

U.S. Department of Commerce Adds 28 Chinese Entities to the Entity List

October 10, 2019

International Trade Controls

On October 9, the U.S. Department of Commerce issued a [Final Rule](#) adding 20 Chinese government entities and eight Chinese private sector entities (“Listed Entities”) to the Entity List maintained by the Commerce Department’s Bureau of Industry and Security (“BIS”). Specifically, BIS designated the Xinjiang Uighur Autonomous Region People’s Government Public Security Bureau, 18 of its subordinate municipal and county public security bureaus, and one other subordinate institute, as well as the following eight private-sector entities: Dahua Technology; Hikvision; IFLYTEK; Megvii Technology; Sense Time; Xiamen Meiya Pico Information Co. Ltd.; Yitu Technologies; and Yixin Science and Technology Co. Ltd.

Pursuant to the rule, exports, reexports, and transfers (in-country) to the Listed Entities of any item subject to the Export Administration Regulations (“EAR”) now require prior BIS licensing, even for non-sensitive “EAR99” items (e.g., ordinary commercial products). Items subject to the EAR include goods, software, and technology originating in or exported from the United States, as well as non-U.S.-origin items that contain more than *de minimis* levels of controlled U.S.-origin content, as further described below. Moreover, license exceptions under the EAR are now suspended with regard to exports to the Listed Entities, and BIS has instituted a license review policy of a presumption of denial of export license requests for most items.

Basis for Entity List Designations

The Entity List, maintained as Supplement No. 4 to Part 744 of the EAR, identifies legal and natural persons believed to be involved, or to pose a significant risk of being or becoming involved, in activities contrary to the national security or foreign policy interests of the United States. BIS explains in the rule that it has reasonable cause to believe that the Listed Entities have been or may become involved in such activities. The notice states that the interagency End-User Review Committee determined that the Listed Entities are engaging in or enabling activities contrary to the foreign policy interests of the United States, adding: “Specifically, these entities have been implicated in human rights violations and abuses in the implementation of China’s campaign of repression, mass arbitrary detention, and high-technology surveillance against Uighurs, Kazakhs, and other members of Muslim minority groups in the XUAR.”

Notably, the Department of Commerce’s action takes place during a period of proliferation around the globe of regulations and standards relating to the responsibility of businesses to respect human rights in their global operations and supply chains. As just one example, the U.S. State Department recently published draft guidance on the export of technology with surveillance capabilities, containing recommendations for exporters regarding human rights due

diligence. (See [here](#) for our recent blog post on the U.S. draft guidance and [here](#) for our most recent alert on global developments in the area of Business and Human Rights.)

Entity Listing Designations

The Entity List designation mandates BIS licensing for all exports, reexports, and transfers (in-country) to the Listed Entities of any item subject to the EAR. Moreover, license exceptions otherwise available under the EAR are suspended with respect to the Listed Entities and BIS has instituted a license review policy of a presumption of denial for export license requests for most items.¹ All goods, software, and technology that are subject to U.S. export jurisdiction under the EAR—including common EAR99 items not identified on the EAR’s Commerce Control List—require licensing prior to their supply to any of the Listed Entities. Pursuant to Part 734 of the EAR, items “subject to the EAR” include all items located in or exported from the United States, and all items produced in the United States, wherever located. Furthermore, non-U.S.-made items that contain more than *de minimis* amounts of controlled U.S.-origin content also are subject to the EAR.

Regarding *de minimis* thresholds, a non-U.S.-made item is typically subject to the EAR only when more than 25% of its content by value consists of “controlled U.S.-origin content.” Controlled U.S.-origin content for purposes of EAR *de minimis* calculations includes any content for which BIS licensing would be required, were that content to be exported or reexported independently to the non-U.S.-made item’s country of destination. Non-U.S.-made items destined for Listed Entities in China now require BIS licensing if their value is made up of more than 25% U.S.-origin content, if that content is itself subject to BIS licensing requirements for export to or transfers in China. Notwithstanding this general 25% *de minimis* threshold, non-U.S.-made items are deemed “subject to the EAR” if they contain any amount of certain types of U.S. content. Such content includes, for example, U.S.-origin components classified under a “600 series” or 9x515 Export Control Classification Number (“ECCN”), when destined for countries subject to U.S. arms embargos, such as China. There similarly are no *de minimis* levels for any non-U.S.-origin encryption technology that incorporates U.S.-origin encryption controlled under ECCN 5E002.

Finally, certain non-U.S.-produced items that meet the narrow conditions to constitute “direct products” of sensitive U.S. software or technology also are subject to the EAR, even if those non-U.S. items were produced and are located abroad and contain no or less than *de minimis* U.S. content. Additionally, items produced at a non-U.S. manufacturing plant or by a major manufacturing plant component can be subject to the EAR if the plant or plant component was a product of certain U.S. software or technology.

¹ The Commerce Department will apply a license review policy of case-by-case review for Export Control Classification Numbers 1A004.c, 1A004.d, 1A995, 1A999.a, 1D003, 2A983, 2D983, and 2E983. A policy of case-by-case review also applies to items designated as EAR99 that are described in the Note to ECCN 1A995—specifically, items for protection against chemical or biological agents that are consumer goods, packaged for retail sale or personal use, or medical products.

Items “subject to the EAR” under the criteria outlined above may no longer be exported from the United States, reexported from a third country, or transferred within a country to the Listed Entities, unless a BIS license is first issued. As noted, however, license applications for most items will be subject to a presumption of denial. In addition, release of any technology subject to the EAR to representatives of the Listed Entities, wherever located, will now require prior BIS licensing.

These restrictions apply only to the Listed Entities and their representatives, because Entity List designations do not automatically extend to non-listed subsidiaries or affiliates of listed persons. However, when dealing with a non-listed affiliate of a Listed Entity, under longstanding BIS guidance, companies should exercise heightened caution to ensure that the entity with which they are dealing is not a front or shell company for the Listed Entity, and otherwise to avoid indirectly furnishing items subject to the EAR to a Listed Entity.

Business and Human Rights Implications

In addition to the trade controls implications, this rule is significant in that it reflects the U.S. government’s continued efforts to address what it concludes are serious human rights abuses committed abroad by a range of stakeholders. Some of these high-profile actions have focused on abuses by governments, such as actions taken against the Government of Syria, and some have focused on individuals, such as former President of Gambia Yahya Jammeh and others, pursuant to a [2017 Executive Order implementing the Global Magnitsky Human Rights Accountability Act of 2016](#). This new rule serves as a reminder that corporations can also be implicated in human rights-related sanctions. Companies doing business abroad should therefore consider whether they have adequate oversight and accountability mechanisms in place, including conducting regular audits of their global operations, in order to determine whether any human rights abuses are being committed in their supply chains or by key partners.

We are well-positioned to advise on the export controls issues related to this latest action, and more broadly on the business and human rights dimensions of doing business internationally. If you have any questions concerning the material discussed in this client alert, please contact the following members of our International Trade Controls practice:

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