

From: Chad Kolton

Sent: Monday, January 28, 2019 1:43 PM

To: [REDACTED]

Subject: RE: follow-up on Jinhua coverage

[REDACTED], the letter is attached. It is fairly comprehensive but if you have any questions after reading it I can do my best to see about answers. Thanks.

Chad

This material is distributed by Chad Kolton, Blueprint Communications, on behalf of Fujian Jinhua Integrated Circuit Company, Ltd. Additional information is available at the Department of Justice, Washington, DC.

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January 25, 2019

BY EMAIL AND HAND DELIVERY

Joseph Cristofaro
Chair, End-User Review Committee
Bureau of Industry and Security
U.S. Department of Commerce
14th Street and Pennsylvania Avenue NW, Room 3886
Washington, DC 20230
ERC@BIS.DOC.GOV

**Re: Fujian Jinhua Integrated Circuit Company, Ltd. – Intent to Seek
Review of Entity List Designation and Request for Relevant
Documents, Data, and Other Information**

Dear Chair Cristofaro:

On behalf of our client, Fujian Jinhua Integrated Circuit Company, Ltd. (JHICC), we write to notify you that JHICC will soon file a formal petition for removal from the Entity List pursuant to 15 C.F.R. § 744.16(e) and Supplement No. 5. While JHICC acknowledges the existence of litigation concerning alleged trade secrets of an American company, JHICC respectfully but strongly disagrees with the End-User Review Committee's (ERC) apparent conclusion that JHICC, simply by being a defendant, poses a national security threat to the United States—the sole basis upon which a company may be placed on the Entity List. Accordingly, by this letter we request that the ERC provide the evidence forming the basis of the listing decision, and permit a fair assessment of the Committee's views of JHICC's future activities and the perceived impact on U.S. national security interests.

The ERC's decision to add JHICC to the Entity List differs from past uses of this authority in which the United States identified precisely the national security policies violated or threatened by the listed entity. The Federal Register notice, dated October 30, 2018, provides no information about why the ERC believes that JHICC “poses a significant risk of becoming involved in activities that could have a negative impact on the national security interests of the United States.” Commerce Secretary Wilbur Ross announced in a press release that the decision was based on a

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threat to U.S. military supply chains posed by JHICC's assumed future production of dynamic random access memory (DRAM) integrated circuits. This limited information suggests that the ERC concluded that JHICC's business plan would impact the U.S. domestic DRAM market, then reduce the supply of DRAM integrated circuits, and, finally, impair the U.S. military's procurement options. Again, respectfully, this chain of cause and effects involves many complex assumptions that warrant closer examination.

While a clear national security concern is thus far difficult to discern, JHICC's placement on the Entity List was effected upon the *commencement* of the U.S. Department of Justice's (DOJ) criminal and civil actions against the company, and well before any opportunity for JHICC to have its day in court. DOJ has alleged that JHICC's plan to manufacture DRAM integrated circuits involves the trade secrets of a U.S. company, Micron Technology, Inc. (Micron). Though headquartered in China, JHICC has appeared in U.S. federal court to contest these charges and on January 9, 2019, pleaded not guilty. The company vehemently denies the Justice Department's allegations, and it has defended itself against similar claims in a civil action brought by Micron. Whereas inclusion on the Entity List is at times the only means to take action against a company because it is outside of the jurisdiction of U.S. courts, here the distant reach and severe sanction of the Entity List are both unnecessary. JHICC has already appeared in the criminal proceeding and due process is underway, with JHICC preparing to address those allegations directly. Instead of awaiting the outcome of a fair trial in an American court, the ERC appears to have decided in advance the merits of the case—which is, at its core, a trade secrets dispute—and simultaneously imposed a very harsh penalty.

The ERC's hasty decision to place JHICC on the Entity List has had a significant negative impact on many American businesses. JHICC has to date contracted with U.S. companies for a substantial volume of its equipment and materials requirements. However, the ERC listing eliminated JHICC's access to all equipment, materials, and other items originating from the United States, and abruptly halted dozens of JHICC partnerships with U.S. companies, resulting in potential losses of hundreds of millions of dollars to the U.S. economy. Now, shut out from the United States, JHICC will necessarily seek to fill these needs elsewhere.

For the above-stated reasons, and others, JHICC intends to submit in the near term a formal written request to the ERC to remove JHICC from the Entity List pursuant to 15 C.F.R. § 744.16(e) and Supplement No. 5.

Request for Documents, Data, and Other Relevant Information

In order to prepare a request for removal that directly addresses the factual basis of the ERC decision, on behalf of JHICC, we ask that the ERC now provide all documents, data, and other information underlying the ERC's decision to place JHICC on the Entity List.

The Supreme Court has "recognized that the right to know the factual basis for the action and the opportunity to rebut the evidence supporting that action are essential components of due process." *See Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 318 (D.C. Cir. 2014)

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(citations omitted). Under longstanding principles of constitutional law, the protections of the Due Process Clause apply to foreign nationals with property interests in the United States. *See, e.g., Sardino v. Fed. Res. Bank of N.Y.*, 361 F.2d 106, 111 (2d Cir. 1966).

Basic norms of due process require that the ERC disclose to JHICC the factual basis of its Entity List designation. JHICC's designation deprived the company of property, including, for example, JHICC's possessory interests in ongoing contracts for U.S.-origin equipment and materials which have been suspended by the ERC's action. The listing has further deprived JHICC of its contractual rights to supplies owed under warranty agreements for equipment already delivered. Yet, as described above, neither the Federal Register notice adding JHICC to the Entity List, nor the accompanying Commerce Department press release provide any information supporting the broad conclusions drawn by the ERC, and certainly nothing close to the level of information JHICC must have in order to meaningfully respond to the ERC's decision.

Consequently, JHICC requests that the ERC provide all documents, data, and other information underlying its decision to add JHICC to the Entity List. Doing so will allow JHICC to understand the basis of the ERC's decision, present to the ERC a more comprehensive picture of relevant facts and circumstances if afforded the opportunity, and, ultimately, seek removal from the Entity List. Please consider this request to encompass documents, data, and other information from the representative members of the ERC, including information relied upon or provided by the Department of Commerce, the Department of State, the Department of Defense, the Department of Energy, and the Department of the Treasury (if a participant in this decision) in assembling the "specific, articulable facts" upon which the ERC's decision was based. This request also covers any opinions expressed or information relied upon by any member agency of the ERC in connection with its participation in the ERC's majority vote procedure, as such information is part of the factual basis of the ERC's decision. Finally, this request includes, but is not limited to, documents, data, and other information used by the ERC to:

- (i) identify the future activities of JHICC that the ERC determined could have a negative impact on the national security interests of the United States;
- (ii) assess potential JHICC production of DRAM integrated circuits, including JHICC's intended market(s), customers, and sales volume;
- (iii) assess the effects of potential JHICC DRAM production on U.S. DRAM manufacturers;
- (iv) assess the effects of potential JHICC DRAM production on the U.S. domestic supply of DRAM integrated circuits;
- (v) determine that the assessments in (ii), (iii) and (iv) would impair the ability of the United States Government to procure an adequate supply of DRAM integrated circuits; and
- (vi) conclude that there is reasonable cause to believe that JHICC's anticipated future activities identified in (i) would have the effects described in (ii)-(v), or any other effects considered by the Committee, which in turn would have a negative impact on the national security interests of the United States.

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We appreciate your prompt attention to this request.

Sincerely,

/s/ G. Scott Hulsey
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