

A singular list (with many dimensions)



Once confined to the recondite practices of US dual-use export controls, the Entity List,¹ part of the Export Administration Regulations ('EAR'), and administered by the US Bureau of Industry and Security ('BIS'), is having a moment, write Mi-Yong Kim and Scott Jones, who outline the potential uses to which it might be put by lawmakers, and the need for a just and transparent removal mechanism.

In the emerging and full-blown stages of the US-Chinese technology conflict, the Entity List has figured prominently in mainstream discussions concerning US national security as a function of technology control. The additions of Huawei and ZTE, in particular, to the Entity List signaled a substantive change in its original purpose from preventing the proliferation of weapons of mass destruction into a general tool for protecting US security interests.

The expansion of the Entity List introduces several operational and reputational risks for targets, exporters, and the US government. Despite growing due process concerns, adding parties to the Entity List appears relatively easy, relying only on an interagency majority, whereas removal requires consensus. Consequently, unpruned growth is foreordained. Targets find that a listing is not discrete and impacts its entire business dealings, with financial institutions and other business partners avoiding further engagement. Lastly, imitation is inevitable as a matter of course. While blank at the moment, the Chinese Ministry of Commerce ('MOFCOM') issued the Regulations on Unreliable Entity List in autumn 2020 in response to the increasingly China focus of

Entity List designations, thereby introducing another note of uncertainty in US-Chinese commercial relations.

By volume, the Entity List is the second largest US trade and security list after the Specially Designated Nationals and Blocked Persons ('SDN') list, with over 35% of its growth occurring since 2018. As a policy tool of increasing prominence, it is instructive to review its history and current trajectory, noting especially possible legal challenges and the unintended impact of the Entity List's topical expansion.

From 'know your customer' to the Hotel California

The Entity List is a by-product of the Enhanced Proliferation Control Initiative, which was established in December 1990 to counter the spread of the capability to produce or acquire weapons of mass destruction ('WMD') and their delivery means. The Entity List was established in February 1997 as way to inform the public of parties that would be ineligible to receive certain items under the jurisdiction of the Export Administration Regulations ('EAR') without authorisation. Prior to the Entity List, the Bureau of Industry and Security ('BIS'), known then as the Bureau of Export Administration ('BXA'), relied on the 'is informed' process



to inform the public about the risks associated with exporting to certain parties.²

At its founding, BIS designated Ben Gurion University of Israel as the first party on the Entity List. Thereafter, BIS soon followed with other additions, such as in June 1997, the All-Russian Scientific Research Institute of Technical Physics (aka VNIITF), the Bhaba Atomic Research Center in India, the Chinese Academy of Engineering Physics (aka the Ninth Academy), the Khan Research Laboratory in Pakistan, the Nuclear Research Center in Israel, and several others. Until 2007, the parties on the Entity List consisted of entities deemed as 'proliferation concerns'.

In June 2007, BIS published a proposed rule to expand the scope of the Entity List beyond WMD concerns to include those parties 'acting contrary to the national security and foreign

policy interests of the United States'. The proposed rule also explicitly stated that a party listed on the Entity List has a right to request removal and set procedures for addressing such request. In August 2008, BIS published the final rule expanding the scope. The August 2008 final rule included a supplement which outlined certain provisions that were not part of the proposed rule. The final rule explicitly outlined the role of the End-User Review Committee ('ERC'), an interagency body chaired by the Department of Commerce and composed of representatives from the departments of Commerce, Defense, Energy, and State, to review the addition and removal of parties on the Entity List. The most significant parts of the supplement included provisions that:

1. the ERC decision to add parties to the Entity List would be by majority vote

LINKS AND NOTES

- ¹ The Entity List is often mischaracterised as a prohibition list. While there is no 'prohibition' against exporting, reexporting, or transferring items to parties on the Entity List, by imposing licensing requirements which otherwise would not be required to transact business with such parties, the Entity List could have the same effect as a prohibition.
- ² As noted by BXA, 'the development of a list of entities of concern through the 'Is Informed' process arose from the Enhanced Proliferation Control Initiative (EPCI) begun in 1990 to stem the spread of missile technology as well as nuclear, chemical and biological weapons.' See, BXA Annual Report, 1997 – t.ly/QGJl. BXA became the Bureau of Industry and Security in April 2002.

- but the decision to remove a party would be by consensus;
2. allows for escalation to a higher level if an ERC member is not satisfied with an outcome of a vote;
 4. set procedures for requesting removal from the Entity List; and
 5. mandates that the ERC conduct annual reviews to determine whether any listed entities should be removed or modified.

Since the 2008 change in scope to include national security and foreign policy concerns, the number of parties added to the Entity List has increased dramatically.

According to the BIS 2020 annual report, there are over 1,500 parties on the Entity List. Since the end of the fiscal year 2020 to July 2021, BIS added 159 more parties and removed seven parties. That means, there are 1,700 parties on the Entity List as of July 2021.

In addition to the increase in entities, the regional focus of designations shifted, around 2014, from the Middle East and South Asia to China and Russia. The latter designations focused primarily on companies in the semiconductor, surveillance, and related technologies sectors. In addition to the further designations, BIS also removed certain parties based

on its annual review or on request by the listed party.

The data on how many removal requests were made is not publicly available, but the actual removals are published in the Federal Register. Also, based on publicly available information, it appears the ERC has not conducted an annual review since 2013. Therefore, it is likely that there are numerous

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parties on the Entity List where the reason for listing is no longer applicable.

The reasons for the dramatic increase in additions in recent years, but the decline in the removals, may be due to the process established in the EAR where removal can be tedious and difficult. In addition, the government has increased the use of the Entity List as one of the tools to change the geopolitical behaviour of China

and Russia. Lastly, once added to the Entity List, removal can generate Congressional scrutiny which can be an additional burden on the implementing agency. With regard to the process, Supplement 5 of the August 2008 rule specifies the ERC’s decisions by votes, the removal process, and the annual review. Specifically, the rule states: ‘The ERC will be chaired by the Department of Commerce and will make all decisions to add an entry to the Entity List by majority vote and all decisions to remove or modify an entry by unanimous vote.

‘A listed entity may present a request to remove or modify its Entity List entry along with supporting information to the chairman at [BIS address].

‘The End-User Review Committee [sic] will conduct a review of the entire Entity List at least once per year for the purpose of determining whether any listed entities should be removed or modified. The review will include analysis of whether the criteria for listing the entity are still applicable...’

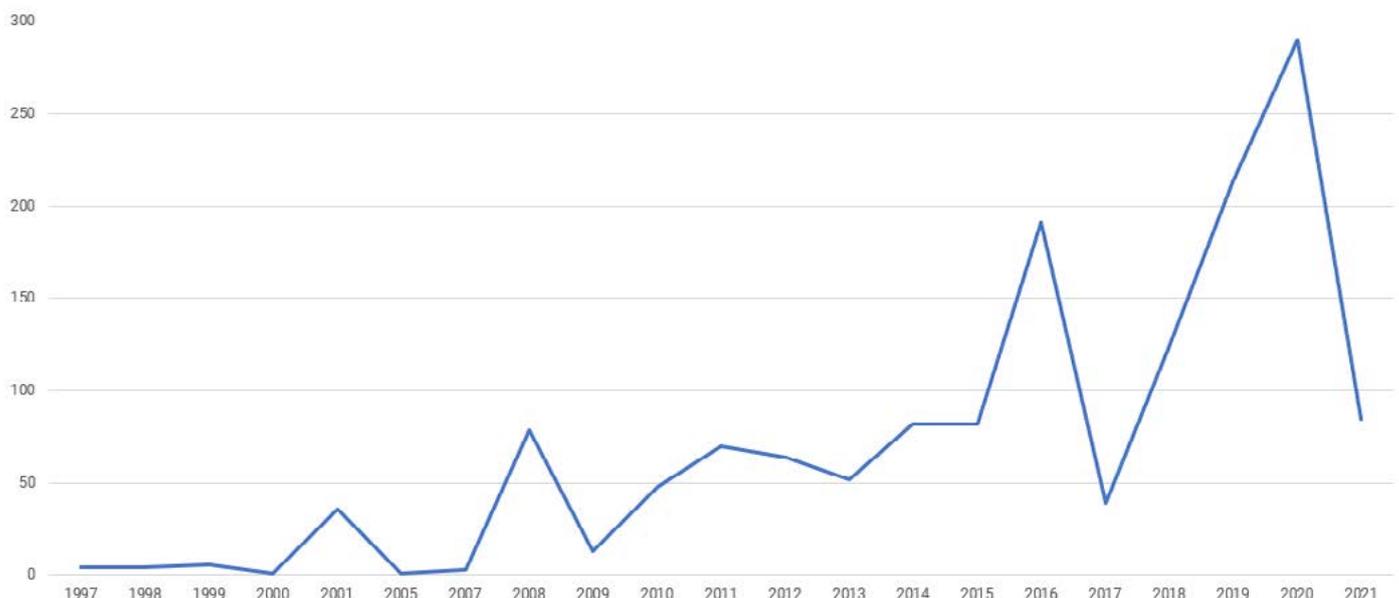
The final rule has no explanation on the first, concerning the difference in votes to add and to remove from the Entity List. The provision related to removal and annual review resulted from a public comment to the proposed rule

that BIS provide a transparent and rational process for removal. Other comments included that BIS establish a process to correct or remove outdated entries.

Agencies workloads and related staffing burdens may also explain the relatively small number of removals. With the volume of additions to the Entity List, it is a considerable strain on the current personnel to thoroughly and meaningfully review all requests to be removed *and* conduct annual reviews. If the US government intends to use the Entity List as a primary tool in the national security and foreign policy toolbox, it is imperative that the government devote the necessary resources to do all three parts of the ERC job and not just one.

One secondary effect for the government of stretching the use of the Entity List has been that more eyes are on it and on other types of extant and new restrictive lists maintained by government. Those eyes are not just from the affected parties but also from Congress. Since the beginning of the 117th Congress, there have been no less than nine bills including references to the Entity List, most prominently in H.R. 1595, The Keep Huawei on the Entity List Act. The preceding Congresses were largely silent on the matter as they were with respect to export controls in general (e.g., the 2001 lapse of

Parties added to the Entity List since 1997



the 1979 Export Administration Act). Direct Congressional involvement threatens to further complicate the list making and removal process.

Recently, there have been several court challenges to the US government’s use of various lists to restrict foreign entities in the name of national security. In the first case, Xiaomi Corporation challenged the Department of Defense’s listing it as a Communist Chinese military company (‘CCMC’). The Court agreed with Xiaomi and enjoined the Department of Defense from enforcing the restrictions. In the second case – Luokung Technology Corporation, also a DOD CCMC designee – the Court agreed with Luokung and enjoined the Department of Defense from enforcing the restrictions. The most recent court challenge was filed in July 2021 by Changji Esquel Textiles Co. Ltd. (Esquel) against the Department of Commerce in the US District Court for the District of Columbia (Case no. 121-CV-01798-RBW). In the complaint, Esquel basically argues that it was not afforded due process when it was placed on the Entity List in July 2020.

Parties removed by BIS based on its annual review or on request by the listed party

| Year | Removals | Removal Means |
|--------------|------------|--|
| 2008 | 0 | – |
| 2009 | 5 | 3 based on annual review; 2 by request |
| 2010 | 6 | 5 based on annual review; 1 by request |
| 2011 | 9 | 5 based on annual review; 3 by request; 1 USG action |
| 2012 | 18 | 17 based on annual review; 1 by request |
| 2013 | 7 | 2 based on annual review; 5 by request |
| 2014 | 4 | 1 by request; 3 by agreement with BIS |
| 2015 | 7 | 6 by request; 1 by agreement with BIS |
| 2016 | 17 | 17 by request |
| 2017 | 13 | 13 by request |
| 2018 | 7 | 7 by request |
| 2019 | 7 | 7 by request |
| 2020 | 4 | 4 by request |
| 2021 | 3 | 3 by request |
| Total | 107 | |

All things to all people
Controlling the export of strategic US-origin goods and technologies is hardly novel. For decades, BIS has policed the export of dual-use goods.

In support of that mandate and in parallel with other US agencies, BIS has also deployed lists, including the Entity List, to achieve export control objectives. However, the export

control objectives have shifted from a WMD to a broader national security and foreign policy rationale. As we noted, the 2008 Final Rule establishes a broad statutory mechanism

LINKS

- MOFCOM (China) regulations on the Unreliable Entity List: <http://english.mofcom.gov.cn/article/policyrelease/questions/202009/20200903002580.shtml>
- National Security Directive dated 10 July 1992 on the Enhanced Proliferation Control Initiative (ECPI): <https://irp.fas.org/offdocs/nsd/nsd70.pdf>
- Rule on Additions to the Entity List: <https://www.federalregister.gov/documents/1997/06/30/97-17146/revisions-to-the-export-administration-regulations-additions-to-the-entity-list>
- Final Rule: Authorisation to Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States (July 2007): <https://www.govinfo.gov/content/pkg/FR-2007-06-05/pdf/E7-10788.pdf>
- Final Rule: Authorisation to Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States (August 2008): <https://www.govinfo.gov/content/pkg/FR-2008-08-21/pdf/E8-19102.pdf>
- US BIS Annual report to Congress 2020 (includes number of parties listed as 1500): <https://www.bis.doc.gov/index.php/documents/pdfs/2711-2020-bis-annual-report-final/file>
- Index of Rules Affecting the EAR: <https://www.bis.doc.gov/index.php/regulations/federal-register-notice>
- SUPPLEMENT NO. 5 TO PART 744 – PROCEDURES FOR END-USER REVIEW COMMITTEE ENTITY LIST DECISIONS: <https://www.govinfo.gov/content/pkg/CFR-2012-title15-vol2/pdf/CFR-2012-title15-vol2-part744-appNo--id491.pdf>
- Comments Concerning § 744.16 – Procedure for Requesting Removal or Modification of an Entity List Entry: <https://www.federalregister.gov/documents/2008/08/21/E8-19102/authorization-to-impose-license-requirements-for-exports-or-reexports-to-entities-acting-contrary-to#p-103>
- Comment on changes for improving quality of information on the entity list: <https://www.federalregister.gov/documents/2008/08/21/E8-19102/authorization-to-impose-license-requirements-for-exports-or-reexports-to-entities-acting-contrary-to#p-115>
- H.R.1595: ‘Keep Huawei on the Entity List’: <https://www.congress.gov/bills/117/congress/house-bill/1595/text?q=%7B%22search%22%3A%22keep+huawei%22%7D&r=1&s=3>
- Xiaomi challenge to DoD: <https://dockets.justia.com/docket/district-of-columbia/dcdce/1:2021cv00280/226816>
- EO ‘Addressing the threat from securities investments that finance Communist Chinese Military Companies’: <https://www.govinfo.gov/content/pkg/FR-2020-11-17/pdf/2020-25459.pdf>
- Xiaomi injunction: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2021cv0280-21
- Luokung injunction: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2021cv0583-33

for designating entities. In particular, the Final Rule notes ‘[U]nder this rule, the activities at issue need not involve items or activities that are subject to the EAR in order for the entity to be placed on the Entity List.’

Clearly, the government is within its legal mandate to ascribe designations based on its security and foreign policy interests. Less certain, however, are the designation and removal processes and accompanying legal implications from a due process perspective. For example, a catch-22 type situation is created in the removal process whereby the government may be unable to

share relevant and necessary information for the listing such that the party can comply in a manner that could result in removal. The processes are further constrained by personnel and financial resources and interagency attenuation across an ever-increasing array of lists.

Wherever are we going?

Currently, there are 12 lists generated by the US government imposing varying levels of trade, travel, asset, and financial constraints on the listed and, in some case, on parties involved with the listed. The Entity List is the second

largest by weight. Arguably, along with Treasury’s Specially Designated Nationals List, it is one of most consequential. Huawei, for example, is reeling from its inability to source US-origin and produced components and technology. The secondary and tertiary effects of a listing are equally significant, with potential financiers and clients wary of engagement with listed parties.

The leverage afforded by the US economy and financial system is an indispensable component of US economic statecraft. Indeed, this advantage should be used to achieve select foreign policy and national

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security objectives. However, befitting such importance, sufficient resources should be allocated to their administration. Likewise, policy makers should ensure that these instruments are legally consistent with our foundational jurisprudence, including a just and transparent means by which to seek removal.