

Biggest Trade Policy Moves Of 2023: Year In Review

By Jennifer Doherty

Law360 (December 20, 2023, 7:41 PM EST) -- This year saw every federal agency dedicated to trade redouble efforts to stop U.S. funds and technology from flowing to adversaries, from the largest-ever export controls settlement to a fresh round of semiconductor rules and new curbs on outbound investments.

Law360 looks back at some of the biggest international trade developments of 2023.

Commerce Hones Its Chip Controls

In October, almost exactly one year after the U.S. Department of Commerce dropped a landmark set of proposed rules designed to complicate China's efforts to obtain or develop advanced semiconductors, the department's Bureau of Industry and Security did it again.

While the 430-page October regulatory drop may not become an annual BIS tradition, "this is likely not the last salvo with respect to the export control measures," Covington & Burling LLP partner Stephen Bartenstein told Law360.

The new rules expand potential targets for enforcement beyond China to a host of third-party countries, drill down on certain U.S. nationals working in tech abroad, and update duties on lithography equipment used to produce advanced chips, among other changes that have companies recalibrating their compliance programs.

"What's most interesting about it are the tools and weapons of technological controls that it opens up," said Reid Whitten, managing partner at Sheppard Mullin Richter & Hampton LLP's London office. "All industries can learn from how BIS is starting to regulate in new and innovative ways."

Specifically, Whitten pointed to BIS' treatment of lithography equipment imports as a creative carrot-and-stick approach. Japan, whose export controls align with ours, may import more equipment to the U.S. before duties kick in than the other leading global producer, the Netherlands, which stopped short of implementing certain controls Washington called to place on Dutch exports to China.

More changes to the rules are forthcoming. Secretary of Commerce Gina Raimondo recently said that her department will continue adjusting export controls as circumstances evolve.

Meanwhile, she's also calling on Congress to raise her \$200 million budget. A top priority for additional

funds should be export classification, according to Giovanna Cinelli, who leads Morgan Lewis & Bockius LLP's international trade and national security practice.

"Commerce is weakest, according to past GAO studies, in that area," Cinelli said in a statement to Law360. "Export classification forms the foundation for every export licensing and compliance decision so a misclassification has significant downstream impact."

Outbound Investment Review Becomes Reality

After years of debate, conjecture and pared-down expectations winding back to the earliest versions of the competition bills that eventually became the CHIPS and Science Act, President Joe Biden finally issued **an order** this summer establishing federal review of certain investments U.S. persons seek to make overseas.

Despite the long wind-up, what came out in August, in the form of an executive order and an advance notice of proposed rulemaking from the U.S. Treasury Department, was pretty bare bones.

Even with some insight from Treasury's ANPR, critical questions remain, requiring a more complete regulation to show how the agency plans to put the order into action, Covington partner Jonathan Wakely told Law360.

"Those include the scope of covered foreign persons, meaning the scope of Chinese companies into which investments would either be prohibited or notifiable; the definition of 'passive investments' that would be outside the scope of the order; and the extent to which there'd be extraterritorial application, meaning non-U.S. investors whose investments would be subject to notifications or prohibition," Wakely said.

As companies wait to see how those questions are answered, Wakely said his clients are keeping an eye on the rulemaking process with a view toward developing compliance programs.

A Year for Record-Breaking Enforcement

In April, Seagate Technology LLC and its Singapore-based affiliate agreed to pay \$300 million to resolve export controls violations for computer chip sales the company made to Chinese technology giant Huawei after it was added to BIS' Entity List of companies blocked from receiving sensitive U.S. tech.

Seagate's settlement, the largest civil-only settlement in BIS history, was a paltry sum compared to the \$968 million virtual currency exchange Binance Holdings Ltd. agreed to pay in November to Treasury's Office of Foreign Assets Control for apparent sanctions violations, on top of more \$3.4 billion the company must pay the Financial Crimes Enforcement Network for violating the Bank Secrecy Act. Both settlements were the largest ever for the respective agencies.

A week later, Deputy Treasury Secretary Wally Adeyemo decried a "lack of action" from firms in response to the Treasury's calls to ensure compliance with national security regulations, warning companies who believed themselves immune from such penalties: "We will find you."

Adeyemo's messaging echoed leaders in other federal agencies, from Commerce to the U.S. Department of Justice, who have put industry on notice that business deals that jeopardize national security interests

will not be tolerated.

Across Treasury, Commerce and the DOJ, the government is urging companies to disclose potential violations before regulators discover them — including violations committed by others — for a reduced punishment. At the same time, BIS has removed the possibility of settling without admitting fault in many cases.

"These factors together have changed the risk calculation for conducting internal export investigations and for managing the decisions related to disclosures," Cinelli said in a statement.

"This approach increases the costs related to export compliance and counsels for a broader deeper bench of resources who can build and manage effective compliance processes and meet the government's focus on programs that 'identify, prevent and mitigate' export control violations," she added.

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