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THE BIS ENTITY LIST: THE U.S. GOVERNMENT'S "NEW" FOREIGN POLICY STICK

Since 2016, BIS has added hundreds of entities and individuals to its Entity List, not just for violations of export control regulations, but also for various threats to U.S. national security and foreign policy. The authors describe BIS's evolving procedures and grounds for adding names to the List, the recent additions of Huawei and its affiliates, new listings for human rights violations, and other reasons for list additions in 2019. They note that BIS officials have stated that the Entity List is the easiest of all the government's tools for restricting trade and will likely remain a favorite tool in 2020 and beyond.

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Until recently, companies paid little attention to the Entity List published by the US Department of Commerce's Bureau of Industry & Security ("BIS"),¹ in contrast to the more well-known and feared Specially Designated Nationals and Blocked Persons List, published by the US Department of Treasury's Office of Foreign Assets Control ("OFAC"). That blissful ignorance is and should be no more.

The BIS Entity List made headlines in 2016 when BIS added the second-largest telecommunications company in China, Zhongxing Telecommunications Equipment Corporation ("ZTE"), in connection with an ongoing investigation of violations of the Export Administration Regulations ("EAR") and OFAC regulations. Since then, BIS has, at a disconcerting pace, added hundreds of entities and individuals. In 2019, it

added 230 entities, not just for violations of the EAR, but for various stated threats to US national security and foreign policy, including human rights violations, and theft of trade secrets. According to recent comments by BIS officials, companies can expect a continued high level of Entity List activity, moving beyond the historical trigger of unauthorized export, reexport, or transfer of items subject to the EAR. There are currently about 1,000 Listed Entities.

Companies operating internationally must understand the Entity List, both to ensure compliance with licensing restrictions imposed on transactions with entities on the list and to prevent being listed themselves.

BACKGROUND AND BASIS FOR INCLUSION IN THE ENTITY LIST

The addition of a company to the Entity List imposes a licensing requirement on the Listed Entity for all items

¹ 15 C.F.R. pt. 744, Supp. 4 (2019), available at https://www.ecfr.gov/cgi-bin/text-idx?rgn=div5&node=15:2.1.3.4.28#ap15.2.744_122.4.

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subject to the EAR.² Accordingly, exports, reexports, or in-country transfers to a Listed Entity of many US-origin items that would normally either not require a license or be subject to license exceptions, now require a license from BIS.

In most cases, BIS will review each license application under a presumption of denial. This essentially cuts off the Listed Entity from its US suppliers, unless there is an authorization specific to the Listed Entity. Authorization could be in the form of a “savings clause” inserted in the applicable listing for items already en route to the Listed Entity when the listing becomes effective. Authorization may also be in the form of a Temporary General License (“TGL”). ZTE was the first company to receive a TGL, two weeks after it was placed on the Entity List.

The licensing requirement does not apply to shipments by or from the Listed Entity, nor services provided to or by the Listed Entity. Restrictions apply just to the named entity, not its subsidiaries or affiliates. Accordingly, in most cases, US persons and others may continue to do business with the Listed Entity as long as it does not involve the provision of items subject to the EAR, such as spare parts or technology, or even shipments for repairs of items subject to the EAR.

US persons should be careful to ensure that any business conducted with a Listed Entity is in full compliance with the EAR and that the US person is not aware, even after conducting sufficient due diligence of an actual, potential, or intended violation of the EAR. General Prohibition Ten in the EAR prohibits US persons from proceeding with a transaction when they are aware that a violation has occurred, is about to occur, or, is intended to occur.³

The Listed Entities include non-US persons (*e.g.*, businesses, research institutions, organizations, or

individuals) who, upon inclusion in the Entity List, become subject to special export licensing restrictions. The BIS Entity List does not include US persons, as it provides BIS with authority to restrict or penalize persons over which it would not otherwise have jurisdiction to impose monetary penalties.⁴

The decision to add, remove, or change entries on the BIS Entity List is made by the End-User Review committee (“ERC”), composed of the Departments of Commerce, State, Defense, Energy, and, as appropriate, Treasury.⁵

An entity or those acting on its behalf will be considered for listing if “*there is reasonable cause to believe, based on specific and articulable facts, that an entity has been involved, is involved, or poses a significant risk of being or becoming involved in activities contrary to the national security or foreign policy interests of the United States and those acting on behalf of such entities*”⁶ The activity does not need to have a direct nexus to the United States. The EAR provides some examples of captured activities:⁷

- supporting persons engaged in acts of terror;
- actions that could enhance the military capability, or the ability to support terrorism of governments that have been designated by the Secretary of State as having repeatedly provided support for acts of international terrorism;
- transferring, developing, servicing, repairing, or producing conventional weapons in a manner that is contrary to United States national security or foreign policy interests, or enabling such transfer, service, repair, development, or production by supplying

² “Items subject to the EAR” include all items in the United States, US-origin items wherever located, and certain non-US made commodities that incorporate more than *de minimis* controlled US-origin content, or are direct products of US-origin technology or software, or were made in non-US plants that are products of US-origin technology or software. 15 C.F.R. § 734.3.

³ 15 C.F.R. § 736.2(b)(10).

⁴ The EAR provides criminal penalties for each violation of up to USD 1 million and 20 years imprisonment, as well as civil penalties up to the greater of USD 300,000 or twice the transaction value per violation.

⁵ 15 C.F.R. pt. 744, Supp. 5 (2019). The ERC has other responsibilities, including the Validated End User program.

⁶ License Requirements that Apply to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States, 15 C.F.R. § 744.11(b) (2019).

⁷ 15 C.F.R. § 744.11(b)(1)-(5).

parts, components, technology, or financing for such activity;

- preventing accomplishment of an end-use check conducted by or on behalf of BIS or the Directorate of Defense Trade Controls of the Department of State by: (1) precluding access to; (2) refusing to provide information about; and (3) providing false or misleading information about parties to the transaction or the item to be checked;⁸ or
- engaging in conduct that poses a risk of violating the EAR when such conduct raises sufficient concern that the ERC believes that prior review of exports, re-exports, or transfers (in-country) involving the party and the possible imposition of license conditions or license denial enhances BIS’s ability to prevent violations of the EAR.

Proof is not required. BIS needs only to have reasonable cause to believe an entity is engaged in such activity based on specific, articulable facts.

THE EVOLVING RATIONALE FOR ADDITIONS TO THE ENTITY LIST

Prior to 2008, the BIS Entity List was rarely used; there were only 50 entities on the list, and in some years, there were no new entries. That changed in 2008 when BIS expanded the Entity List to cover activities contrary to US national security or foreign policy interests, and broadened the scenarios in which the Entity List could be used, including the risk of imminent EAR violations.

However, the link between EAR violations and the national security and foreign policy rationale was broken in 2018 year, as BIS and other law enforcement authorities recognized the power of the Entity List to incentivize non-US companies to conform and comply with US government expectations in their commercial activities. BIS’s explanatory notes announcing additions to the Entity List did not always refer to the EAR in justifying the additions, and some of the newly Listed Entities were involved in commercial or foreign policy disputes.

⁸ 15 C.F.R. § 744.11(b)(4). The section further explains: “*The conduct in this example includes: expressly refusing to permit a check, providing false or misleading information, or engaging in dilatory or evasive conduct that effectively prevents the check from occurring or makes the check inaccurate or useless. A nexus between the conduct of the party to be listed and the failure to produce a complete, accurate, and useful check is required, even though an express refusal by the party to be listed is not required.*”

In recent additions to the Entity List, BIS describes the list as only “*an illustrative list of activities that could be contrary to the national security or foreign policy interests of the United States.*”⁹

Huawei and Its Affiliates Added to the List

Huawei Technologies Co. Ltd, China’s largest smartphone manufacturer, and the world’s second largest,¹⁰ was put on the Entity List, effective May 16, 2019, along with 68 of its non-US affiliates. In August 2019, BIS added another 46 non-US affiliates of Huawei to the List.

The reason for the listing, provided by BIS, was that Huawei “*has been involved in activities determined to be contrary to the national security or foreign policy interests of the United States. To illustrate, Huawei has been indicted in the U.S. District Court for the Eastern District of New York on 13 counts of violating U.S. law . . . by knowingly and willfully causing the export, reexport, sale, and supply, directly and indirectly, of goods, technology and services (banking and other financial services) from the United States to Iran and the government of Iran without obtaining a license from*” OFAC.¹¹ BIS also stated that “*Huawei’s affiliates present a significant risk of acting on Huawei’s behalf to engage in such [proscribed] activities.*”¹²

BIS very quickly thereafter issued a TGL allowing for the transfer of certain US-origin items to Huawei and the listed affiliates, if all requirements of the TGL were met.¹³ The TGL is subject to periodic expiration but has, thus far, been renewed by BIS.

Entity List Additions for Human Rights Violations

Further illustrating the US government’s use of the Entity List beyond EAR violations, on October 9, 2019, BIS added 28 Chinese entities to the Entity List because

⁹ Addition of Certain Entities to the Entity List, 84 Fed. Reg. 56,117 (October 9, 2019).

¹⁰ Lisa Eadicicco, *Apple just got knocked out of the top 3 smartphone makers in the world — here’s how it stacks up against rivals like Samsung, Huawei, and LG*, Business Insider, Aug. 8, 2019, <https://www.businessinsider.com/biggest-smartphone-makers-in-the-world-apple-slips-2019-8#2-huawei-9>.

¹¹ Huawei and Affiliates Entity List Rule, 84 Fed. Reg. 22,961 (May 21, 2019).

¹² *Id.*

¹³ 15 C.F.R. pt. 744, Supp. 7 – Temporary General License (2019).

*“these entities have been implicated in human rights violations and abuses in the implementation of China’s campaign of repression, mass arbitrary detention, and high-technology surveillance against Uighurs, Kazakhs, and other members of Muslim minority groups in the Xinjiang Uygur Autonomous Region of China.”*¹⁴

Additions to the BIS Entity List on the basis of human rights abuses alone is a clear departure from past additions and trends, showing the intention of the Trump administration to use the Entity List as a “stick” to bring non-US entities into line with US foreign policy priorities. It is also notable that these Chinese entities have developed advanced artificial technology, rivalling their US competitors. In announcing their addition to the Entity List, the Commerce Department took care to emphasize that the decision had nothing to do with on-going trade tensions between the United States and China, although trade talks were scheduled the same week the listing was announced.

Other Stated Reasons for Additions to the Entity List in 2019

BIS also added entities to the Entity List in 2019 for other reasons, including that an *“entity transshipped US-origin items to sanctions destinations or entities without the required authorizations,”* an entity was *“involved in the proliferation of unsafeguarded nuclear activities,”* and several entities had *“knowingly divert[ed] U.S. origin items to Iran without authorization and are therefore unreliable recipients of U.S.-origin goods and technology.”*¹⁵

In June 2019, five Chinese supercomputer firms were designated for *“acting contrary to the national security or foreign policy interests of the United States,”* or just being owned by one of the other companies.¹⁶ Even

though BIS has acknowledged that there was no public information concerning the companies’ conduct, their involvement in advanced technology beyond current computing capability, particularly in light of Chinese law requiring companies to provide data and other information to the government upon request, was sufficient for listing.

REMOVAL FROM THE BIS ENTITY LIST

BIS’s published guidance on removal from the Entity List is sparse. The regulations provide that a listed entity may request removal by filing a request in writing, along with supporting information, with the ERC Chairman. The Chairman will refer the request to all ERC members, who will consider and vote on the request. The interagency deliberation will involve review of public and non-public sources of information, to which the Listed Entity will not have access, making effective advocacy for removal a challenge. The vote must be unanimous (as opposed to adding an entry, which requires only a majority vote).¹⁷

THE BIS ENTITY LIST IN 2020

Using the BIS Entity List as a foreign policy tool to pressure non-US entities to bend to the will of the United States is a recent trend. Potential targets for future listings include non-US entities located in countries where the United States has other foreign policy concerns and priorities, as evidenced in 2019 with the listing of numerous Chinese companies.

BIS officials have stated in various forums that the Entity List is the easiest of all the US government’s tools for restricting trade. However, they contend that they are trying to limit its application to true national security concerns, recognizing that its overuse could jeopardize their ability to impose it at will. That said, the Trump administration has shown no signs of letting up on this approach or strategy. We expect the Entity List to remain a favorite tool in 2020 and possibly beyond. ■

¹⁴ Addition of Certain Entities to the Entity List, 84 Fed. Reg. 56,117 (October 9, 2019).

¹⁵ Addition of Certain Entities to the Entity List, 84 Fed. Reg. 61,538 (November 13, 2019).

¹⁶ Addition of Entities to the Entity List and Revision of an Entry on the Entity List, 84 Fed. Reg. 29,371 (June 24, 2019). In October 2018, BIS listed Chinese semi-conductor company, Fujian Jinhua Integrated Circuit Co., because it “poses a significant risk of becoming involved in activities that are contrary to the national security interests of the United States” as it was “nearing completion of substantial production capacity for dynamic random access memory (DRAM) integrated circuits. The additional production, in light of the likely U.S.-origin technology, threatens the long-term economic viability of U.S. suppliers of these essential

components of U.S. military systems.” BIS Press Release (October 29, 2018).

¹⁷ E.g., Removal of Certain Entities from the Entity List; and Revisions of Entries on the Entity List, 82 Fed. Reg. 44,514 (Sept. 25, 2017) (codified at 15 C.F.R. pt. 744 (2019)).