Export compliance continues to be complicated for companies involved in business with China. On 1 August 2018, the U.S. Department of Commerce’s Bureau of Industry and Security (BIS) expanded the Entity List, restricting certain transactions with eight Chinese entities and 36 subordinate institutions.[1] These 44 Chinese parties include large state-owned enterprises and their subsidiaries, and high-tech research institutions involved in the semiconductor industry. BIS included no grace period in its notice, and the designations and restrictions explained below took effect immediately. Accordingly, these restrictions have an immediate impact on U.S. and non-U.S. companies, universities, and other organizations.

BIS designated the Chinese parties after determining that the parties acted “contrary to the national security or foreign policy interests of the United States.” BIS also determined that a number of the entities are “involved in the illicit procurement of commodities and technologies for unauthorized military end-use in China.”

BIS has imposed export license requirements on each listed person. These license requirements are independent of, and in addition to, license requirements otherwise imposed in the Export Administration Regulations (EAR) with regard to controlled products. As part of these designations, BIS chose to impose the strictest Entity List requirements. For example, a company must obtain a license to export, reexport, or transfer (in country) any item subject to the EAR to these Entity List entities. Moreover, BIS imposed a license review policy of “presumption of denial” for each of the newly-designated entities. This means that BIS is very unlikely to grant, without a compelling reason, any licenses requested for export, reexport, or transfer (in country) of any goods subject to the EAR to these listed entities. Lastly, no license exceptions are available for exports, reexports, or transfers (in-country) to the entities added to the Entity List.

Although certain EAR licensing requirements apply to related entities, such as parents, subsidiaries, and sister companies, the license requirements imposed by the Entity List do not extend to such legally distinct entities unless the listing specifically indicates that they do. If BIS determines that such legally distinct entity is acting as an agent, front, or shell company for the listed entity in order to circumvent the restrictions imposed by the Entity List, then the companies doing business with affiliates of newly-designated entities may violate the EAR and
General Prohibition 10 if they sell, transfer, export, reexport, finance, order, buy, remove, conceal, store, use, loan, dispose of, transport, forward, or otherwise service, in whole or in part, any item subject to the EAR and exported or to be exported with the knowledge that a violation has occurred or is about to occur. Therefore, it is critical that companies transacting with affiliates of newly-designated parties are wary of the complex corporate structure of Chinese entities, and these companies should perform due diligence and discern the exact relationships between these entities.

[1] BIS also modified one entry on the Entity List under the destination of China to provide additional addresses and names for the entity at issue.

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