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BIS Releases Final Rule Creating List of Chinese and Russian “Military End Users”

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Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

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On December 22, 2020, the U.S. Department of Commerce, Bureau of Industry and Security (“BIS”) released a final rule creating a list (“MEU List”) of companies that qualify as “military end users” pursuant to § 744.21 of the Export Administration Regulations (“EAR”). The final rule comes nearly a month after an unofficial draft of the rule had leaked and circulated among international trade practitioners. The MEU List includes total of 102 firms, consisting of 57 Chinese firms and 45 Russian firms. (Although § 744.21 also applies to Venezuelan “military end users,” no Venezuelan companies were named in the MEU List, though they could be in the future.) Consequently, certain exports, reexports, and in-country transfers to those companies will require a license from BIS.

Specifically, § 744.21 of the EAR requires a license from BIS for any exports, reexports, or in-country transfers (1) to China, Russia, or Venezuela, (2) where a listed MEU entity is the purchaser, intermediate consignee, ultimate consignee, or end-user, and (3) that involve items subject to the EAR that are described in an Export Control Classification Number (“ECCN”) identified in Supplement 2 to Part 744 of the EAR. Consistent with the existing standard of review at §744.21(e), applications for such licenses will be reviewed with a presumption of denial.

Notably, the final rule stresses that the MEU List is not exhaustive, and companies not identified on the MEU List could nevertheless fall within the license requirement if they otherwise qualify as a “military end user.” In particular, the rule explains that “the establishment of the MEU List does not imply that other parties, not included on the list, are not subject to the ‘military end-use’ and ‘military end user’ controls under the EAR.” A “military end user” includes – in addition to armed services, national police, and related intelligence and security government organizations – “any person or entity whose actions or functions are intended to support ‘military end uses’ as defined in paragraph (f) of this section.” See 15 C.F.R. § 744.21(g). In turn, “military end use” is defined to mean “incorporation into a military item described on the U.S. Munitions List (USML) (22 CFR part 121, International Traffic in Arms Regulations); incorporation into items classified under ECCNs ending in ‘A018’ or under ‘600 series’ ECCNs; or any item that supports or contributes to the operation, installation, maintenance, repair, overhaul,

refurbishing, 'development,' or 'production,' of military items described on the USML, or items classified under ECCNs ending in 'A018' or under '600 series' ECCNs." See *id.* at § 744.21(f).

Accordingly, it is entirely possible that the § 744.21 licensing requirements could apply to companies not on the MEU List. For example, companies identified on the U.S. Department of Defense's list of "Communist Chinese Military Companies" that are not also identified on the MEU List would not necessarily trigger the § 744.21 license requirement, but would raise compliance concerns. BIS warns that such companies "would require additional due diligence by the exporter, reexporter, or transferor to determine whether a license is required under § 744.21." However, the rule does make clear that the license requirement does not apply to subsidiaries and affiliates owned or controlled by listed companies so long as those companies do not otherwise meet the definition of a "military end user."

The publication of the MEU List follows a significant expansion of the scope of products covered by the licensing requirement for "military end users" that was announced in April 2020, which we previously summarized here. The final rule explains that the MEU List is derived from "decisions made by BIS in reviewing license applications under § 744.21," and notes that, since the April 2020 expansion of the "military end user" license requirements, BIS "received over 80 advisory opinion . . . requests asking whether 34 specific entities are considered 'military end users' for purposes of § 744.21." Therefore, according to the rule's preamble, the MEU List is intended to make these determinations public, and thereby "ease the public's compliance burden."

It is also potentially significant that the final rule states, "[a]ll of the one hundred and two entities added to the MEU List in today's final rule are 'military end users' within the definition of § 744.21(g), and were thus already subject to the 'military end-use' and 'military end-user' requirements under § 744.21." Through this statement, BIS may be encouraging exporters who previously engaged in unlicensed transactions with the listed entities to voluntarily disclose those transactions, although the decision to include a savings clause arguably would undercut any attempt to bring enforcement actions for past transactions involving companies that are not clearly within the definition of "military end-user."

However, although the MEU List purportedly reflects BIS's determinations, the final version of the rule empowers the interagency End User Review Committee ("ERC") – the same committee that oversees the Entity List, consisting of the Departments of Commerce, State, Defense, Energy and, where appropriate, the Treasury – to make determinations regarding MEU List additions, modifications, and removals. This could be a late-term attempt by the Trump Administration to make it more difficult for the incoming Biden Administration to undo or otherwise reduce the effect of the rule. The ERC procedures related to the MEU List are virtually identical to the Entity List, and require only a majority of the participating agencies to add parties, but a unanimous decision to modify or remove parties.

As noted above, the final rule follows an earlier draft that was circulated within the export community in late November 2020. That draft rule included a list of 89 Chinese companies and 28 Russian companies. The final version of the list, in contrast, reduces the number of Chinese companies to 57 while increasing the Russian companies to 45. At least with respect to the Chinese companies, this reduction appears to have come in response to pressure from industry following the leaked draft rule questioning why some entities with no obvious military connections were included.

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