

Commerce Expands Export License Human Rights Criteria

By **Alex Lawson**

Law360 (October 6, 2020, 8:40 PM EDT) -- The U.S. Department of Commerce announced Tuesday that it will consider human rights concerns when it reviews almost all export license applications, citing threats posed by the abuse of telecommunication and information security goods.

In a new rule published Tuesday, Commerce's Bureau of Industry and Security said that although it had always considered human rights when reviewing licenses for the batch of goods it restricts for "crime control" purposes, it will now extend the policy to cover nearly every license application made to the agency.

"This revision is necessary to clarify to the exporting community that licensing decisions are based in part upon U.S. government assessments of whether items may be used to engage in, or enable violations or abuses of, human rights including those involving censorship, surveillance, detention or excessive use of force," BIS said in its rule.

In explaining its decision to expand the official use of human rights as a criteria when evaluating export license bids, the agency said it was imperative to prevent "certain telecommunications and information security and sensors from being used to engage in or enable the violation or abuse of human rights."

Formally, BIS said it will generally consider license applications "favorably," unless the agency determines there is "civil disorder in the country or region or unless there is a risk that the items will be used to violate or abuse human rights."

BIS also clarified that it would be considering potential human rights violations by both government and nongovernment entities as it decides whether to authorize exports of controlled items.

Although the rule does not specifically mention China, experts said the change does fall in line with the Trump administration's recent efforts to address Beijing's detention and monitoring of religious and ethnic minority groups in its Western region of Xinjiang.

Akin Gump Strauss Hauer & Feld LLP partner Kevin J. Wolf, who led BIS from 2010-2017, said BIS has usually considered human rights issues as a matter of policy, but that the new rule will make that approach "explicit" within the agency's governing regulations.

"The change is nonetheless worthwhile considering the increasing role export controls are and will take in addressing human rights issues, particularly in China," Wolf said.

Crowell & Moring LLP partner Maria Alejandra del-Cerro agreed with Wolf, saying the new rule makes the agency's discretion over human rights "clearer." Del-Cerro added that the rule is "in keeping with BIS' more explicit focus on human rights concerns as a basis for export denial," noting a number of steps it has taken against China earlier this year.

In July, BIS floated a raft of new export controls on facial recognition software and other biometric surveillance equipment, noting that China has "deployed facial recognition technology in the Xinjiang region, in which there has been repression, mass arbitrary detention and high technology surveillance."

Earlier in the summer, the Trump administration put both officials and companies on a government blacklist over their purported complicity in the human rights violations unfolding in Xinjiang.

--Editing by Stephen Berg.