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U.S. Government Adds Chinese Governmental and Commercial Organizations to the Entity List

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October 8, 2019 – On October 7, 2019, the U.S. Department of Commerce, Bureau of Industry and Security (“BIS”) announced that it was adding 28 Chinese governmental and commercial organizations to the Entity List, citing activities alleged to have contributed to the repression and detention of Muslim minorities in the Xinjiang region of China. The designations will become effective on October 9, 2019, when the notice is formally published in the *Federal Register*.

New Additions to the Entity List

In announcing these additions to the Entity List, the Commerce Department stated that the entities were all “implicated in human rights violations and abuses in China’s campaign targeting Uighur and other predominantly Muslim ethnic minorities in the Xinjiang Uighur Autonomous Region (XUAR).” According to United Nations reports, the Chinese government has detained more than 1 million ethnic Uighurs and other Muslim minority group members in internment and re-education camps in the XUAR. It has also been reported that the Chinese government has established a vast surveillance system, which uses predictive technology to track Chinese citizens. The Commerce Department has determined that the 28 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 the Uighurs, Kazakh, and other members of Muslim minority groups in the XUAR.”

The Commerce Department identified the parties added to the Entity List in a draft *Federal Register* notice, which will be published on October 9, 2019. The 28 Chinese entities include the XUAR People’s Government Public Security Bureau, 18 of its subordinate municipal and county public security bureaus, and eight companies. The eight firms are largely technology and surveillance companies with operations in the XUAR, and they include Duahua Technology, Hikvision, IFLYTEK, Magvii Technology, Sense Time, Xiamen Meiya Pico Information Co., Ltd., Yitu Technologies, and Yixin Science and Technology Co., Ltd. These firms are alleged to have engaged in an

array of surveillance-related operations, including development of facial- and voice-recognition software, operation of surveillance cameras and phone-tracking systems, and social media monitoring.

According to the Commerce Department, these entities “are engaging in or enabling activities contrary to the foreign policy interests of the United States.” The additions illustrate BIS’s increasing practice of using the Entity List as a tool to advance U.S. foreign policy. This practice represents an expansion beyond the historical use of the Entity List as a method to sanction foreign entities that violated the U.S. export controls regulated under the Export Administration Regulations (“EAR”).

The Entity List

Procedural Requirements

The Entity List consists of “persons reasonably believed to be involved, or to pose a significant risk of becoming involved, in activities contrary to the national security or foreign policy interests of the United States.” The End-User Review Committee (“ERC”), which is composed of representatives from the Commerce Department and Departments of State, Defense, Energy, and Treasury, makes decisions regarding additions to, removals from, or other modifications to the Entity List.

Decisions to add a party to the Entity List require a majority vote of the ERC, but decisions to remove a party or modify the applicable restrictions require a unanimous vote of the ERC. Therefore, in practice, any single member agency of the ERC can veto a proposed modification or removal, even though temporary relief may be possible for entities on the list.

Consequences

The *Federal Register* notice states that the designated entities are subject to a license requirement for all items subject to the EAR. Under 15 C.F.R. § 734.3(a), the EAR applies to goods, software, and technology that:

1. are physically present in the United States, including items moving in transit through the United States;
2. are U.S.-origin regardless of their location;
3. are foreign-made items that incorporate or are bundled with more than a de minimis amount of U.S. origin parts, components, or software; or
4. fall within certain narrow categories of foreign-made products that are the direct product of U.S. technology or a plant made from U.S. technology.

The *de minimis* threshold for U.S. components of items to be exported to Iran, North Korea, Sudan and Syria is 10%; for every other country, including exports to China, it is 25%.

A license is required for *any* transaction in which EAR-controlled items are exported, reexported, or transferred to any of the designated entities. For all 28 entities, BIS will review license requests for certain narrow categories of Export Control Classification Numbers (“ECCNs”) on a case-by-case basis with the possibility of approving a license request.

Those ECCNs include:

- ECCNs 1A004.c, 1A004.d, and 1D003 – Certain detection systems specially designed for the detection of biological agents, radioactive material, and chemical warfare agents; electronic equipment designed for

- automatically detecting or identifying the presence of explosives; and related software;
- ECCN 1A995– Personal radiation monitoring dosimeters and certain protective and detection equipment limited by design or function to protect against hazards specific to civil industries, such as mining, quarrying, agriculture, pharmaceuticals, medical, veterinary, environmental, waste management, or to the food industry;
 - ECCN 1A999.a – Certain radiation detection, monitoring and measurement equipment;
 - ECCNs 2A983, 2D983, 2E983 – Certain automated explosive or detonator detection equipment and related software and technology;
 - EAR99 items described in the Note to ECCN 1A995 – latex exam gloves, latex surgical gloves, liquid disinfectant soap, disposable surgical drapes, surgical gowns, surgical foot covers, and surgical masks.

All other EAR-controlled items (including EAR99 items not specified in the Note to ECCN 1A995) are subject to a license review policy with a presumption of denial. Additionally, no existing license exceptions in the EAR apply if persons on the Entity List are involved in the transaction.

Because of the large number of items subject to the EAR and the strict license restrictions, addition to the Entity List effectively amounts to a U.S. trade embargo with the entities included on the list. Therefore, for the affected Chinese entities, the designation will substantially disrupt their supply chain access to U.S. origin items or items that contain U.S. content. At the same time, the “case-by-case” license review policy for certain items subject to the EAR may indicate that the U.S. Government is potentially open to issuing licenses for such items provided that the parties can demonstrate that such items will not be used for the activities that led to such entities’ Entity List designation.

Why this Matters

This latest move by the U.S. government could further complicate ongoing trade negotiations between the United States and China, which were scheduled to advance later this week with the arrival in the United States of Chinese Vice Premier Liu He. China has already objected to the action, and the Chinese government responded to the designations by calling the allegations groundless, denying any human rights abuses involving ethnic Uighurs, and asserting that “[the] accusations are nothing more than an excuse for the United States to deliberately interfere in China’s internal affairs.”

The latest additions to the Entity List also underscore that U.S. and non-U.S. companies alike should adopt policies to ensure their existing operations do not conflict with the Entity List licensing requirements. These procedures should include methods for confirming whether items being exported, reexported, or transferred are subject to the EAR; and procedures to screen customers and third parties and verify that the shipments will not be diverted to a party prohibited from receiving them under U.S. law.

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