universal Tariff”) and a sixty percent tariff on all imports from China (the “Proposed China Tariff”, and together with the Proposed Universal Tariff, the “Proposed Tariffs”). Relatedly, President-elect Trump has reiterated calls from his first term to pass a “Reciprocal Trade Act“ which would empower the president to increase tariffs to either the rate imposed by the opposite country or the determined value of the applicable nontariff barriers.

While there are a handful of existing statutes that authorize the president to impose tariffs under certain circumstances, there are two that are most likely to provide support for the Proposed Tariffs.

First, Section 301 of the Trade Act of 1974[1] authorizes the president to impose tariffs in response to foreign practices that either violate trade agreements or are unjustifiable, unreasonable, or discriminatory and burden or restrict U.S. commerce. While Section 301 would authorize the Proposed China Tariff based on findings of unfair trade practices, it is unlikely to authorize the Proposed Universal Tariff, as it requires the identification of such acts, policies, or practices by a specific foreign country.

Second, Section 203 of the International Emergency Economic Powers Act (“IEEPA”)[2] authorizes the president, during a period of national emergency declared by the President, to regulate any importation of any property in which any foreign country or a national thereof has any interest. Section 203 may be invoked to authorize the Proposed Tariffs on the basis that trade deficits threaten the national security of the United States.

A possible, but less likely, option to support the Proposed Tariffs is Section 232 of the Trade Expansion Act of 1962, which authorizes the president to impose tariffs on imports of articles determined by a U.S. Department of Commerce ("Commerce") investigation to undermine national security.[3] While Section 232 would authorize the Proposed China Tariff, doing so would be delayed by a lengthy investigation and could only be applied to specific articles with a national security nexus. Section 232 also may not be the most effective vehicle to authorize the Proposed Universal Tariff because there is unlikely to be a plausible national security nexus to imports of all articles from all countries.

Regardless of the authority used to implement the Proposed Tariffs, such actions along with likely retaliation by foreign governments could significantly impact global supply chains and could lead to decreases in the availability of certain goods and increases in the cost of goods around the world. Already, the European Union ("EU") and China have indicated they are prepared to retaliate should President-elect Trump move forward with the Proposed Tariffs. We note that President-elect Trump's promise to reduce regulation and taxes during his second term could offset some of the impact of the Proposed Tariffs.

Any executive action that might be taken to impose the Proposed Tariffs will almost certainly be the subject of substantial legal challenges, particularly as the U.S. Constitution provides that Congress has general tariff authorities. However, challenging the Proposed Tariffs could still prove difficult, particularly those imposed under IEEPA, which broadly authorizes the president to impose tariffs based on a national emergency declaration. Despite the newfound possibility of meaningful challenges to agency decisions due to the fall of *Chevron* deference[4] and the revitalization of the major questions doctrine, we assess that in other than truly unusual matters, it is likely that courts could continue to broadly defer to the executive in matters of national security and foreign affairs.

Alternatively, the new administration could look to effectuate the Proposed Tariffs legislatively—something that has not happened since the Smoot-Hawley Tariff Act of 1930. President-elect Trump's team has reportedly engaged the House Ways and Means Committee about developing legislation that would cut taxes and raise revenue through tariff increases. There has also been legislation proposed in both the Senate and the House to strip China of its Permanent Normal Trade Relations ("PNTR") status, create a new China-specific tariff schedule, and impose 100% tariffs on goods critical to U.S. national security.[5] Should such legislation succeed—now more likely given the Republican control of both houses of Congress—it would be very difficult to challenge congressionally enacted tariffs.

2. Outbound Investment

Outbound investment controls, particularly regarding U.S. investment in China, will also play a meaningful role in the second Trump administration's international trade policy. On October 28, 2024, the U.S. Department of the Treasury ("Treasury") issued a final rule implementing an outbound investment control regime targeting artificial intelligence ("AI"), semiconductors and microelectronics, and quantum computing investments involving China which raise national security concerns. The regulations' prohibitions and reporting requirements take effect on January 2, 2025. For more details about the final rule, please refer to our prior client alert.

Treasury provided that the final rule "sought to maintain the goals of both open investment and protection of national security." But as hawkishness toward China seems poised to grow in the second Trump administration (and enjoys a large degree of bipartisan support), that balance could tip towards protecting national security. While the regulations are presently targeted at U.S. outbound investments in China and limited to a narrow group of critical technology sectors, the regime could be expanded both with respect to target countries and sectors of interest. For example, the second Trump administration could expand the list of restricted investments to other sensitive sectors such as hypersonics, satellite-based communications, and networked laser scanning systems with dual-use applications.[6]

Although the Biden administration relied on executive authorities in promulgating its outbound investment regime, Congress may quickly seek to enact its own regime. House Speaker Mike Johnson, Foreign Affairs Committee Chairman Michael McCaul, and Select Committee on the Chinese Communist Party Chairman John Moolenaar strongly support addressing outbound investment in the FY 2025 National Defense Authorization Act ("NDAA")—a "must pass" piece of legislation that funds the military and to which unrelated amendments (regularly involving sanctions and trade matters) are frequently attached.

The day after Treasury released the final rule, Chairman Moolenaar issued a statement "commending" the regulation but calling for Congress to "build on these rules and address a broader set of technologies and transactions that threaten our national security."[7] However, House Financial Services Committee Chairman Patrick McHenry favors a sanctions regime rather than a sectoral approach to limiting outbound investment. He had opposed the inclusion of outbound investment provisions in the FY 2024 NDAA, effectively blocking it from becoming law, and appears poised to do so again this year. Moolenaar has made clear that House leadership is pushing for legislation before the next Congress and hinted that such legislation could involve a compromise including both sanctions and sectoral regulation.[8] But with McHenry retiring from Congress and Republicans poised to control the executive and both houses of Congress, proponents of stronger outbound investment regulation could decide to forego a negotiated compromise and push for more aggressive legislation in the new Congress.

3. CFIUS

In contrast to the new and rapidly developing outbound investment regime, we assess that the Committee on Foreign Investment in the United States ("CFIUS") we continue its efforts. CFIUS's reviews of inbound investment—which also enjoy bipartisan support—are unlikely to undergo meaningful changes under President-elect Trump. Both the Biden and first Trump administrations have been tough on Chinese investment into the United States, and this stance will continue and perhaps intensify. In addition to a generally harsh climate for Chinese investment, we have seen—for many years—calls from Congressional leaders on both sides of the aisle to more strictly scrutinize Chinese investments in agricultural land near military bases (discussed in a prior alert). This rigorous scrutiny of Chinese investment in real estate is likely to evolve further, including through ever-increasing state and local legislative efforts, in addition to CFIUS reviews.

While major changes to CFIUS's regulations and practices are unlikely, there may be some shift in priorities. For example, during the Biden administration, CFIUS carefully scrutinized investments from Saudi Arabia. Under the leadership of President-elect Trump, who previously enjoyed a relatively close relationship with Saudi Arabia, CFIUS may place slightly lower scrutiny on Saudi investments. Similarly, potential easing of Russian sanctions (described below) could crack the door for a return to Russian minority investments in U.S. businesses.

Although CFIUS is unlikely to undergo any paradigm shift in the next year or so, its importance as a regulatory gating item for transactions will continue apace and could grow. Under the Biden administration, CFIUS took unprecedented actions to ramp up enforcement activities related to CFIUS filings and noncompliance with mitigation agreements reached that allowed certain investments to proceed so long as the parties complied with agreed upon restrictions. We discussed CFIUS's formal guidelines for enforcement and subsequent increase in the frequency and size of civil monetary penalties in a prior alert. One indicator of President-elect Trump's stance on CFIUS enforcement is the fact that, of the fewer than ten transactions that CFIUS has referred to a President to block since its inception, then-President Trump was responsible for blocking four during his first term. CFIUS's enforcement focus is likely to persist under the incoming administration.

4. Sanctions

Although expanded tariffs have taken center stage with respect to a second Trump administration's trade policy toward China, we assess it as likely that the Trump White House will also leverage economic sanctions in the strategic competition between Washington and Beijing. The first Trump administration and the outgoing Biden administration have each imposed restrictions on the ability of U.S. persons to invest in publicly traded securities of certain named Chinese companies. Those measures presently restrict dealings involving sixty-eight entities that appear by name on the Non-SDN Chinese Military-Industrial Complex Companies ("NS-CMIC") List maintained by Treasury's Office of Foreign Assets Control ("OFAC"). The second Trump administration may continue to expand the number of entities named to the NS-CMIC List, further restricting U.S. investment in certain Chinese public companies. It may also designate additional individuals and entities to OFAC's more restrictive Specially Designated Nationals and Blocked Persons ("SDN") List. Designations to the SDN List were employed during President-elect Trump's first term in response to various foreign policy disputes with China, including to impose consequences on certain Hong Kong and mainland Chinese government officials for their alleged involvement in implementing the 2020 Hong Kong National Security Law or perpetrating human rights abuses in China's Xinjiang Uyghur Autonomous Region. Upon returning to the White House, President Trump could resume the practice he began in his first administration of imposing blocking sanctions on senior Hong Kong, and potentially mainland Chinese, government officials.

The Trump administration could also revive certain China-related sanctions authorities that have fallen dormant during the Biden administration. For example, during his first term in office, President Trump signed into law the Hong Kong Autonomy Act ("HKAA"), which authorizes the imposition of sanctions such as asset freezes and visa bans on individuals identified by the U.S. Secretary of State as enforcing the Hong Kong National Security Law. Notably, the HKAA authorizes "secondary" sanctions on non-U.S. financial institutions that knowingly conduct "significant" transactions with such designated persons—potentially subjecting non-U.S. financial institutions that engage in such dealings to a range of consequences, including loss of access to the U.S. financial system. Although the United States has yet to designate any non-U.S. financial institutions under this authority, the recent passage of a new National Security regime in Hong Kong suggests that it remains a viable tool for the Trump White House should the new administration be inclined to further pressure Beijing.

Following Russia's full-scale invasion of Ukraine in early 2022, a coalition of global powers—including the United States, the EU, the United Kingdom, Canada, Australia, and Japan—deployed an unprecedented barrage of trade restrictions on Russia. Novel, targeted measures were unleashed and, as the war in Ukraine unfolded, the United States and its allies incrementally expanded the scope of blocking sanctions, sectoral sanctions targeting specific segments of the Russian economy, services bans (including on the maritime transport of Russian origin crude purchased at or above a specified price), export controls, and import bans.

The first Trump administration imposed sanctions on more targets in each of its four years than any previous administration. However, in light of President-elect Trump's pronouncements on the campaign trail about quickly ending the war in Ukraine and his recent statements on the proper use of sanctions as short-term coercive tools (having condemned long-term use of sanctions as weakening the dollar's dominance as a global currency), U.S. sanctions on Russia could potentially be eased under the second Trump administration as part of a negotiated resolution to the conflict.

Should President-elect Trump be inclined to relax U.S. sanctions on Russia, there are several avenues at his disposal to do so. For example, upon re-entering the White House, President Trump could narrow or revoke existing measures that have been implemented solely via executive order (e.g., the prohibition on "new investment" in the Russian Federation set forth in Executive Order 14071) by issuing new or amended executive orders, or by issuing permissive general licenses. Because many of the Biden-era sanctions measures targeting Russia are ones implemented solely via executive order, they are among those measures which are susceptible to unilateral amendment or revocation by the new executive, President Trump.

Where statutes direct the president to impose sanctions in response to specific events, President Trump may enjoy less flexibility to unilaterally alter the status quo. For example, the Countering America's Adversaries Through Sanctions Act ("CAATSA"), which imposed sanctions on Iran, North Korea, and Russia, and codified certain Obama-era sanctions authorities, provides that the president must submit the easing or lifting sanctions promulgated under CAATSA for congressional review. Specifically, the president must submit a report to the appropriate congressional committees describing the proposed action and supporting reasons. Congress's views are subject to presidential veto, and congressional checks can merely delay, not stop, presidential action. Thus, although CAATSA creates some hurdles to lifting certain Russia sanctions, President-elect Trump may still do so, especially given Republican party control of both the House and the Senate.

Furthermore, while the *modus operandi* of the Biden administration has been to garner international cooperation in the field of sanctions—exemplified most prominently by relying on a coalition of G7 and other partner countries to coordinate a collective response to Russia's invasion of Ukraine—the first Trump administration favored unilateral actions and an often-confrontational stance toward traditional U.S. allies. EU officials anticipate a decrease in multilateral cooperation during President Trump's second term and are reportedly working on domestic measures to guarantee the efficacy and endurance of sanctions on Russia, including through tighter enforcement. The United Kingdom has also reaffirmed its "iron-clad" support for Ukraine, and the Starmer government has not indicated any intention to scale back sanctions on Russia. The Russia-related regulatory environment is already difficult to navigate as even coordinated measures do not always align across jurisdictions. Further divergence among the United States, the United Kingdom and the EU could dramatically increase the compliance burden for global enterprises.

A second Trump administration could also aggressively wield sanctions to advance U.S. national security objectives in the Middle East, with a particular focus on Iran and its regional proxies. Notably, the United States during President-elect Trump's first term withdrew from the Joint Comprehensive Plan of Action ("JCPOA")—the 2015 Iran nuclear deal—and launched a "maximum pressure" economic campaign that aimed to deny Tehran the resources needed to fund its destabilizing activities. Although the outgoing Biden administration has left most U.S. sanctions on Iran in place—and indeed has continued to periodically designate additional Iranian parties to the SDN List, including Iranian government officials, entities involved in exporting unmanned aerial vehicles to Russia, and entities involved in the Iranian petroleum and petrochemicals trade—the pace of Iran-related sanctions designations could sharply increase upon President-elect Trump's return to office.

As part of a widely anticipated resumption of the "maximum pressure" campaign, the second Trump administration could also target third-country shipping companies, port operators, oil traders, and financial institutions that enable Iranian oil exports. President-elect Trump could also continue his predecessor's practice of using U.S. counter-terrorism sanctions authorities expansively to target Iran-backed militias, including Hamas, Hezbollah, and the Houthis. In a possible break from the current administration and in light of certain early nominees to core Middle East policy positions, we assess it as possible that the President-elect could revoke a February 2024 executive order that created a new West Bank sanctions program which has been used to target a small number of Israeli settlers.

As discussed in our 2023 Year-End Sanctions and Export Controls Update, the Biden administration brought record-breaking sanctions enforcement actions, as well as an increased focus on and dedication of resources to criminal enforcement of sanctions violations. Indeed, the Biden Administration has actually broken the Trump Administration's sanctions record, with each of his four years in office seeing record numbers of additions to OFAC sanctions lists. This has been matched by an increasing pace and severity of civil and criminal enforcement actions. Although aggressive enforcement of sanctions is likely to continue, the Trump administration could effect a shift in the industries and types of violations that give rise to enforcement actions by OFAC and the U.S. Department of Justice ("DOJ"). For example, while the Biden administration has heavily focused on the virtual currency sector, including the largest settlement in OFAC history with a cryptocurrency exchange, the Trump campaign has signaled the potential for a friendlier regulatory environment for cryptocurrency industry participants.

5. Export Controls

As was the case in the first Trump administration, export controls targeting China are expected to play a key role in the second Trump administration's management of the U.S.-China strategic competition. The first Trump administration deployed export controls to respond to several Chinese actions deemed contrary to U.S. interests and values, including:

- Chinese industrial policy initiatives, such as Made in China 2025 and the National Innovation-Driven Development Strategy, that are designed to catalyze Chinese advancements, and ultimately leadership, in strategic technologies including advanced manufacturing, AI, information technology, robotics and semiconductors;
- China's strategy of military-civil fusion ("MCF"), which seeks to integrate commercial advancements in advanced technologies (including quantum computing, big data, semiconductors, 5G, advanced nuclear technology, aerospace technology, and AI) into military applications to further the Chinese military's technological capabilities; and
- Alleged deficiencies in China's human rights record through the use of surveillance and other technologies as well as Chinese actions in Hong Kong.

Measures adopted by the first Trump administration included, among others, enhanced scrutiny requirements for an increasing number of civil and military Chinese end users and end uses in China; changes to China-related export license requirements; designation of several large, multinational Chinese firms to the Entity List, including the Semiconductor Manufacturing International Corporation; targeted controls on Huawei, including by designating Huawei to the Entity List and crafting a Huawei-specific foreign direct product rule intended to impede Huawei's ability to procure certain items; and the removal of Hong Kong as a separate destination under the Export Administration Regulations ("EAR").

The Biden administration continued the first Trump administration's widespread deployment of export controls to counter China and in fact implemented an even more expansive regime. Notably, the Biden administration's controls on semiconductors marked a fundamental shift in the U.S. government's long-standing policy on such export controls: in contrast to the previous approach of maintaining a relative advantage (i.e., "two generations ahead") in certain key technologies, the Biden Administration views it as a national security imperative to "maintain as large of a lead as possible." President-elect Trump's expected appointments of "China hawks" to key national security positions for his second term appear to indicate a continuation of this maximalist approach to export controls.

The second Trump administration will also likely see the continued and enhanced focus on restricting exports of "emerging technologies" to China. The Biden administration has focused on technological competition with China by controlling the export to China of advanced technologies such as advanced integrated circuits, semiconductor manufacturing equipment, and items related to AI and quantum computing and by working to multi-lateralize these controls with counterparts in Europe, Japan and South Korea outside of the traditional multilateral regimes like the Wassenaar Arrangement.

The Biden administration has also issued proposed rules that would greatly expand the licensing requirements that would apply to exports of most items to companies and other entities in China with ties to its military and intelligence sectors, and to U.S. person services to these same entities even when no U.S. exports are involved. The second Trump administration could build upon these policies by lowering the *De Minimis* Rule value threshold at which foreign made items that incorporate U.S. controlled content would be subject to export controls and by imposing controls on additional sectors.

Restrictions could also come in the form of modifications to some of the more technical aspects of the EAR. For example, partly in response to China's MCF strategy, the first Trump administration removed License Exception Civil End Users ("CIV") which previously authorized exports, reexports, and transfers of certain national security-controlled items, without prior review by BIS and subject to satisfaction of certain conditions, to multiple countries including China. Senator Marco Rubio, the presumptive Secretary of State, has previously called for the Bureau of Industry and Security ("BIS") to adopt a "blanket 'presumption of denial'" posture for export license applications seeking to send "critical technology" to any entity in China. While the Department of State does not exercise control over the EAR, Senator Rubio's comments are instructive of the types of changes to export controls that advisors may be considering. And although President-elect Trump has distanced himself from Project 2025, regulatory changes proposed in Project 2025's *Mandate for Leadership* provide an insight into the export controls thinking of potential advisors. Project 2025's proposals with respect to China and other countries of concern include:

- eliminating the "specially designed" licensing exceptions;
- redesignating China and Russia to more highly prohibitive export licensing groups (country groups D or E);
- eliminating license exceptions;
- broadening foreign direct product rules;
- reducing the de minimis threshold from twenty-five percent to ten percent, or zero percent for critical technologies;

- tightening the deemed export rules to prevent technology transfer to foreign nationals from countries of concern;
- tightening the definition of "fundamental research" to address exploitation of the open U.S. university system by authoritarian governments through funding, students and researchers, and recruitment;
- eliminating license exceptions for sharing technology with controlled entities/countries through standards-setting "activities" and bodies; and
- improving regulations regarding published information for technology transfers.

Combined, such modifications to the EAR have the potential for significant impact on bilateral trade between the United States and China and could severely restrict Chinese companies' ability to source items subject to the EAR (including many foreign-manufactured goods). These changes may also have significant collateral consequences for non-U.S. companies who continue to make use of supply chains that include links in China. They may also have a significant impact on the ability of the United States to continue to attract the world's best and brightest to pursue graduate studies in U.S. universities, the ability of U.S. companies to participate in global standards development for next generation technologies, and lead to decreasing use of U.S. origin software, technology, and design and production by non-U.S. companies.

Notably, the Department of State administers and enforces the International Traffic in Arms Regulations ("ITAR"). ITAR, which applies only to items designed for and used in military and intelligence applications, is the other primary legal regime for implementing U.S. export controls. Should Senator Rubio be confirmed as the Secretary of State, and given his focus on export controls during his time in the Senate, he is likely to ensure that State Department reviewers in interagency export licensing reviews and in Entity List and other restricted party export control designations take less business-friendly positions in any determinations that touch on China.

Consistent with the approach of the first Trump administration and the Biden administration, the second Trump administration may aggressively use Entity List designations to target entities in China. Persons added to the Entity List are subject to additional licensing requirements and specific, often restrictive, licensing policies. For instance, Project 2025's proposals specifically advocate for designating certain Chinese apps to the Entity List in an effort to prevent the applications' software from updating within the United States, with the ultimate goal of rendering these applications (and potentially others) non-functional in the United States over time.

One of the major export controls-related complaints of the China hawks in D.C. is the approval rate of licenses for export of EAR controlled items to China, including items controlled for national security purposes. The House Foreign Affairs Committee as well as the Select Committee on the Chinese Communist Party have called for implementing significant restrictions on licensing requirements, and in particular imposing a "policy of denial" for all exports of national security-controlled items to China. Taken within the context of the generally aggressive view on

China the second Trump administration is expected to hold, we could see a fundamental shift in export licensing policy, and in particular, the number of licenses granted, especially for the export to China of "critical technology" such as semiconductors and advanced computing items.

Another area of export controls that could receive significant attention under the second Trump administration is enforcement. Reports in late October and early November 2024 that highly advanced semiconductor technology manufactured by TSMC, which is subject to U.S. export controls, was found in Huawei's Ascend 910B chips has highlighted the difficulties that the U.S. government faces in enforcing its panoply of China-focused export controls. In fact, this is not the first time that doubts regarding the efficacy of export controls have been raised. Huawei's use of an indigenously designed and produced 7 nm chip in its Mate 60 Pro phone (the release of which was timed during Commerce Secretary's Raimondo visit to China in August 2023) raised similar concerns. Influential members of Congress have repeatedly focused on what they consider inadequate enforcement and implementation of export controls. There could be increased pressure on the incoming administration to prioritize enforcement.

Although the second Trump administration is widely expected to pursue an aggressive export controls policy, there are several factors that could temper its approach, at least in certain instances. During the first Trump administration, media reports indicated that Chinese leader Xi Jinping's personal intervention persuaded President Trump to temporarily roll back certain restrictions targeting Huawei. Personal diplomacy of a similar nature could impact the severity, duration, targets or other aspects of certain export controls. Moreover, recent media reports indicate that Chinese officials are in increasing contact with American business leaders, including individuals identified as close to President-elect Trump and with business interests in China, to counter the influence of the China hawks. China could attempt to use such high-level intermediaries to moderate current and proposed export controls.

Lastly, over the past several years, China has steadily built up its economic lawfare toolkit. These tools give Beijing the ability to not only counter U.S. economic statecraft, but also to use its economic strengths to further its foreign policy goals. For instance, primarily in response to the semiconductors-related export controls, China imposed export controls on gallium, germanium, and graphite, key critical minerals with applications in a range of industries. The list was further expanded to include antimony. China has threatened to cut Japan's access to critical minerals essential for automotive production if Japan imposes further semiconductor-related export controls on China. Separately, China has imposed standalone export controls on several technologies, and in October 2024 published comprehensive export controls regulations to regulate dual-use items, which include provisions similar to the EAR's *de minimis* rule and foreign direct product rules to regulate foreign-produced items incorporating Chinese-origin items or produced using Chinese technology. More recently, China sanctioned Skydio, the largest American drone manufacturer, ostensibly for its sales to Taiwan and for its lobbying efforts against Chinese drone manufacturer DJI. As part of the sanctions, Beijing banned Chinese companies, including Chinese entities of non-China-headquartered companies, from supplying Skydio with critical components, including battery supplies from its sole provider. China's ability, and willingness, to leverage these tools, which could cause significant adverse consequences for U.S. companies, could also serve as a moderating force in the Trump administration's export controls deliberations. On the other hand, formalized weaponization of the supply chain could empower Trump administration officials calling for strategic decoupling.

One other issue that we are following closely—in the event that the new administration is successful in ending the Ukraine war (on whatever terms can be agreed)—is the possibility that in addition to the easing of sanctions, President-elect Trump may seek to ease export controls restrictions which have also played a significant role in the U.S. and international response to Russian aggression. While it would be legally possible for President-elect Trump to ease many of these restrictions, it is also possible that allies across the G7 would be unwilling to do so. Similarly, if a "grand bargain" is made with China, there is a similar potential of easing of many of these restrictions as well.

6. Bulk Sensitive Personal Data Notice of Proposed Rulemaking

President-elect Trump is likely to advance efforts to restrict and prohibit the transfer of sensitive data to foreign adversaries. However, despite both the Trump and Biden administrations' efforts to protect sensitive U.S. data and the bipartisan consensus about the risks posed, the fate of a potentially high-impact rule recently proposed by the Biden administration to regulate transfers of bulk sensitive data to foreign adversaries remains uncertain.

Efforts to restrict foreign adversaries' access to sensitive data concerning U.S. persons span both the Trump and Biden administrations. In his first term, President-elect Trump issued an executive order restricting the acquisition or use of communications and information technology by foreign adversaries seeking to obtain sensitive data about U.S. persons. The U.S. government's focus on disrupting the flow of sensitive data to adversaries has continued under the Biden administration. At the forefront of these efforts is a notice of proposed rulemaking ("NPRM") issued by DOJ on October 21, 2024 which would, for the first time, allow DOJ to restrict or prohibit the bulk transfer of certain categories of sensitive data to individuals or entities associated with six "countries of concern."

The NPRM follows a February 28, 2024 executive order in which President Biden called for DOJ to address the risk that bulk sensitive data on U.S. persons could be accessed and weaponized by foreign adversaries for espionage, influence, and blackmailing operations. The NPRM would impose compliance and due diligence requirements on U.S. entities involved in data brokerage transactions, data transfers, vendor and employment agreements, and investment agreements for certain kinds of data above specified quantity thresholds. Regulated data would include genomic, biometric, geolocation, health, financial, personally identifiable, and government-related information. Regulated entities would be expected to create risk-based compliance programs which would vary based on the size of the regulated entities and the volume and type of data which they process. Presently, only data transferred to six "countries of concern"—China, Cuba, Iran, North Korea, Russia, and Venezuela—would fall within the proposed rule's scope. Except for China, each of the countries of concern is already subject to broad-reaching sanctions which comprehensively limit their ability to do business with U.S. persons.

The proposed rule's future is uncertain. The NPRM is subject to public comment until November 29, 2024, after which DOJ may attempt to issue a final rule before the presidential transition on January 20, 2025. To do so, DOJ would first consider public comments, issue a final rule, and publish the rule in the *Federal Register*. Either the White House Office of Information and Regulatory Affairs (OIRA) or DOJ itself is likely to deem the rule a "major rule" for purposes of the Congressional Review Act[9] ("CRA"), since DOJ estimates that the combined value of lost transactions resulting from the proposed rule would exceed $300 million annually[10], far surpassing the CRA's $100 million annual economic impact threshold for major rules. As a result, the rule would take effect no earlier than sixty days after publication. Even if the rule were not deemed major, DOJ would have fewer than two months between the public comment period and President-elect Trump's inauguration in which to issue the final rule and yet less time if it was in fact a major rule. In any event, Congress could overturn the rule through a joint resolution of disapproval under the CRA.

If DOJ publishes its final rule before January 20, it is unclear whether the Trump administration will allow it to remain in place. The NPRM aligns with the first Trump administration's hawkish stance: since China is not subject to the same comprehensive sanctions as the other five "countries of concern," data transfers to Chinese persons and entities would likely constitute the vast majority of transactions subject to the rule's restrictions or prohibitions. As noted above, the proposed rule also addresses a bipartisan concern that received significant attention in the first Trump administration: the flow of sensitive data about U.S. persons to foreign adversaries. The Trump administration could therefore decide to retain the rule because it is consistent with the administration's policy priorities.

The second Trump administration could also amend the rule, revoke it and replace it with a regulation or executive order of its own, or work with Congress to address the issue. In this case, the second Trump administration's emphasis on deregulation could result in efforts to restrict bulk sensitive data transfers in ways that would impose fewer compliance and due diligence requirements on U.S. entities. Carveouts and exceptions in the NPRM—including, for example, with respect to data transfers between U.S. companies and their foreign subsidiaries—would likely remain or be expanded. Revocation or amendment of the rule would require notice and public comment and could be disruptive for U.S. entities already adjusting or expanding their compliance and due diligence programs in anticipation of the NPRM's promulgation.

If the NPRM is not issued as a final rule under the Biden administration, the second Trump administration could also choose not to act on the issue. Indeed, Congress has already taken action: in the Protecting Americans' Data from Foreign Adversaries Act of 2024 ("PADFAA"), signed by President Biden in April, Congress empowered the U.S. Federal Trade Commission to regulate data brokers engaging in sensitive data transactions with entities affiliated with China, Russia, North Korea, and Iran.[11] While PADFAA and the NPRM overlap in many respects, importantly, PADFAA's narrow definition of "data brokers" and its provisions excepting many types of data brokers from its scope mean that allowing the NPRM to lapse, or declining to issue a similar rule, would leave substantial gaps in the United States' response to the access and weaponization of U.S. persons' sensitive data by foreign adversaries.

7. Connected Vehicles Notice of Proposed Rulemaking

Another key rule to watch in the second Trump administration is the Biden administration's proposed connected vehicles rule. On September 23, 2024, BIS announced an NPRM that, once implemented, would ban certain imports of vehicles from China (including Hong Kong) and Russia, as well as key hardware and software components, based on identified "undue or unacceptable risks" to national security and the privacy of U.S. citizens.

There is likely bipartisan consensus to finalize the rule. However, it remains to be seen whether BIS will finalize the rule before the second Trump administration begins. The comment period closed on October 28, 2024, and BIS has stated that its goal is to publish a final rule by January 2025. If finalization slips past inauguration day, it is possible the second Trump administration could consider revising and strengthening the rule. In any event, the connected vehicles rule could serve as a model for additional rules in the new Trump administration to address the increasing bipartisan concern about national security risks posed by foreign adversaries.

The connected vehicles NPRM effectuates EO 13873, which, *inter alia*, identifies "undue or unacceptable risks" posed by a class of transactions that involve information and communications technology and services ("ICTS") designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary.[12] Such ICTS includes "connected software applications," as outlined in greater detail in the ICTS regulations currently in effect.[13]

According to the NPRM, the proposed regulations are meant to address, in part, the ability of China and Russia—under their respective domestic legal and regulatory regimes—to compel companies subject to their jurisdiction to cooperate with security and intelligence services. Such access could enable China and Russia to exfiltrate sensitive data and potentially allow remote access and manipulation of connected vehicles in the United States.

The proposed measure focuses on hardware and software integrated into a car's Vehicle Connectivity System ("VCS") and the software integrated into its Automated Driving System ("ADS"). Both are critical systems that allow for external connectivity and autonomous driving capabilities in the increasingly commonplace "connected vehicles" traversing American roads. The proposed rule would apply to all on-road vehicles such as cars, trucks, and buses, but would exclude vehicles not used on public roads like agricultural or mining vehicles.

In general, the NRPM would prohibit the import and sale in the United States of (1) completed connected vehicles that incorporate covered software designed or developed by persons under Chinese (or Russian) control, and (2) such VCS or ADS components. In order to import VCS hardware or completed connected vehicles, or sell completed connected vehicles manufactured outside of the United States that are *not* prohibited, companies would be required to submit "Declarations of Conformity" to BIS. These submissions would require substantive technical information—including a Hardware Bill of Materials and Software Bill of Materials, as relevant.

Once implemented, the final regulations will have a delayed impact in theory, but companies will need to proactively take steps to prepare for new compliance obligations and supply chain requirements (including designing and manufacturing processes associated with the identified vehicle model years). As proposed, the software prohibitions impacting connected vehicle manufacturers would take effect for Model Year 2027 vehicles. As proposed, the hardware prohibitions impacting VCS hardware importers and connected vehicle manufacturers would take effect for Model Year 2030 vehicles, or starting on January 1, 2029 for units without a model year. Parties (including manufacturers and importers) impacted by the new regulations, once implemented, will need to carefully review and modify supply chains involving covered vehicles, hardware, or software from China (including Hong Kong) or Russia unless a general or specific authorization applies.

[1] Trade Act of 1974, 19 U.S.C. § 2411, Pub. L. No. 93-618, § 301, 88 Stat. 1978.

[2] 50 U.S.C. § 1702.

[3] Trade Expansion Act of 1962, 19 U.S.C. § 1862, Pub. L. No. 87-794, § 232, 76 Stat. 872 (1962).

[4] *See Loper Bright Enterprises v. Raimondo,* 144 S. Ct. 2244 (2024) (Supreme Court overruled the *Chevron* doctrine but noted that agency interpretation of a statute will be accorded *Skidmore* deference).

[5] *E.g.*, S. 5264, *Neither Permanent Nor Normal Trade Relations Act*, 118th Cong. (Sept. 25, 2024), https://www.congress.gov/bill/118th-congress/senate-bill/5264/text.

[6] Indeed, proposed outbound legislation circulating in Congress already contemplates including these sectors. *See, e.g.*, S. Amend. 3284 to National Defense Authorization Act for Fiscal Year 2025 (NDAA), S. 4638, 118th Cong. (2024), https://www.congress.gov/amendment/118th-congress/senate-amendment/3284/text?s=a&r=1.

[7] Press Release, Chairman of the Select Comm. on the Strategic Competition Between the U.S. and the Chinese Communist Party John Moolenaar, *Moolenaar: Biden Regulations on Outbound Investment to China a Good Step, Congress Must Strengthen* (Oct. 29, 2024), https://selectcommitteeontheccp.house.gov/media/press-releases/moolenaar-biden-regulations-outbound-investment-china-good-step-congress-must.

[8] Jasper Goodman, *POLITICO Pro Q&A: Rep. John Moolenaar*, Politico Pro (Nov. 8, 2024), https://subscriber.politicopro.com/article/2024/11/politico-pro-q-a-rep-john-moolenaar-00188480?site=pro&prod=alert&prodname=alertmail&linktype=article&source=email.

[9] *See* 5 U.S.C. §§ 801–808.

[10] *See* NPRM at 269–70.

[11] Protecting Americans' Data from Foreign Adversaries Act (PADFAA), 15 U.S.C. § 9901.

[12] Executive Order 13,873 invoked the International Emergency Economic Powers Act and the National Emergencies Act to provide BIS the authority to engage in rulemaking. Securing the Information and Communications Technology and Services Supply Chain, 84 Fed. Reg. 22,689 (May 15, 2019).

[13] *See* 15 C.F.R. Part 791.

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