

House 90-Day Review Report Calls for “Win-At-All-Costs” Approach to Preventing PRC Access to Critical U.S. Technology

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On December 7, 2023, the U.S. House of Representative’s Foreign Affairs Committee (House Committee) [released](#) a 90-day report (the Report) on the Commerce Department’s Bureau of Industry and Security (BIS). The report lays bare several areas where, according to the House Committee, BIS has unduly and inequitably prioritized commercial interests over U.S. national security interests, or where the agency has otherwise been derelict in carrying out its mandate to prevent outflows of critical U.S. technology to the People’s Republic of China (PRC or China).

The Report and its findings herald a notable shift away from a “free trade” oriented U.S. export policy toward more hardline oversight and regulation of U.S. exports to the PRC and adversaries. According to the House Committee, the [Chinese Communist Party’s \(CCP\) Military-Civil fusion strategy blurs the line between commercial and military items](#) in such a way that requires the United States to abandon the “post-Cold War” distinction between economic and national security. In doing so, the Report calls on licensing officials to act less as the “voice of business” and more as U.S. regulators that are more “willing to deny licenses to export technology” to U.S. adversaries. It remains to be seen whether Congress or BIS will implement any of the recommendations, but it is clear the House Committee has serious concerns about the current state of play.

The Report makes several recommendations to address key areas of weakness in the United States’ approach to U.S. export controls, including the following:

- 1. Implement a majority vote system for the BIS’s Operating Committee, especially for exports to China.** For the fiscal years of 2017–2019, there has been a 60 percent increase in non-consensus decisions of the Operating Committee, which adjudicates escalations from licensing decisions where reviewing agencies are not in agreement. According to the House Committee, these statistics raise concerns that the Operating Committee too often overrides the objections of other agencies by abusing Commerce’s role as both a Chair and a member. Implementation of this recommendation from the House Committee would likely make it more difficult for U.S. industry to obtain favorable licensing decisions through the escalation process.
- 2. BIS should impose a policy of denial for all exports of national security-controlled items to China to reduce the rate of approval.** In 2020, nearly all exports to China of items listed on the Commerce Control List (CCL) were unlicensed. Even where required, BIS granted an overwhelming majority of requests to export or release U.S. software or technology to the

PRC. The House Committee concluded that denying the value of these exports, which in 2021 reflected around 1 percent of U.S. exports to China, would hardly effect U.S.-China trade relations, while blunting CCP military ambitions. If implemented, U.S.-regulated firms involved in dual-use transactions with China would face stronger headwinds in obtaining licenses that historically have been granted.

3. **BIS (or Congress) should apply a “presumption of denial” for all items subject to the EAR for companies on the Entity List and clearly define the term to mean that a license, no matter the item, will be denied in essentially every instance.** BIS’s licensing regime is not strict enough in preventing the proliferation of U.S. technology to prohibited end users and end uses, according to the Report. The Report submits that too many license applications for companies appearing on the Entity List are approved despite being subject to a “presumption of denial,” with BIS approving \$60 billion worth of licenses to Huawei during a six-month period between November 2020 and April 2021. Defining the term to limit BIS’s discretion, while also expanding the scope of items subject to the “presumption of denial” standard, would make it much more difficult if not impossible to engage in controlled transactions with Entity Listed PRC companies.
4. **BIS should broaden the scope of Entity List requirements to subsidiaries and affiliates, and invest in enhanced, commercially-available mapping tools.** The Report cites the effectiveness of the “50 percent rule,” a mechanism that the Treasury Department’s Office of Foreign Assets Control employs when administering economic sanctions against Specially Designated Nationals (SDNs) to “flow-down” U.S. sanctions requirements to certain entities majority owned by SDNs. The Report recommends that BIS similarly adopt, at the very least, a mechanism that would automatically apply Entity List licensing requirements to related PRC-entities in order to mitigate circumvention of U.S. export controls. In addition, the House Committee calls for investment in enhanced tools for screening and identifying linkages of PRC companies to CCP military. This measure, if implemented, could result in more entities being subject to Entity List restrictions, cutting off sales to unlisted subsidiaries.
5. **The Department of Commerce must renegotiate its end-use agreement with the PRC or impose greater restrictions on exports to China considering the inability to conduct meaningful end-use checks.** Unlike other countries, where U.S. export control officers have a good deal of discretion to conduct end-use checks for up to 5 years after shipment, end-use checks involving PRC shipments must occur within 180 days. Moreover, end-use checks on PRC shipments require PRC approval. According to the Report, this severely hinders BIS’s ability to monitor and ensure compliance with license terms. Should the Department of Commerce successfully re-negotiate these terms, U.S. exporters can expect greater and longer lasting U.S. official involvement in commercial relationships with PRC firms overseas, including more auditing of end users and end uses.

In addition to the above, the Report makes numerous other recommendations, including limitations on standard-setting loopholes, fees for certain export licensing requests, requirements to refer certain licensing decisions or CCL determinations to interested U.S. agencies, intensive review and transfer of EAR99 technologies to the CCL, and a continued push for bilateral and plurilateral export control agreements covering, at a minimum, AI, quantum, and biotechnology.

Key Takeaways:

In the run up to the election, neither Party will want to be regarded as “weak on China” or U.S.

national security issues. And it is unlikely that the Commerce Department and BIS will push back against these recommendations in any public way.

So, while the administration and BIS may not implement every recommendation, the Report marks for the new year a movement toward a stricter policy position with respect to China, if not additional “tough on China” measures and rulemaking. As pressure on U.S. regulatory bodies continues to mount, U.S. industry should anticipate increased regulation and greater difficulty in obtaining licenses for export transactions involving China, even where those transactions involve EAR99 designated items.

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