

New Designations of Chinese Entities Impose Varying Restrictions

January 20, 2021

Key Points

- The U.S. government has recently imposed controls pertaining to “Communist Chinese Military Companies” (CCMCs or “1237 entities”); Chinese “Military End Users” (MEUs); and Chinese “Military-Intelligence End Users” (MIEUs). The U.S. government has also been adding Chinese companies to the Entity List based on concerns regarding the companies’ relationships to the Chinese military industrial complex.
- Although the names and underlying policy concerns are similar, the scope and source of the prohibitions regarding each set of Chinese entities are quite different. Companies on one of the lists are not automatically on others, but overlap is possible as the lists evolve. These lists are in addition to the Chinese entities that are on the Unverified List (UVLs), the Denied Persons List (DPLs), and the Specially Designated Nationals and Blocked Persons List (SDNs).
- The CCMC rules prohibit certain U.S. person investments in CCMCs. They do not prohibit exports of items or services to CCMCs. In particular, CCMCs are not subject to any of the export control prohibitions applicable to companies on the Entity List, unless they are also designated on the Entity List.
- The MEU rules prohibit the unlicensed export of specific items to MEUs. They do not prohibit investing in, supporting, or providing services to MEUs, or exporting other items that cannot be sent to those on the Entity List.
- The MIEU rules, but not the Entity List rules, prohibit U.S. persons from providing support to MIEUs. The MIEU and Entity List rules prohibit the export of **any** items subject to U.S. jurisdiction to designated companies, but they do not prohibit investments. The scope of the Entity List rules pertaining to certain companies, such as CNOOC and Huawei affiliates is different than the rules pertaining to all other listed entities.
- Those that do business in China and with Chinese companies will need to revise screening and other compliance program efforts to account for the changes.

Contact Information

If you have any questions concerning this alert, please contact:

Kevin J. Wolf

Partner

kwolf@akingump.com

Washington, D.C.

+1 202.887.4051

Shiva Aminian

Partner

saminian@akingump.com

Los Angeles

+1 310.552.6476

Thomas J. McCarthy

Partner

tmccarthy@akingump.com

Washington, D.C.

+1 202.887.4047

Christian C. Davis

Partner

chdavis@akingump.com

Washington, D.C.

+1 202.887.4529

Tatman R. Savio

Registered Foreign Lawyer

tatman.savio@akingump.com

Hong Kong

+ 852 3694.3015

Jaelyn Edwards Judelson

Partner

jjudelson@akingump.com

Los Angeles

+1 310.552.6477

Anne E. Borkovic

Partner

aborkovic@akingump.com

Washington, D.C.

+1 202.887.4432

The U.S. government has recently imposed a series of prohibitions on “Communist Chinese Military Companies” (CCMCs), Chinese “Military End Users” (MEUs), and Chinese “Military-Intelligence End Users” (MIEUs). The U.S. government has also been adding Chinese companies to the Entity List based on concerns regarding China’s military-civil fusion policies, involvement with human rights abuses in the Xinjiang region, relationships with the Chinese military industrial complex, efforts to acquire U.S.-origin items for the Chinese military, and activities in the South China Sea.

Although the titles and policy concerns underlying the different groups of designated Chinese entities are similar, the scope of the prohibitions and activities they restrict differ significantly. This alert provides a comparative summary of these different measures pertaining to Chinese entities to clarify the rules to the extent possible and to suggest an approach to identify and resolve points of confusion or ambiguity. Ultimately, determinations on whether an activity involving one of the listed entities is permitted or prohibited will require close factual and legal analysis given the complexity of the rules.¹

I. CCMCs – Summary of Prohibitions, the Affected Entities, and Government Guidance

A. Prohibitions

As a result of **Executive Order (EO) 13959**, “Addressing the Threat from Securities Investments that Finance Communist Chinese Military Companies” – issued on November 12, 2020 and **amended** on January 13, 2021 – U.S. persons are, with some exceptions, prohibited from purchasing or selling:

- Publicly traded securities of CCMCs;
- Securities that are derivative of publicly traded securities of CCMCs; and
- Securities that are designed to provide investment exposure to publicly traded securities of CCMCs.

The EO, as amended, prohibits U.S. persons from engaging in transactions with CCMC covered securities after January 11, 2021, or 60 days after an entity is designated as a CCMC, whichever is later. It also prohibits the possession of CCMC covered securities by U.S. persons after November 11, 2021, or one year after an entity is designated as a CCMC, whichever is later.

“Transaction” is defined as “the purchase for value, or sale, of any publicly traded security.”²

B. Identification of Communist Chinese Military Companies (“1237 Entities”)

A “Communist Chinese military company” is, in essence, any individual or entity the Secretary of Defense or the Secretary of the Treasury identifies as being:

- “owned or controlled by, or affiliated with, the People’s Liberation Army or a ministry of the government of the People’s Republic of China or that is owned or controlled by an entity affiliated with the defense industrial base of the People’s Republic of China;” and
- “engaged in providing commercial services, manufacturing, producing, or exporting.”³

Nnedinma C. Ifudu Nweke
Partner
nifudu@akingump.com
Washington, D.C.
+1 202.887.4013

Katherine P. Padgett
Counsel
kpadgett@akingump.com
Washington, D.C.
+1 202.887.4079

Chris Chamberlain
Associate
cchamberlain@akingump.com
Washington, D.C.
+1 202.887.4308

Ursula R. Rothrock
Associate
urothrock@akingump.com
Los Angeles
+1 310.229.1077

Nick Russell
Associate
nrussell@akingump.com
Washington, D.C.
+1 202.887.4542

Andrew R. Schlossberg
Associate
aschlossberg@akingump.com
Washington, D.C.
+1 202.887.4314

Alasdair Kan
Law Clerk
alasdair.kan@akingump.com
Hong Kong
+ 852 3694.3069

The “People’s Liberation Army” is defined as “the land, naval, and air military services, the police, and the intelligence services of the Communist Government of the People’s Republic of China, and any member of any such service or of such police.”⁴ “Entity” means “a government or instrumentality of such government, partnership, association, trust, joint venture, corporation, group, subgroup, or other organization.”⁵

Since the Department of Defense (DoD) began identifying CCMCs in June 2020 in response to [requests](#) to do so from members of Congress, it has identified 44 CCMCs in five “tranches.” They are listed on the DoD website at: [Tranche 1](#), [Tranches 2 & 3](#), [Tranche 4](#), and [Tranche 5](#). Tranche 5 was [published](#) on January 14, 2021 and identifies as CCMCs: Advanced Micro-Fabrication Equipment Inc. (AMEC); Luokong Technology Corporation (LKCO); Xiaomi Corporation; Beijing Zhongguancun Development Investment Center; GOWIN Semiconductor Corp; Grand China Air Co. Ltd. (GCAC); Global Tone Communication Technology Co. Ltd. (GTCOM); China National Aviation Holding Co. Ltd. (CNAH); and Commercial Aircraft Corporation of China, Ltd. (COMAC). These entities are not on the Military End User List or the Entity List.

The EO’s prohibitions regarding the entities in Tranches 1, 2, and 3 became effective on January 11, 2021. The prohibitions applicable to the entities in Tranche 4 will become effective on February 1, 2021, and the prohibitions applicable to the entities on Tranche 5 will become effective on March 15, 2021.

C. Government Guidance

The State Department has described Executive Order 13959 and its purpose in two Fact Sheets published [December 8, 2020](#) and [January 14, 2021](#). Although the State Department Fact Sheets identify CCMC affiliates and subsidiaries, the Treasury Department’s Office of Foreign Assets Control (OFAC) [stated](#) in online Frequently Asked Questions (FAQs) that transactions in covered securities of the subsidiaries are not prohibited until Treasury has identified them as CCMCs. OFAC stated that Treasury “intends to publicly list” subsidiaries that are 50 percent or more owned or controlled by one or more designated CCMCs. Further, [OFAC stated](#) that the prohibitions apply also to an “entity with a name that exactly or closely matches the name” of a designated CCMC. Other OFAC [FAQs](#) answer questions about prohibited and permissible ancillary activities, including during a wind down, support services, covered instruments and U.S. and foreign funds that contain CCMC securities. OFAC has also [published](#) resource links, general licenses, and other materials about the new prohibitions.

II. Chinese “Military End Users” (MEUs) – Summary of Prohibitions, the Affected Entities, and Government Guidance

A. Prohibitions

The Export Administration Regulations (EAR) prohibit the unlicensed export, reexport, and transfer of specific types of otherwise uncontrolled commodities, software, and technology (“items”) subject to the jurisdiction of the EAR (e.g., U.S.-origin items) to China, Russia, or Venezuela if:

- There is “knowledge” that the item is for a “military end use” or “military end user;”
or

- The Commerce Department’s Bureau of Industry and Security (BIS) has identified the recipient as a “military end user.”⁶

One can have such “knowledge” either as a result of being individually informed by BIS that there is an unacceptable risk of the item being diverted to “military end use” or “military end user”⁷ or, without such a notification, having awareness of a “high probability”⁸ that the covered item is for a “military end use” or “military end user.”

Effective June 29, 2020, BIS **expanded** the definition of “military end use” so that that it means:

- The “incorporation into” a military item; or
- “any item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, ‘development,’ or ‘production,’” of military items.⁹

A “military end user” is:

- “the national armed services (army, navy, marine, air force, or coast guard), as well as the national guard and national police, government intelligence or reconnaissance organizations;” or
- “any person or entity whose actions or functions are intended to support ‘military end uses.’”¹⁰

Thus, even if an export is purely for civil end uses and the recipient is otherwise engaged in civil activities, the entity is still a “military end user” if **any** other part of its business supports “military end uses.”

When the “military-intelligence end user” definition described below becomes effective, this definition will exclude intelligence or reconnaissance organizations of the armed forces or the national guard. These entities will be subject to broader licensing requirements of new EAR section 744.22 (the MIEU rule). Other government intelligence or reconnaissance organizations that are not part of the armed services or national guard will, however, remain subject to the controls of EAR section 744.21 (the MEU rule).

B. Identification of “Military End Users”

On December 23, 2020, BIS **published** in a new EAR supplement¹¹ a list of entities it had determined were “military end users.” The “first tranche” of MEUs consists of 57 entities in China and 45 in Russia. Exports, reexports, and transfers to listed MEUs of certain items¹² subject to the EAR require a license. BIS’s creation of a specific list of MEUs does not remove the obligation to determine whether one has knowledge that an unlisted end user in China (or Russia or Venezuela) is an MEU when companies are exporting items subject to the MEU rule.

C. Government Guidance

BIS has published online **FAQs** about the MEU rule. The Commerce Department also issued a **press release** describing the new MEU List.

III. Chinese “Military-Intelligence End Users” (MIEUs) – Summary of Prohibitions, the Affected Entities, and Request for Comments

A. Prohibitions

On January 15, 2021, BIS **published** an interim final rule imposing controls on specific activities by U.S. persons in connection with “military-intelligence end uses” and “military-intelligence end users.” The MIEU rule becomes effective on March 16, 2021. BIS published the rule in response to a requirement of the Export Control Reform Act of 2018 to impose controls on U.S. person activities involving foreign military-intelligence services.¹³

These end use controls will be in addition to the existing EAR controls on U.S. person activities involving specific nuclear explosive devices, chemical or biological weapons, and maritime nuclear projects, which the new rule will also expand when it takes effect.¹⁴ Specifically, unless subject to the license requirements of another U.S. government agency, U.S. persons may not “support” a “military-intelligence end use” or a “military-intelligence end user” in China or one of the other listed countries without a BIS license. “Support” will mean:

- Shipping or transmitting from one foreign country to another foreign country any item not subject to the EAR when there is knowledge that it will be used in or by any of the prohibited end uses or end users described in the amended section 744.6;
- Transferring (in-country) any item not subject to the EAR when there is knowledge that it will be used in or by any of the end uses or end users described in the amended section 744.6;
- Facilitating such shipment, transmission, or transfers; or
- Performing any contract, service, or employment with knowledge that it may assist or benefit any of the end uses or end users described in the revised section 744.6, including, but not limited to: ordering, buying, removing, concealing, storing, using, selling, loaning, disposing, servicing, financing, transporting, freight forwarding, or conducting negotiations in furtherance of.¹⁵

In addition, no U.S. or foreign person may export, reexport, or transfer (in-country) any item subject to the EAR, whether identified on the Commerce Control List or an EAR99 item, if there is “knowledge” that the item is intended for a “military-intelligence end use” or a “military-intelligence end user” in China or one of the other listed countries.¹⁶

A license is also required under the new rules if BIS informs a party that an activity, export, reexport, or transfer (in-country) implicates one of the new “military-intelligence end use” or “military-intelligence end user” rules.¹⁷ The new rules leave open the possibility that BIS will create a new list of “military-intelligence end users.”

B. Identification of “Military-Intelligence End Users”

“Military-intelligence end user” means “any intelligence or reconnaissance organization of the armed services (army, navy, marine, air force, or coast guard); or national guard.”¹⁸ Thus, MIEUs are a subset of the “government intelligence and reconnaissance organizations” already included in the definition of “military end users” in section 744.21. The new rule identifies examples of “military-intelligence end users” in the countries at issue. For China, the identified example is the Intelligence Bureau of the Joint Staff Department.

C. Request for Comments

BIS has requested comments on the rule by March 1, 2021.

IV. Chinese Entities on the Entity List – Summary of Prohibitions, the Affected Entities, and Government Guidance

A. Prohibitions

A license is required to export, reexport, or transfer any item “subject to the EAR” when an entity that is listed on the Entity List is a party to the transaction.¹⁹ “Items” are commodities, software, and technology. Providing support for or services related to such items or to the entity is not within the scope of the Entity List prohibitions. For all but Huawei-related shipments, items are “subject to the EAR” when they are (i) U.S.-origin; (ii) in the United States, regardless of origin; (iii) foreign origin and containing more than a *de minimis* amount of controlled U.S. content; or (iv) foreign origin and the direct product of specific technology or software controlled for national security reasons.²⁰ Under new jurisdictional rules that became effective on **August 17, 2020**, foreign-made items outside the United States that are not otherwise subject to the EAR will be subject to the EAR if a Huawei entity is involved in the transaction and the item is developed or produced from certain types of U.S. software or technology, or if the item is produced or tested by certain types of equipment or tools that are the direct product of specific types of U.S. technology or software.

Until August 17, 2020, the Entity List rules prohibited exports, reexports, and transfers of items subject to the EAR “to” a listed entity. BIS **changed the scope** of the rules so that they apply to exports, reexports, and transfers of items subject to the EAR to anyone if a listed entity is a party to the transaction, such as a purchaser, intermediate consignee, ultimate consignee, or end user. Thus, if a listed entity is the purchaser of an item exported, exports to unlisted entities are still subject to Entity List-related license obligations, even if the listed entity never receives or takes possession of the item.

B. Identification of Companies to Be Added to the Entity List

The standard for adding an entity to the Entity List is whether “there is reasonable cause to believe, based on specific and articulable facts, that the entity has been involved, is involved, or poses a significant risk of being or becoming involved in activities that are contrary to the national security or foreign policy interests of the United States.”²¹ The EAR and Entity List actions over the years indicate that many different activities can lead to a company’s addition to the Entity List.²² As evidenced by recent BIS actions, this includes Chinese companies conducting activities with entities in **China’s military-industrial complex**, supporting China’s human rights abuses, attempting to acquire U.S.-origin items in **support of China’s military**, and having ties to China’s efforts to assert unlawful maritime claims **in the South China Sea**.

C. Government Guidance

BIS’s website has **several links** that describe the **Entity List** and the **Huawei-specific** rules. It also contains **guidance** and FAQs on how to determine whether an item is subject to the EAR and how to apply the related ***de minimis*** and **direct product** rules.

V. Conclusion and Commentary

As companies conduct and pursue business opportunities in China, it will be important to understand the distinctions between and among the various lists in order to properly

navigate compliance requirements. Examples of the many differences among the CCMC, MEU, MIEU, and Entity List controls include:

- The CCMC restrictions are not equivalent to SDN designations that—unlike the CCMC restrictions—broadly prohibit transactions with and block any associated property interests of SDNs.
- The CCMC restrictions do not impose controls on the export of any item to a CCMC. Rather, they restrict U.S. person investments in a CCMC’s publicly traded securities, securities that are derivative of, or are designed to provide investment exposure to such securities.
- The CCMC restrictions allow U.S. persons to divest their holdings in a CCMC within one year of it being publicly listed as a CCMC. The MEU, MIEU, and Entity List rules have few exceptions.
- Being identified as a CCMC does not *per se* mean that the entity is a MEU or MIEU, or on the Entity List. Indeed, no CCMC entities are currently on BIS’s MEU List, but that could change if BIS adds CCMCs to its MEU List or the Defense or Treasury Departments add MEUs to the list of CCMCs. Although some companies are on both the CCMC and the Entity List and others could be added later, most companies are not on both lists. Moreover, a company is not on both lists unless specifically added to each list.
- The standards for being added to the CCMC list, the MEU list, the MIEU list, and the Entity List are different. Entities owned or controlled by the Chinese government or a Chinese military entity can be added to the CCMC list. Entities that support military end uses can be added to the MEU list. Entities that are an intelligence or reconnaissance organization of an armed service can be added to the MIEU list. Entities that engage in acts contrary to U.S. national security and foreign policy interests can be added to the Entity List.
- Although the lists have separate purposes or origins, being listed as a CCMC is a “red flag” that the entity might satisfy the definition of a MEU, which would warrant additional diligence for an exporter of a covered item to determine whether the exporter has “knowledge” that the entity is a MEU, even though it is not identified on the MEU list. If no such knowledge exists, then the MEU license obligations do not apply to exports to CCMCs. Being on the CCMC list, however, is not a “red flag” that the entity is on the MIEU list or the Entity List.
- The MEU rules only apply to exports, reexports, and transfers of covered items (i.e., specific items subject to the EAR that are identified in Supplement No. 2 to Part 744 of the EAR). The MIEU rules apply to services in support of MIEUs, even if the items are not subject to the EAR. The MIEU rules also apply to all items that are subject to the EAR, regardless of whether the items are identified in Supplement No 2. The Entity List rules apply to all items subject to the EAR, but some items not normally subject to the EAR are subject to the EAR if a Huawei entity is involved. The MEU List and the Entity List rules do not apply to services in support of any type of item or activity, only to the export, reexport, or transfer of items.
- Exports to companies that are not on the Entity List can be subject to the Entity List prohibitions if an Entity List entity is a party to the transaction, such as a purchaser. Exports to unlisted companies outside of China, Russia, or Venezuela when an MEU is a party to the transaction, however, do not create a license requirement under the MEU rules.

As evidenced by the foregoing examples, the rules are complex and require separate analyses when conducting compliance reviews of potential transactions. At a minimum, companies that do business in China and with Chinese entities will need to consider updating their internal compliance programs, particularly their end use and end user screening for exports and other transactions, to address these additional restrictions. Companies may want to consider creating compliance guidance that clarifies the differences between CCMCs, MEUs, MIEUs, ELs, UVLs, DPLs, and SDNs, and providing such guidance and associated training to those in the company that potentially interact with China (and the other countries affected by the new rules) in order to ensure compliance.

Companies should also monitor for further modifications to these measures as well as other pending regulatory actions—such as **new rules** for information and communications technology services (ICTS)—that may require updating internal compliance programs.

¹ This alert focuses on the evolving prohibitions pertaining to China. There have been equally complex developments regarding the controls and sanctions involving entities in Russia, Venezuela, and comprehensively embargoed countries that will be addressed separately.

² Section 4(e) of EO 13959, as amended.

³ Section 4(a) of EO 13959, as amended (referencing Section 1237(b)(4)(B), as amended, of the FY 1999 National Defense Authorization Act (P.L. 105-261) (codified at 50 U.S.C. § 1701 note)).

⁴ *Id.*

⁵ *Id.* at § 4(b).

⁶ 15 C.F.R. §§ 744.21(a)-(b).

⁷ *Id.* at § 744.21(b).

⁸ *Id.* at § 772.1 (defining “knowledge” to include awareness of a high probability of a circumstance’s existence or future occurrence).

⁹ *Id.* at § 744.21(f).

¹⁰ *Id.* at § 744.21(g).

¹¹ *Id.* at Part 744, Supplement Number 7 (‘Military End-User’ (MEU) List).

¹² *Id.* at Supplement Number 2 (List of Items Subject to the Military End-Use or End User License Requirements of § 744.21).

¹³ 50 U.S.C. §§ 4812(a)(2)(F), 4813(d), and 4813(a)(16).

¹⁴ 15 C.F.R. § 744.6.

¹⁵ To be codified at 15 C.F.R. § 744.6(b)(6) effective March 16, 2021.

¹⁶ To be codified at 15 C.F.R. § 744.22(a) effective March 16, 2021.

¹⁷ To be codified at 15 C.F.R. §§ 744.6(c) and 744.22(b) effective March 16, 2021.

¹⁸ To be codified at 15 C.F.R. § 744.22(f)(2) effective March 16, 2021.

¹⁹ 15 C.F.R. § 744.11(a).

²⁰ *Id.* at § 734.3(a).

²¹ *Id.* at § 744.11(b).

²² See *id.*

akingump.com