

Insights

BIS RULE CHANGES: THE GIFT THAT KEEPS ON GIVING

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As 2020 comes to a close, the U.S. Department of Commerce, Bureau of Industry and Security (BIS) continues to implement new measures targeting countries of interest, among them Russia and China (which now, for export purposes, officially includes Hong Kong SAR). Because these measures are effective now, companies will need to ensure that they have in place procedures to ensure compliance with these measures, including compliance with licensing and reporting requirements.

On December 22, 2020, BIS published a [final rule adding 77 entities](#) to the Entity List as a result of their having been determined by the U.S. government to have been engaging in or enabling activities contrary to U.S. national security and foreign policy interests. The changes took effect December 18, 2020. Among the entities added to the Entity List pursuant to the rule is Semiconductor Manufacturing International Corporation Incorporated (SMIC) and 10 related entities; they were added because of concern regarding their role in transactions with entities of concern in the Chinese military industrial complex. Licenses are now required in connection with the export, re-export, or in-country transfer of any item subject to the Export Administration Regulations (EAR) when a listed entity is a party to the transaction (i.e., purchaser, intermediate consignee, ultimate consignee, end-user). A wide range of other entities, including parties involved in shipbuilding and a number of universities and research institutes, in China (including Hong Kong SAR), Bulgaria, France, Germany, Italy, Malta, Pakistan, Russia, and the United Arab Emirates were also included among the additions.

The following day, BIS published a [rule adding a new “Military End User” \(MEU\) List](#) in Part 744 of the EAR containing a first tranche of entities determined to be “military end users” for purposes of the military end use/end user rule set forth in EAR § 744.21. The published list contains 57 entities under China and 45 entities under Russia, along with a holding place for parties in Venezuela. The list also includes subordinate institutions of certain listed entities. The publication of this list serves as notice that a license is required for the export, re-export, or transfer of items listed in Supplement No. 2 to Part 744 to any of the parties on the list. Importantly, the publication of the MEU List does not relieve organizations of their obligations to conduct diligence to determine whether an export, re-export or transfer of items listed in Supplement No. 2 is intended for a military end user or military end use in China, Russia, or Venezuela, for transactions that do not involve entities on the MEU List.

In particular, organizations should pay close attention to any entities not listed on the MEU List but listed on the Section 1237 List published by the U.S. Department of Defense (most recently amended on December 3, 2020), as BIS has made clear that an entity's inclusion on the Section 1237 List is a red flag requiring that additional diligence be conducted to determine whether a license is required under § 744.21.

On December 23, BIS also issued a [final rule](#) taking further steps to implement Executive Order 13936, which directed the Commerce Department to end different and preferential treatment afforded to Hong Kong SAR in relation to mainland China. This final rule, which became effective upon publication, removes Hong Kong SAR as a separate destination on the Commerce Country Chart in Part 738 of the EAR. Under the final rule, exports to Hong Kong SAR are now treated as exports to China for all purposes under the EAR. License requirements for exports, re-exports, or transfers to Hong Kong will now be governed by license requirements that apply to China. Because the rule is effective immediately, this means that licenses must now be obtained for the export, re-export or transfer to Hong Kong SAR of any item for which a license would be required for China, even if such item could previously be exported to Hong Kong SAR No License Required (NLR). While the PRC End-User Statement requirements under §748.10 will not automatically extend to exports to Hong Kong SAR, BIS may request one on a case-by-case basis. The final rule does contain a Savings Clause authorizing until January 22, 2021, shipments of items that could previously be made to Hong Kong under NLR; however the Savings Clause only applies to shipments that were on dock for loading, on lighter, laden aboard an exporting or transferring carrier, or en route aboard a carrier to a port of export or reexport on December 23, 2020, pursuant to actual orders for export, re-export, or transfer to Hong Kong SAR. In other words, if the shipment was not already "out the door" for export as of December 23, the savings clause does not provide any safe harbour or grace period.

Further, references to Hong Kong SAR in license exceptions APP, GOV, and APR and the list of Country Groups have been removed, as Hong Kong SAR is now covered by China's entries in Country Groups D:1, D:3, D:4 and D:5. Entity List and Unverified List entries under the country of Hong Kong SAR are now merged into entries in those lists under the country of China.

Effective immediately on December 23, 2020, the new rule extends the requirement to file an EEI for all exports of items on the CCL, regardless of value, to exports to Hong Kong unless the export is made pursuant to license exception GOV. This requirement applies even if the AES requirements state that the destination filed in the EEI is to be listed as Hong Kong SAR.

Organizations should take steps now to ensure that they are in compliance with these new rules, particularly given that they are already effective. This includes ensuring that any screening is updated to account for new Entity List designations and, where relevant to the organization's activities, the new MEU List, including confirming with your third party screening provider that they have added the MEU List to the lists you utilize for screening; that exports, re-exports, and transfers to Hong Kong SAR are reviewed under the license requirements that apply to China; and that EEI is

filed for exports of any item on the CCL to Hong Kong SAR (unless the export is made under license exception GOV), including for exports where the AES requires that the destination filed in EEI is to be listed as Hong Kong SAR.

RELATED CAPABILITIES

- International Trade

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