

## STATES BRING A HUMAN RIGHTS FOCUS TO DUAL-USE EXPORT CONTROLS WITH A NEW CODE OF CONDUCT

On March 30, 2023, the multilateral Export Controls and Human Rights Initiative ("**the Initiative**") announced the release of a [Code of Conduct](#). The Initiative, launched in a December 2021 [Joint Statement of the governments of Australia, Denmark, Norway, and the United States](#), highlights the importance of trade in advanced technologies while also acknowledging the danger that such technologies pose when used in ways that results in serious human rights abuses. In the 2021 Joint Statement, the signatory countries resolved to issue a code of conduct, with the goal that other states would join forces in using trade and export control measures to curb the use of advanced technology to inflict human rights abuses.

### CODE OF CONDUCT

The Code of Conduct is a set of voluntary commitments by subscribing states, the list of which is growing even beyond those who signed on to the 2021 Initiative, to develop, improve, implement, and share export control systems to address the use of goods and technology by state and non-state actors to undermine privacy rights and commit serious human rights abuses. The aim of the Code of Conduct is to ensure that such goods and technologies are used in compliance with, and not to the detriment of, human rights.

The Code of Conduct recognizes that advanced dual-use goods and technologies have legitimate uses but can also be used for serious human rights abuses, notably the misuse of surveillance tools and technologies to censor political opposition and track dissidents, journalists, human rights defenders, and individuals belonging to vulnerable groups.

Subscribing states to the Code of Conduct commit to:

- Ensure that their existing domestic legal, regulatory, policy and enforcement tools are appropriate and updated to account for potential serious human rights abuses when considering the export of dual-use

goods or technologies, and communicate best practices with other subscribing states to control exports of such goods and technologies;

- Seek assurances that export recipients will not misuse, reexport, or transfer dual-use goods and technologies in such a way that they could result in serious human rights abuses, and require sufficient relevant information from them that export authorities can use to assess the risk that such dual-use goods and technologies may be used in a manner inconsistent with the protection of human rights;
- Share information on an ongoing basis with other subscribing states on emerging human rights threats and risks associated with such goods and technologies;
- Consult with the private sector, academia, and civil society representatives, including members of vulnerable groups, on human rights concerns and effective implementation of export control measures;
- Work with their respective private industry sectors to promote the implementation of human rights due diligence policies and procedures in line with the [UN Guiding Principles on Business and Human Rights](#) and other complementary international instruments;
- Aim to improve the capacity of non-subscribing states to do the above and encourage them to join and implement the Code of Conduct; and
- Meet and collaborate in order to further develop and implement the Code of Conduct.

The Code of Conduct is open for all Summit for Democracy participants to join, regardless of whether they are part of an existing multilateral export control treaty, such as the Wassenaar Arrangement – a reflection of perhaps both the fact that such agreements as the Code of Conduct are more expedient for those wishing to align on a voluntary basis on specific issues and the fact that it is often difficult for states to agree on binding multilateral treaties. Along with the United States, Albania, Australia, Bulgaria, Canada, Croatia, Czechia, Denmark, Ecuador, Estonia, Finland, France, Germany, Japan, Kosovo, Latvia, The Netherlands, New Zealand, North Macedonia, Norway, the Republic of Korea, Slovakia, Spain, and the United Kingdom have endorsed the Code of Conduct, and additional endorsements are being sought.

A meeting is planned for later in 2023 to discuss the implementation of the Code of Conduct.

While voluntary, states can use their adherence to the Code of Conduct to signal to industry that the state is focused on controlling misuse of technology in ways which can lead to serious human rights abuses.

International efforts to protect human rights against abuses of advanced technologies have gathered additional steam from related actions announced at the second Summit for Democracy, when the Code of Conduct was included, including:

- The [Guiding Principles on Government Use of Surveillance Technologies](#) is a consensus document among 36 nations that distinguishes between

legitimate and unjustifiable uses of surveillance technology and highlights three main areas of concern: (1) the use of internet controls to suppress human rights by limiting access to information, (2) the use of AI to continuously monitor people without legal basis, and (3) use of analytic tools to support the discriminatory enforcement of laws against vulnerable groups, dissidents, and the like;

- A March 27, 2023 [executive order](#) by the Biden Administration prohibiting the U.S. government's operational use of commercial spyware that poses risks to national security or has been misused by foreign actors to enable human rights abuses; and
- A [Joint Statement on Efforts to Counter the Proliferation and Misuse of Commercial Spyware](#) by the U.S., Australia, Canada, Costa Rica, Denmark, France, New Zealand, Norway, Sweden, Switzerland and the United Kingdom which includes, among others, a commitment to preventing the export of software, technology, and equipment to end-users who are likely to use them for malicious cyber activity.

## SPECIFIC FOCUS ON THE UNITED STATES

The Initiative, and its Code of Conduct, reflect ongoing efforts by the Biden Administration to address how the misuse of technology can result in serious human rights violations. First, beyond dual use technology, the United States has stepped up enforcement efforts more broadly on the import side by aggressively enforcing the ban on imports made (or presumed to be made) with forced labor. Second, the Biden Administration is expected to publish a new National Action Plan on Responsible Business Conduct in the coming months, further affirming the Administration's focus on human rights.

In addition, the U.S. Department of Commerce's Bureau of Industry and Security ("**BIS**") maintains an Entity List ("**Entity List**") where those listed are subject to additional license requirements for the exports, reexports, and transfers of designated entities that "*have been involved in, 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*" or can be prohibited from engaging in exports with the United States altogether.

In this respect, on March 30, 2023, [BIS updated the Export Administration Regulations \(EAR\)](#) to broaden the basis for adding entities to the Entity List, adding: "*the foreign policy interest of protecting human rights worldwide is a basis for adding entities to the Entity List.*" BIS further explained that the amendment is consistent with U.S. foreign policy objectives which include the protection of human rights and the protection of democracy. The expanded Entity List criteria takes on greater significance in light of the Code of Conduct and possible additions to export licensing requirements and restrictions which may result. BIS also recently [clarified its approach to the evaluation of human rights considerations in license applications](#) in a set of FAQ responses.

We continue to monitor for developments in this space, which are emerging at the state level and through voluntary agreements such as the Code of Conduct, as they have implications for companies developing and exporting technology.

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