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Congress, Trump Administration Continue to Move Ahead with New Controls on Emerging Technologies and Exports to China Despite Shutdown

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This week's release of the *2019 National Intelligence Strategy* and the introduction in the new Congress of the "*Fair Trade with China Enforcement Act*" (S. 2, H.R. 704) signal that pressure to move ahead with new export controls and other measures designed to restrict Chinese access to the U.S. market and U.S. technology and intellectual property has been largely unaffected by the federal government shutdown. Companies with investments in these technologies, Chinese operations, or tie-ups with Chinese investors should closely monitor these developments.

As previously discussed, the Trump administration is forging ahead with plans to implement new export controls on "emerging and foundational technologies" as required by last year's National Defense Authorization Act (NDAA). Comments on an Advanced Notice of Proposed Rulemaking were submitted on January 10, and are currently under review. An additional rulemaking to begin the process of defining new export controls on "foundational technologies" is expected to be issued soon after the government shutdown ends.

The *2019 National Intelligence Strategy* that the Director of National Intelligence issued on January 22, 2019, continues this focus, highlighting developments in "emerging technologies" such as artificial intelligence, automation, high-performance computing, nanotechnology, and biotechnology as trends that "have the potential to pose significant threats to U.S. interests and security." It calls on the U.S. intelligence community to be prepared to monitor and warn of the strategic effects and adapt to meet new threats arising from this area. Given this focus, it is likely that these concerns will be in the fore during the ongoing rulemaking process to define new export controls on emerging and foundational technologies.

At the same time, a bipartisan group of House and Senate lawmakers, led by Senators Marco Rubio (R-FL) and Mark Warner (D-VA) and Representatives Tim Ryan (D-OH) and Mike Conaway (R-TX), have introduced legislation explicitly designed to address "profound national and economic security risks to the United States" from China's trade and industrial development policies. This legislation would continue last year's trend of more closely linking U.S. national and economic security interests to address perceived threats from China through several new mechanisms. In particular, the proposed legislation would:

1. Ban the export to China of "any national security sensitive technology or intellectual property (IP) subject to the jurisdiction of the United States."

- This export ban would include technologies subject to U.S. export controls for national security reasons, as well as all "patents, copyrights, trademarks, or trade secrets" deemed sensitive by U.S. authorities.
- The export ban would also apply to the export of technologies and IP related to industries that are supported by the Chinese government through Chinese policies such as "*Made in China 2025*," including:
    - Civil aircraft
    - Autos and other motor vehicles
    - Advanced medical equipment
    - Advanced construction equipment
    - Agricultural machinery
    - Railway equipment
    - Diesel locomotives
    - Freight handling
    - Semiconductors
    - Lithium battery manufacturing
    - Artificial intelligence
    - High-capacity computing
    - Quantum computing
    - Robotics
    - Biotechnology
- The United States Trade Representative would be required, on a yearly basis, to review Chinese policies to identify any additional technologies and industries that should be added to the above list.

2. Prohibit all Chinese majority ownership of U.S. corporations involved in the technologies and industries subject to the export ban (listed above). This provision seeks to clamp down on the use of U.S. subsidiaries of Chinese companies or

investments in U.S. companies to transfer U.S. technology to China in strategic industries.

3. Ban U.S. government procurement of any equipment, system or service that uses telecommunications equipment or services produced by designated Chinese companies, including Huawei. This ban echoes similar restrictions in the NDAA passed last year.

4. Amend the U.S. trade remedy laws to enable the U.S. Commerce Department to apply countervailing duties to merchandise imported from China in the above-listed industries based on a statutory presumption that such merchandise is subsidized by the Chinese government. Further, the U.S. International Trade Commission would be required to find that producers in the United States are automatically materially injured or threatened with material injury by such imports from China.

5. Eliminate certain preferential income tax withholding rates for persons who are deemed residents of China under the U.S. tax laws, as well as tax exemptions on income from U.S. debt held by the government of China.

Prospects for passage of the above legislation remain uncertain, but the significant bipartisan support it has garnered thus far suggests that the chances of at least some of the above provisions being enacted into law – or, at a minimum, shaping the Trump administration's approach to the regulation of Chinese investment in and acquisition of "emerging and foundational technologies" and sensitive IP – are fairly high.