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Commerce Adds Seventy-Seven Parties to Export Blacklist

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December 18, 2020 – On December 18, 2020, the U.S. Department of Commerce, Bureau of Industry and Security (“BIS”) released a final rule that would add 77 new entities, including Semiconductor Manufacturing International Corporation Incorporated (“SMIC”), to the Entity List. All of the newly added entities are subject to a license requirement for all items subject to the Export Administration Regulations (“EAR”), even though some entities are subject to different license review policies. Consistent with BIS’s clarification of the Entity List licensing requirements from earlier this year, the license requirement will apply whenever any of the listed entities are a purchaser, intermediate consignee, ultimate consignee, or end-user for EAR-controlled items, whether or not the listed party actually takes possession of the items. The rule is effective immediately (but includes a savings clause for shipments already in transit).

Specifically, the rule adds SMIC and ten affiliates to the Entity List and will, therefore, require a BIS license prior to export. However, only “items uniquely required for production of semiconductors at advanced technology nodes (10 nanometers and below, including extreme ultraviolet technology)” will be reviewed under a presumption of denial; all other items will be reviewed on a case-by-case basis. The rule does not specify what items BIS considers to be “uniquely required for production of semiconductors at advanced technology nodes,” such as specific Export Control Classification Numbers (“ECCNs”). The lack of a definition may make it more difficult for exporters to determine if their license applications may be granted (i.e., reviewed on case-by-case basis) or are likely to be denied (i.e., reviewed under a presumption of denial).

The dual license review policies applicable to SMIC suggest that BIS may apply a “catch and release” licensing approach similar to what has informally been done with Huawei. Huawei – which is also on the Entity List – requires a license for all items subject to the EAR; however, BIS has been generally issuing authorizations for transactions involving Huawei so long as the underlying commodities do not support the development of 5G technology. The license review policies specified for SMIC suggest that BIS may take a similar approach of generally licensing transactions except for those involving items “uniquely required for the production of semiconductors at advanced technology nodes.”

We also note that the Entity List requirement follows the September 25, 2020, “is informed” letters distributed by BIS notifying certain exporters that SMIC is subject to the “military end-user” licensing requirements specified at 15 C.F.R. § 744.21. Since the issuance of that letter, exports, reexports, and in-country transfers of all items identified in Supplement 2 to 15 C.F.R. Part 744 – including “mass market” encryption items controlled under ECCN 5A992, such as most consumer cell phones, tablets, and computers – have already been subject to a license requirement when sent to SMIC and are reviewed under a presumption of denial.

Only six other entities added to the Entity List in the rule are subject to a license review policy other than a presumption of denial. Specifically:

- Two entities – Geo Research and Link Lines (Pvt) Limited – are subject to the license review policy set forth in 15 C.F.R. § 744.2(d) (restrictions on certain nuclear end-uses);
- Four entities – AGCU Sciencetech, China National Scientific Instruments and Materials (CNSIM), DJI and Kuang-Chi Group – are subject to a license review policy of case-by-case review for items necessary to detect, identify and treat infectious disease and a presumption of denial for all other items subject to the EAR.

The remaining 60 entities are subject to a presumption of denial for all items subject to the EAR.

Notably, the rule adds the 77 total entities under a scattershot litany of justifications. For example:

- The 11 SMIC entities were added “as a result of China’s military-civil fusion (MCF) doctrine and evidence of activities between SMIC and entities of concern in the Chinese military industrial complex”;
- Four entities, AGCU Sciencetech, China National Scientific Instruments and Materials (CNSIM), DJI, and Kuang-Chi Group, were added for allegedly “enable[ing] wide-scale human rights abuses within China through abusive genetic collection and analysis or high-technology surveillance”;
- China Communications Construction Co. Ltd. and four other entities were added for allegedly “enable[ing] China to reclaim and militarize disputed outposts in the South China Sea”;
- Thirty entities – including 25 affiliates of the China State Shipbuilding Corporation, Ltd. as well as Beijing Institute of Technology, Nanjing University of Science and Technology, Nanjing University of Aeronautics and Astronautics, Nanjing Asset Management Co., Ltd., and Jiangsu Hengxiang Science and Education Equipment Co., Ltd. – were added for allegedly “acquiring and attempting to acquire U.S.-origin items in support of programs for the People’s Liberation Army”;
- One entity – Tongfang Technology Ltd. (NucTech) – was added for allegedly producing “lower performing equipment [that] impair U.S. efforts to counter illicit international trafficking in nuclear and other radioactive materials”;
- One entity – Beijing University of Posts and Telecommunications – was added for allegedly “participat[ing] in the research and development, and production, of advanced weapons and advanced weapons systems in support of People’s Liberation Army modernization”;
- Three entities – ROFS Microsystems, Tianjin Micro Nano Manufacturing, and Tianjin University – and five individuals were added for allegedly engaging in the “theft of trade secrets from U.S. corporations”;
- Five entities – Zigma Aviation Services, MRS GmbH, France Tech Services, Maintenance Services International GmbH, and Satori Corporation – were added for allegedly “provid[ing] aircraft parts, without the necessary licenses, to one entity – Mahan Air – that is listed as a Specially Designated National per the U.S. Department of Treasury’s Office of Foreign Assets Control”;
- Two entities – Link Lines (Pvt.) Limited and Geo Research – were added for “their participation in the procurement and attempted procurement of items, to include U.S.-origin items, for entities on the Entity List without obtaining the necessary licenses”; and
- Two entities and one individual – Sparx Air Ltd., Sky Float Aviation FZE, and Feroz Ahmed Akbar – were added for their alleged involvement “in a scheme to falsify information in order to obtain and divert U.S.-origin items without authorization.”

These varying justifications are significant because the End-User Review Committee (“ERC”) – the interagency group responsible for deciding on Entity List additions – typically adds parties in tranches with similar underlying policy rationales for their additions. The various rationales presented in the rule suggest that this action may have been a “housecleaning” effort to add all remaining Entity List proposals prior to the end of the year. With the inauguration and transition to the Biden Administration scheduled for just over a month later, the rule could also be the last significant group of additions by the Trump Administration.

These cited justifications also underscore how broadly the ERC has applied the concept of “national security.” The Entity List is intended to identify “persons reasonably believed to be involved, or to pose a significant risk of being or becoming involved, in activities contrary to the national security or foreign policy interests of the United States.” See 15 C.F.R. § 744.16. While the ERC alleged malign actions by a majority of the parties added to the Entity List through the rule, one party, Tongfang Nuctech, appears to have been added for allegedly making low quality products – that is, for producing “lower performing equipment [to] impair U.S. efforts to counter illicit international trafficking in nuclear and other radioactive materials.” This is consistent with the increasingly broad interpretation of “national security” by the ERC over the past few years.

Finally, we note that, although the rule is effective as of December 18, 2020, a savings clause is included in the rule, which makes reference to the rule’s official publication in the Federal Register, scheduled for December 22, 2020. Specifically, the savings clause states, “Shipments of items removed from eligibility for a License Exception or export or reexport without a license (NLR) as a result of this regulatory action that were en route aboard a carrier to a port of export or reexport, on [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER], pursuant to actual orders for export or reexport to a foreign destination, may proceed to that destination under the previous eligibility for a License Exception or export or reexport without a license (NLR).” It is unclear whether the published version would correct this apparent oversight.

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