



Podcast: What a New Executive Order and Tighter Controls on Tech Exports Mean for Companies Doing Business in China



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In 2022, the U.S. restricted technology exports to China that might have military uses, and an executive order is expected soon limiting investments in certain Chinese tech companies. Skadden M&A partner Ann Beth Stebbins leads a discussion about the reasons for the rules and their impact on companies doing business in China. Joining her are Jessie Liu, a partner in Skadden's White Collar Defense and Investigations group, and partner Brian Egan of the firm's National Security, CFIUS and International Trade groups.

One takeaway: Companies will need to update their compliance programs to make sure they accord with the new prohibitions.

U.S. companies seeking to invest abroad have typically not faced scrutiny from U.S. regulators. Ann Beth asked if that is about to change.

The economic and military rivalry between the U.S. and China is not new, Jessie said, pointing to a 2018 Department of Justice initiative under the Trump administration to combat trade secret theft and economic espionage. But it has intensified under the Biden administration, she said.

Today, the government is concerned that we will be helping China advance its military capabilities using our technology and our investment dollars, Brian said.

The U.S. and Chinese economies are too closely linked to be decoupled, Jessie said.

New restrictions on investment in China, which are expected to be imposed by executive order, will likely be limited to a few specified technologies, Brian said, such as advanced artificial intelligence, advanced

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semiconductor manufacturing and development, and quantum computing. Battery technologies, autonomy and biotechnology have also been mentioned as possibilities, he said.

The rules are likely to limit capital investment and the transfer of know-how, Brian added, and may also include reporting requirements. He expects the rules will be administered by the Departments of Treasury and Commerce. The proposed rules are likely being discussed with allies, Brian said, and they are likely to implement their own, similar regulations.

The government has been putting new emphasis on sanctions enforcement, Jessie said, with Deputy Attorney General Lisa Monaco calling sanctions “the new FCPA,” referring to the Foreign Corrupt Practices Act. Ms. Monaco’s declaration sent the message that companies need very strong compliance programs, Jessie said, adding that the statement “caused quite a buzz in the white collar criminal defense community.”

One example of a new enforcement effort in this area is the joint Commerce-Justice Department Disruptive Technology Strike Force, formed to investigate and prosecute export control violations, Jessie said. It reflects the government’s view that national security can be threatened by technology transfer.

As a result of these various government actions, companies need to take a fresh look at their compliance programs, even if they

have been doing business in China for a number of years, Brian said, because the new export controls are novel and extraterritorial.

While companies have years of experience complying with the FCPA, some have not developed the same kind of robust compliance programs with regard to sanctions and export controls, Jessie said. When making acquisitions, due diligence will now need to cover the target’s compliance with sanctions and export controls, she added.

Because the export and investment controls are new, there will be unanswered questions, Brian noted. That means that companies will have to weigh whether to engage with the government to obtain clarity, though many companies are reluctant to do so.

Can companies report their own violations, Ann Beth asked?

Whether to self-report is always a difficult decision, said Jessie, even though the government has promised more lenient treatment for companies that self-report.

Brian noted that the Commerce Department recently encouraged companies not only to report their own violations but those of competitors.

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