

03 May 2018

Brief analysis of U.S. long arm jurisdiction in export control

[Home](#) / [Insights](#) / Brief analysis of U.S. long arm jurisdiction in export control

Recently, a major Chinese technology firm has fallen into troubled waters with the U.S. Department of Commerce due to violations of U.S. economic sanctions against certain foreign nations. As a result, the U.S. levied severe penalties against the Chinese company, including a ban on export sales by American companies for seven years. Previous violations of U.S. export control law by the same company led to over \$1 billion in fines.

This begs the question as to how a Chinese company would be subject to U.S. regulations in the first place. In fact, many U.S. domestic laws regulate foreign companies through the exercise of so-called long-arm jurisdiction. Such jurisdiction is often found when a foreign company establishes certain direct or indirect operational, contractual or commercial contact with the U.S. In a 2014 case, a U.S. federal appellate court went so far as to imputing U.S. activities conducted by a U.S. company to its Chinese parent company in order to find jurisdiction over the Chinese parent company. Thus, it is important to understand the major areas of laws and circumstances under which it may be subject to U.S. long-arm jurisdiction as non-compliance of such laws often result in severe commercial consequences.

To “mark” these areas of potential land mines, we are putting out a series of introductory articles that highlights certain areas with high compliance risks facing Chinese companies doing business with the United States or putting its products into the “stream of commerce” in the U.S. Our introduction will initially cover areas such as export control, national security review on foreign investment in the U.S., anti-money laundering, and anti-corruption.

Export Control

Given the significant impact that violations (even inadvertent ones) of U.S. export controls may

have on Chinese companies, those looking to purchase goods from American entities must be cognizant of the nuances of U.S. law and maintain a rigorous export control compliance program.

Extraterritorial Reach of U.S. Export Control Law

The Export Administration Act (the “EAA”) and its implementing regulations, the Export Administration Regulations (the “EAR”), govern the export of most commercial products, including dual-use products (i.e., those that have both commercial and military functions). The U.S. Department of Commerce’s Bureau of Industry and Security (the “BIS”) is responsible for the administration and enforcement of the EAR. Unlike other U.S. laws which define the U.S. government’s extraterritorial reach with respect to parties, the EAA focuses on the product being exported and looks at its “nationality” to determine whether a foreign company is subject to the EAR.

Under the EAR, companies purchasing any of the following exports must comply with its provisions:

- Any item in the U.S. (including those in a U.S. Foreign-Trade Zone and those moving through the U.S. from one foreign country to another);
- Any U.S.-origin item wherever located;
- Any foreign-made commodity that incorporates certain U.S.-origin commodities or that is bundled or commingled with certain U.S.-origin software;
- Certain foreign-made products (including processes and services) produced directly by the use of U.S.-origin technology or software; and
- Certain commodities produced in any plant or major component of a plant outside the U.S. that is a direct product of U.S.-origin technology or software.

Chinese companies should note that compliance with Chinese law or the laws of other foreign countries does not relieve them of the obligation to comply with the EAA and EAR.

Activities Prohibited under the EAR

If a company purchases a product covered by the EAR, that company is generally prohibited from engaging in any of the following activities without first obtaining a license or license exception from BIS (if applicable):

- Exporting and re-exporting controlled items to certain listed countries (as determined based on the item being exported);
 - Re-exporting and exporting from abroad foreign-made items incorporating more than a de minimis amount of controlled U.S. content;
 - Re-exporting and exporting from abroad foreign-produced direct products of U.S. technology and software;
-

-
- Engaging in actions prohibited by a denial order issued by BIS;
 - Exporting or re-exporting any item to prohibited end-users or for prohibited end-uses;
 - Exporting or re-exporting any item to embargoed nations;
 - Supporting certain weapons proliferation activities (if said company is a U.S. person);
 - Exporting or re-exporting an item through, or transiting such through, certain listed countries;
 - Violating any terms or conditions of a license, license exception, or order issued under the EAR; and
 - Knowingly proceeding with transactions that will cause, or has caused, a violation of the EAR.

Companies should note that BIS generally prohibits all import and export transactions involving sanctioned countries (i.e., Cuba, Iran, North Korea, Sudan, and Syria) without license authorization.

In the event that a company becomes aware of possible violations of the EAR, that company should report such violations to the BIS, as voluntary self-disclosure is a mitigating factor in determining what sanctions may be imposed.

Why the EAR Matter

Failure to comply with the EAA and the EAR may result in significant administrative and criminal penalties for a Chinese company.

Administrative sanctions may include (a) civil monetary penalties for each violation of (i) up to \$125,000 in non-egregious cases resulting from voluntary self-disclosure, (ii) up to \$250,000 in non-egregious cases which BIS becomes aware of through means other than voluntary self-disclosure, (iii) at least \$125,000 in egregious cases resulting from voluntary self-disclosure, and (iv) at least \$250,000 in egregious cases which BIS becomes aware of through means other than voluntary self-disclosure; and (b) denial of export privileges.

Criminal penalties shall be imposed on parties who knowingly violate or conspire to, or attempt to violate, the EAR, and may include fines of up to \$1 million per violation and/or imprisonment (with respect to individuals).

King & Woods Mallesons' U.S. offices monitor developments in U.S. export control law. If you have any questions, please contact [Laura Luo](mailto:laura.luo@us.kwm.com) at laura.luo@us.kwm.com and Thomas Hsieh at thomas.hsieh@us.kwm.com.

Categories: [Competition, Trade & Regulatory](#) | [Dispute Resolution & Litigation](#)

Key contact



Laura Luo
International Partner
New York
T +1 212 319 4755