

Commerce Move Affects Exports to Chinese Nuclear Co.

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Last month, the U.S. Department of Commerce's Bureau of Industry, or BIS, added another major Chinese company to its entity list. In doing so, the United States strengthened its previous efforts to prevent China from using U.S. civil nuclear technology for military uses.

The listing will likely prevent all U.S. and non-U.S. companies from exporting products to China's largest nuclear power company, the China General Nuclear Power Group, or CGN. Companies should monitor their supply chains accordingly.

CGN has been under U.S. scrutiny in recent years, and the U.S. Department of Energy has previously restricted U.S. entities' ability to deal with CGN. This new listing, however, dramatically increases the scope of U.S. restrictions on CGN, and now prevents U.S. and non-U.S. persons from exporting anything subject to U.S. export control jurisdiction to CGN.

China General Nuclear Power Group

Breaking ground decades after the United States, China began constructing nuclear power plants in the mid-1980s.[1] By that time, the United States' first nuclear power plant, the Shippingport Atomic Power Station, had been running for nearly 30 years.[2] But by 2019, China had become the third greatest nuclear power generating country in the world.[3]

China owes much of its success to the state-owned CGN, the country's largest nuclear group.[4] CGN's core technologies are the HPR1000, a design for nuclear reactors; small modular reactors; and FirmSys, a control system for nuclear power plants.[5]

Recently, the United States has begun to suspect that CGN's success is, at least partly, a result of foul play. In April 2016, the U.S. Department of Justice indicted CGN and a senior employee for conspiring to develop special nuclear material outside the United States without the required authorization from the DOE under the Atomic Energy Act.[6] According to the indictment, the employee enlisted U.S.-based nuclear experts to advise on CGN's small modular reactor program, advanced fuel assembly program, fixed in-core detector system, and verification and validation of nuclear reactor-related computer codes.[7]

More than a year later, the employee pleaded guilty, and was sentenced to 24 months in prison and one year of supervised release, and assessed a \$20,000 fine.[8] Following the plea, the Federal Bureau of Investigation made it clear that this violation was of national importance: “[W]e will aggressively investigate those who seek to steal our technology for the benefit of foreign governments.”[9] The acting assistant U.S. attorney general added: “Prosecuting those who unlawfully facilitate the acquisition of sensitive nuclear technology by foreign nations continues to be a top priority of the National Security Division.”[10]

By 2018, the United States had begun to believe that CGN’s activity was more than criminal—it was a national security threat. In October of last year, the DOE issued measures to prevent China from illegally diverting U.S. nuclear technology to military or other unauthorized purposes.[11] Under the new policy, requests to transfer nuclear technology, equipment and material under 10 CFR Part 810 were presumptively denied.[12]

Officials were concerned that China intended to develop the technology for small power reactors in the South China sea and for use in submarines, icebreakers, and weapons.[13] Highlighting the United States’ belief that the Chinese efforts were covert and a threat to national security, U.S. Secretary of Energy Rick Perry said at the time: “The United States cannot ignore the national security implications of China’s efforts to obtain nuclear technology outside of established processes of U.S.-China civil nuclear cooperation.”[14]

Adding CGN to BIS Entity List

Against that backdrop, CGN’s addition to the BIS entity list seemed likely to many observers. On Aug. 14, 2019, BIS added China Nuclear Power Group and three of its affiliates—China General Nuclear Power Corporation, China Nuclear Power Technology Research Institute Co. Ltd. and Suzhou Nuclear Power Research Institute Co. Ltd—to the entity list.[15] According to BIS, each of these entities “engaged in or enabled efforts to acquire advanced U.S. nuclear technology and material for diversion to military uses in China.”[16]

China decried the decision, claiming that it was a pretext to stifle China’s “Made in China 2025” initiative,[17] the government’s 10-year plan, launched in 2015, to rapidly develop 10 high-tech industries.[18] China argued that the United States has “abused the blacklist” before to further its national security and foreign policy interests, citing Huawei’s addition to the entity list earlier this year as evidence.[19]

Entity List Implications

BIS maintains multiple lists of parties of concern, classifying persons and entities according to varying levels of concern.[20] Those seeking to export to entities on any of the lists must perform additional due diligence on the listed entity before proceeding with a transaction, and in many cases will need to seek authorization, often in instances where BIS maintains a policy of denial for any license requests.

Parties on the entity list are those who, BIS believes, present a greater risk of diverting exports to dangerous ends, such as weapons of mass destruction programs and terrorism campaigns.[21] The entity list identifies entities that “have been involved, are involved or pose a significant risk of being or becoming involved in activities contrary to the national security or foreign policy interests of the United States.”[22]

Now, all U.S. and non-U.S. companies must seek U.S. government approval, by securing a license from BIS before exporting or reexporting any item subject to the Export Administration Regulations, or EAR, to CGN or its listed affiliates. Items subject to the EAR include physical goods, technology, and software. Determining whether an item is subject to the EAR is a fact-specific analysis, but, generally speaking, items (including software and technology) will be considered subject to the EAR if they originate in the U.S., travel through the U.S. or are of foreign origin but contain a certain percentage of U.S.-origin controlled content or certain limited “direct products” of U.S. technology.

This license requirement for CGN and other entities on the BIS entity list extends to items that are not otherwise controlled for export to China, such as items of little to no military capability classified under the EAR’s lowest control category, EAR99. Companies seeking to reexport items subject to the EAR from a non-U.S. jurisdiction to CGN or its three affiliates named above may also have to seek U.S. government approval. The U.S. Department of Commerce’s stated policy on license requests is a presumption of denial.

Thus, the scope of export restrictions on CGN has expanded tremendously. Before CGN's listing on the BIS entity list, the DOE guidance prohibited companies from exporting nuclear technology, equipment and material to CGN. Now, they will be prohibited from exporting even low-technology consumer goods and software.

Takeaways

U.S. entities should perform enhanced due diligence both on their direct dealings with CGN and on the dealings of any of their affiliated entities that may deal with CGN. BIS prohibitions are not limited to direct interactions; companies should also seek to identify and understand the ultimate end users—and end uses—of any exported products, software or technology. To help determine whether they are dealing, even indirectly, with listed entities, companies may consider reviewing the BIS Red Flag Indicators^[23] and Know Your Customer Guidance.^[24]

[1] <https://www.world-nuclear.org/information-library/country-profiles/countries-a-f/china-nuclear-power.aspx>.

[2] <https://www.asme.org/about-asme/engineering-history/landmarks/47-shippingport-nuclear-power-station>.

[3] <https://www.world-nuclear.org/information-library/current-and-future-generation/nuclear-power-in-the-world-today.aspx>.

[4] <https://www.cnbc.com/2019/08/16/us-prohibits-firms-from-selling-to-china-nuclear-power-company-cgn.html>.

[5] http://en.cgnpc.com.cn/encgn/c100050/business_tt.shtml.

[6] <https://www.justice.gov/opa/pr/us-nuclear-engineer-china-general-nuclear-power-company-and-energy-technology-international>.

[7] Id.

[8] <https://www.justice.gov/opa/pr/us-nuclear-engineer-sentenced-24-months-prison-violating-atomic-energy-act>.

[9] Id.

[10] Id.

[11] <https://www.energy.gov/articles/doe-announces-measures-prevent-china-s-illegal-diversion-us-civil-nuclear-technology>.

[12] https://www.energy.gov/sites/prod/files/2018/10/f56/US_Policy_Framework_on_Civil_Nuclear_Cooperation_with_China_r

[13] <https://www.reuters.com/article/us-china-usa-nuclear/u-s-tightens-controls-on-china-imports-of-nuclear-components-idUSKCN1ML2V9>.

[14] Id.

[15] <https://www.bis.doc.gov/index.php/documents/regulations-docs/federal-register-notices/federal-register-2019/2435-84-fr-40237/file>.

[16] Id.

[17] <https://www.cnbc.com/2019/08/16/us-prohibits-firms-from-selling-to-china-nuclear-power-company-cgn.html>.

[18] <https://www.cfr.org/background/made-china-2025-threat-global-trade>.

[19] <http://www.chinadaily.com.cn/a/201908/15/WS5d55595ba310cf3e35565ffe.html>.

[20] <https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern>.

[21] *Id.*

[22] <https://www.bis.doc.gov/index.php/documents/regulations-docs/federal-register-notices/federal-register-2019/2435-84-fr-40237/file>.

[23] <https://www.bis.doc.gov/index.php/enforcement/oeec/compliance/23-compliance-a-training/51-red-flag-indicators>.

[24] <https://www.bis.doc.gov/index.php/all-articles/23-compliance-a-training/47-know-your-customer-guidance>.

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