

## BIS Announces Significant Changes to How It Administers Unverified and Entity Lists

October 11, 2022

### Key Points:

- BIS amended the EAR to add a new criterion for placing a party on the Entity List: a sustained lack of cooperation by the host government to schedule and facilitate the completion of an end-use check of an entity identified on the Unverified List.
- In a policy memorandum that accompanied the new rule, BIS stated that it will add to the Unverified List any party that fails to complete a requested end-use check within 60 days of the request, and that it will initiate the interagency process for adding to the Entity List any party that fails to complete the end-use check within 60 days following the party's addition to the Unverified List if these failures are the result of a lack of cooperation by the host government.
- The new rule also added 31 persons to, and removed nine persons from, the Unverified List, all in China, and the policy memorandum noted that the second 60-day escalation clock started the day of the issuance of the memorandum (October 7, 2022) for parties already on the Unverified List.

On October 7, 2022, the Commerce Department's Bureau of Industry and Security (BIS) **amended** the Export Administration Regulation (EAR) to revise the Unverified List and to implement changes to the criteria for determining whether a party may be added to the Entity List. That same day, the BIS Assistant Secretary for Export Enforcement issued a **memorandum** entitled "Addressing Foreign Government Prevention of End-Use Checks." These two documents are intended to work together to implement a more aggressive response to the lack of cooperation in administering end-use checks of foreign parties by the U.S. government related to the implementation of U.S. controls.

### The Unverified List

Under Section 744.15 of the EAR, foreign persons who are parties to an export, reexport and transfer (in-country) subject to the EAR may be added to the Unverified List if BIS or federal officials acting on BIS's behalf cannot verify the bona fides (i.e., legitimacy and reliability relating to the end use and end user of items subject to the EAR) of such person because an end-use check cannot be completed satisfactorily for

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reasons outside of the U.S. government's control. The EAR identifies three examples of reasons that would meet this standard, including a lack of cooperation by the host government authority that prevents an end-use check from being conducted. The rules applicable to the Unverified List require a "UVL statement" from the listed party prior to proceeding with any export, reexport or transfer (in-country) subject to the EAR involving a person listed on the Unverified List as a party described in Section 748.5 of the EAR. Exports, reexports and transfers (in-country) involving a party on the Unverified List are not eligible for license exceptions for which they might otherwise be eligible and must meet certain Electronic Export Information reporting requirements.

## The Entity List

The Entity List (Supplement No. 4 to EAR to Part 744) identifies 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. In addition to the license requirements for items specified on the Commerce Control List (CCL), you may not, without a license from BIS, export, reexport or transfer (in-country) any items included in the License Requirement column of an entity's entry on the Entity List when that entity is a party to a transaction as described in Section 748.5 of the EAR. The specific license requirement and license application review policy for each listed entity is identified in the license requirement column on the Entity List.

BIS made two recent updates to the Entity List in September. First, on **September 16**, BIS expanded its authority by adding a new category of "is informed" notices. An "is informed" notice is a notification to specific persons of the requirement for a license for certain activities described in the EAR. The new authority allows BIS to provide such notices where there is "reasonable cause to believe, based on specific and articulable facts," that an 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."

This new type of "is informed" notice was intended—like the October 7 rule—to provide another pathway for BIS to impose immediate export licensing requirements on a party without going through the formal interagency process for adding the party to the Entity List. The new type of notice may be issued in writing or orally—and, if orally, will be followed in writing within two working days of the oral notice being provided. The specific notice will also include the specific license requirement, limitations on use of license exceptions and license application review policy. BIS stated that entities that are the subject of "is informed" letters may be formally added to the Entity List through the interagency process so as to impose licensing requirements on all exporters, reexporters and transferors engaged in transactions in which the entity is a party and create an equal playing ground between the recipient of the "is informed" letter and all others.

Second, on September 9, BIS **added** a carve-out to the Entity List licensing requirements for standards-related activities. Standards-related activities are defined in the EAR to include the development, adoption or application of a standard with the intent that the resulting standard will be "published," as defined in the EAR. The rule identified the types of items that qualify for the carve out: EAR99 items, items controlled only for anti-terrorism (AT) reasons, and certain encryption items.

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## The New Rule – Revising Entity List Processes to Encourage Foreign Government Cooperation with End-Use Checks

The October 7 amendment to the EAR changed the rules in Section 744.11 related to managing the Entity List by adding a new activity in its illustrative list of examples that could result in the listing of a party on the Entity List:

A sustained lack of cooperation by the host government to schedule and facilitate the completion of an end-use check of entities identified on the Unverified List pursuant to § 744.15, resulting in sufficient concern such that the End-User Review Committee believes that prior review of exports, reexports, or transfers (in-country) involving the entity and the possible imposition of license conditions or license denial enhance BIS's ability to prevent violations of the EAR.

Thus, for the first time, the EAR is explicitly linking the lack of cooperation by the host government in conducting an Unverified List end-use check to the addition of a party to the Entity List. This means that, and as the text of the rule makes pointedly clear, a company may be added to the Entity List “through certain circumstances that may be outside of its own control.” However, as BIS made clear in promulgating the rule, any additions to the Entity List will remain consistent with procedures described in Supplement No. 5 to Part 744 of the EAR, including review by the End-User Review Committee, made up of representatives of the Departments of Commerce, State, Defense, Energy and, where appropriate, Treasury, of any decision regarding additions to, removals from, or other modifications to the Entity List.

The new rule added 31 persons to, and removed nine persons from, the Unverified List. The new rule did not make any changes to Section 744.15, the portion of the EAR that governs the process and requirements related to the Unverified List.

## The Related New Policy – Quickly Moving Parties to the Entity List If Their Governments Do Not Cooperate with End-Use Checks

On the same day as the publication of the new rule, the BIS Assistant Secretary for Export Enforcement issued a memorandum entitled “Addressing Foreign Government Prevention of End-Use Checks.” Under this new policy, there will be a two-step process by which BIS will, following its inability to conduct an end-use check within 60 days of a request, begin the interagency process of adding a company to the Unverified List. Then, following another 60 days after the company having been added to the Unverified List (if the requested end-use check has still not been conducted), begin the interagency process of adding the company to the Entity List.

The policy does not explain how the U.S. government will notify parties that they are being listed on the Unverified List because of foreign government non-cooperation or whether it is for another reason. For example, it is not clear whether all or some of the 31 newly listed parties are being added to the Unverified List because their foreign governments did not cooperate with end-use checks. Instead, BIS merely stated that these parties were being added “on the basis that BIS was unable to verify their bona fides because an end-use check could not be completed satisfactorily for reasons outside the U.S. Government's control” and “pursuant to § 744.15(c).” Section 744.15(c) identifies several different potential reasons for adding a party to the Unverified List, including ones that do not involve non-cooperation by a foreign government. As a consequence, it is not clear which of the parties were added to, or

previously on, the Unverified List because of foreign government non-cooperation such that the second “60-day escalation clock” for Entity List designation has been “initiated immediately” pursuant to the new policy.

## Conclusion

Foreign companies that receive a request for an end-use check should act quickly to arrange for the check within 60 days or face the potential of being placed on the Unverified List. If a foreign government is preventing such a check from occurring, it will quickly jeopardize the ability of the foreign company to obtain access to U.S. commodities, software and technology. The process is now structured, under the new rule and policy, to allow companies to go from completely unlisted to the Entity List solely on the basis of not completing an end-use check shortly after four months of receiving a request from the U.S. government. The new policy illustrates a focus on using these regulatory tools to move more companies into this category.

U.S. and foreign companies engaged in activities subject to the EAR should now consider how to obtain information from foreign business partners regarding BIS end-user check requests—particularly in China in view of the focus of the U.S. government’s policy interest and the signaling in this rule in particular of that focus with the addition of exclusively Chinese parties to the Unverified List. [The new rule removed 9 Chinese companies from the UVL list, many in Jiangsu and Wuxi provinces in China. While 2 of the 9 companies were added to the UVL list in [April 2019](#), 7 were added in [February 2022](#). These removals suggest that with cooperation from the company and the Chinese government on the end user check, companies added to the UVL list could be removed within a relatively short period of time.] On the other hand, the failure of foreign companies to act on these requests, even as a result of their government’s lack of cooperation, can have dire consequences for companies reliant on them as suppliers or customers. To the extent companies are not aware of requests made to their business partners, the new rule and policy will not provide much time or notice to adjust given BIS’s articulation of its new standard.

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