

Client Alert

BIS – Making Their Lists and Adding to them Twice

December 29, 2020

BIS remains busy during the closing days of the year. On December 18 and 21 the Department of Commerce issued several press releases announcing the addition of 77 entities to the Entity List, and for the first time, a Military End User List. The December 18 press releases ([here](#) and [here](#)) announced the addition of 77 entities to the Entity List, including several high-profile Chinese companies. And while the new additions were not published in the [Federal Register](#) until December 22, the additions became effective on the date of the press release, December 18. Continuing a “rulemaking by press release,” exporters who rely on the Federal Register may have missed the additions. The December 21 press release ([here](#)) publicized the creation of a new list, the Military End User List (“MEU List”), related to the MEU rule BIS issued earlier this year (see our prior alert [here](#)). The MEU List was published in the [Federal Register](#) and went into effect on December 23.

Entity List Additions

Under §740.11(b) of the Export Administration Regulations (EAR), Commerce, in consultation with the interagency, can add entities to the Entity List that it reasonably believes to be involved, or to pose a significant risk of becoming involved, in activities contrary to the national security or foreign policy interests of the United States. Among the most significant additions in this tranche, BIS added China’s largest chipmaker, the Semiconductor Manufacturing International Corp., or SMIC, as well as DJI, a leading drone manufacturer. BIS explained that it added SMIC to counteract what BIS describes as “China’s military-civil fusion (MCF) doctrine.” BIS imposed a license requirement (with a policy of denial) for the export, reexport or transfer in country to these entities of all items “subject to the EAR,” including EAR99.

BIS also added more than sixty other entities to the Entity List from Bulgaria, France, Germany, Hong Kong, Italy, Malta, Pakistan, Russia, and the United Arab Emirates (U.A.E.), in addition to China. These companies allegedly: enabled human rights abuses; supported the militarization in the South China Sea; acquired U.S.-origin items in support of the People’s Liberation Army’s programs; and were involved in the theft of U.S. trade secrets.

The New MEU List

Under the authority of another section of the EAR, § 744.21, BIS published a new list, the MEU List. In April 2020, BIS announced a [new rule](#) imposing additional licensing requirements for items (listed in Supplement No. 2 to Part 744) destined to a Military End Use or Military End Users in the People’s Republic of China, Russia, or Venezuela (see our summary [here](#)). This rule, known as the “MEU Rule,” took effect June 29, 2020.

The MEU List is separate and discrete from the Entity List and while similar in some respects, does not contain the same prohibitions. Two important distinctions limit the scope of the MEU List as compared to the Entity List:

1) the MEU Rule does *not* apply to all items subject to the EAR, only to items listed in Supplement No. 2 to Part 744 ([here](#)) (“Supp. 2”); and 2) the MEU Rule is geographically limited and applies to only end users or end uses in China, Russia, or Venezuela, while the Entity List is not so limited.

The MEU List comprises a positive list to notify the public that a license will be required to export, reexport, or transfer (in-country) any item described in Part 744 Supp. 2 to the 102 “military end users” identified on the new MEU List. Notably, however, the list is not exhaustive and exporters are still required to perform due diligence to determine if an end user in any of the three jurisdictions meets the definition of a “military end user.” BIS states, “Exporters, reexporters, or transferors will still be responsible for ensuring their transactions are in compliance with the license requirements set forth in § 744.21 because BIS cannot list every ‘military end user’ or party representing a risk of diversion thereto in the MEU List, or identify all situations which could lead to an item being used for a ‘military end use.’”

Adding to the challenge of exporting to China, the Department of Defense (DOD) has published a separate list naming “[Communist Chinese military companies](#)” operating directly or indirectly in the United States, pursuant to the statutory requirements of §1237 of the 1999 National Defense Authorization Act (NDAA). The DOD published its initial list in June of this year and has been updated since. The DOD list has triggered added confusion among exporters because the DOD statutory criteria for identifying parties is not synonymous with the EAR definition of “Military End User.” Meaning, in practice, that a company identified on the DOD list may not necessarily be subject to additional export restrictions or licensing requirements under the EAR. According to BIS, however, entities listed on the DOD list raise a [Red Flag](#) for BIS Know Your Customer purposes, prompting companies to perform enhanced due diligence prior to engaging in exports of covered items.

The flurry of lists in 2020 reflects BIS’ continued, enhanced focus on managing China’s access to U.S. technology. The complexity of exporting to China shows no sign of waning in the closing days of 2020.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Maria Alejandra (Jana) del-Cerro

Partner – Washington, D.C.

Phone: +1.202.688.3483

Email: mdel-cerro@crowell.com

Jeffrey L. Snyder

Partner – Washington, D.C.

Phone: +1.202.624.2790

Email: jsnyder@crowell.com

Chandler S. Leonard

Associate – Washington, D.C.

Phone: +1.202.624.2905

Email: cleonard@crowell.com