

Security Concerns Prompt Multiple Supply Chain Initiatives

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Takeaways

- As a national and economic security initiative, the Biden administration is developing policies to protect several critical supply chains.
- The Commerce Department is expected to take further measures to regulate imports of information and communications technology and services from countries deemed to be adversaries.
- A broad prohibition on imports from China's Xinjiang region due to forced labor concerns will complicate the importing of some products, including solar panels.
- Previously granted tariff exclusions for some Chinese goods are likely to be extended, but there is pressure to expand the process for seeking exceptions.

One prominent U.S. media outlet dubbed 2021 the "Year of Supply Chains," for good reason. Shortages of semiconductors and other products and components caused by the pandemic, combined with trade-related national security concerns, resulted in a number of regulatory initiatives in 2021 that will lead to new restrictions — and potentially new business opportunities — this year.

A renewed process for granting exclusions to China-related Section 301 tariffs, which is also in the works, should help alleviate some supply problems.

Companies should monitor these developments carefully as they unfold.

Critical Supply Chain Reviews

President Biden opened his administration by proclaiming that "resilient, diverse and secure supply chains" will ensure U.S. economic prosperity and national security, and he directed several cabinet agencies to review and report on recommended regulations to strengthen them.

- **Developments in 2021.** In June 2021, the administration published reports identifying vulnerabilities and making policy recommendations to ensure long-term availability of several critical product categories: semiconductor manufacturing and advanced

packaging, electric vehicle and other high-capacity batteries, critical minerals and other strategic materials, and pharmaceuticals and active pharmaceutical ingredients. Similar reports are to be finalized in early 2022 for other broader economic sectors: defense, public health and biological preparedness, information and communications technology, energy, transportation and agricultural commodities and food products.

- **What to expect in 2022.** Multiple departments have solicited industry and public input on appropriate government initiatives to strengthen supply chains: Defense, Transportation, Energy, Agriculture, Commerce and Health and Human Services. They have been charged with devising policy recommendations, both "positive" (e.g., workforce development, financing opportunities, stockpile creation) and "negative" (e.g., addressing surveillance and cyberrisks). Agencies should begin work on regulatory or legislative proposals later in 2022.

Information and Communications Supply Chain Restrictions

In response to a May 2019 executive order, the Commerce Department imposed restrictions, in the interest of U.S. national security, on the importation of information and communications technology and services (ICTS).

- **Developments in 2021.** Shortly before President Trump left office, Commerce published regulations providing the agency with authority to prohibit a broad range of transactions related to ICTS goods and services involving designated “foreign adversaries” (currently defined to include China and Hong Kong, Cuba, Iran, North Korea, Russia and Venezuela) if Commerce finds that the transaction threatens national security. The department may take prospective or retroactive actions to prohibit such transactions, and has wide discretion to determine the restrictions.

The Biden administration maintained these ICTS regulations, but it is unclear what, if anything, Commerce has done to implement or enforce them since the new president took office. The department has done little to clarify its intentions, leaving unanswered a number of fundamental definitional and jurisdictional questions, such as the threshold for determining when a transaction is sufficiently connected to a foreign adversary to trigger coverage, or whether Commerce will issue guidance clarifying its enforcement priorities and expectations.

In November 2021, Commerce proposed expanding these regulations to cover ICTS transactions involving “apps,” or connected software applications. Proposed criteria for imposing restrictions include potential surveillance capabilities and the scope and sensitivity of data collected.

- **What to expect in 2022.** The Biden administration is expected to amend and clarify the existing ICTS regulations this year to devise a more workable framework, though no specifics have been offered. Some industry participants have pressed for a mechanism to seek clearance or licenses from Commerce for ICTS transactions, which would serve as a safe harbor against retroactive reviews. Others have suggested that Commerce establish a “blacklist” of foreign companies considered off-limits for ICTS dealings, with

a presumption that other ICTS transactions are not prohibited. Regardless of the approach adopted, businesses should be prepared for more aggressive implementation by Commerce once the regulations are clarified or revised.

Xinjiang Supply Chain Restrictions

The importation of some products has also been complicated by restrictions imposed in response to U.S. government findings that goods made in the Xinjiang Uyghur Autonomous Region (Xinjiang) of China have been produced by forced labor.

- **Developments in 2021.** The U.S. government continued to impose sanctions against Chinese government entities and businesses in response to their actions in Xinjiang. U.S. Customs and Border Protection has issued withhold release orders blocking the entry of products from China because of forced labor, including 10 directed specifically at activity in Xinjiang.
- **What to expect in 2022.** On December 16, 2021, the U.S. Congress passed legislation that effectively prohibits imports of goods made either wholly or in part in Xinjiang, relying on a strong presumption that forced labor is used in all products coming from the region. President Biden signed the legislation on December 23, 2021, and the import ban will go into effect 180 days later. In particular, this legislation will affect the U.S. solar industry, as Xinjiang is a major center for polysilicon manufacturing. (See our December 17, 2021, client alert “[Legislation Targeting Imports From Xinjiang Region Moves to President Biden’s Desk](#).”)

Section 301 Tariffs: Exclusions on the Way?

At the same time new import restrictions are being imposed and contemplated, businesses are lobbying for relief from Section 301 tariffs imposed on products from China beginning in 2018.

- **Developments in 2021.** The Biden administration has maintained these tariffs, which apply to the majority of

goods shipped to the U.S. from China, and it has been slow to restart the Section 301 tariff exclusion process established by the Trump administration, by which companies could argue the charges should not be imposed on their products. In October 2021, the U.S. trade representative (USTR) invited public comment on whether to reinstate tariff exclusions that have expired. (See our October 12, 2021, client alert “[USTR Relaunches Exclusion Process for China Section 301 Tariffs](#).”) A large bipartisan group of lawmakers is reportedly advocating changes to make it easier to seek exclusions, citing (among other things) the harm to U.S. supply chains caused by the tariffs.

- **What to expect in 2022.** USTR likely will reinstate most of the tariff exclusions for which it sought public comment and move forward with another, and potentially expanded, procedure for obtaining exclusions in 2022. Broader relief from Section 301 tariffs, however, remains unlikely. The United States and China successfully concluded a “Phase 1” trade deal in 2019, but prospects for a more far-reaching “Phase 2” deal — which might eliminate or substantially reduce the tariffs — appear remote, at least in the near term. In addition to continuing geopolitical tensions between the two countries, China likely has fallen short of its Phase 1 commitments to purchase an additional \$200 billion in U.S. goods and services by the end of 2021.

Supply Chain Initiatives To Present Challenges and Opportunities in 2022

In 2022, we expect the U.S. government to devote substantial attention to addressing the supply chain challenges outlined above. U.S. firms affected by these initiatives should monitor developments carefully, consider providing input where appropriate, and prepare to comply with new restrictions and capitalize on new opportunities.