

INTERNATIONAL BUSINESS ALERT

JULY 27, 2020

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Can an entity be removed from the Entity List?

As the U.S. tightens up its export control over China and other countries, the Department of Commerce's Bureau of Industry and Security (BIS) recently added many entities from China and other countries to their Entity List. Companies being put on the Entity List are subject to strict license requirements for export, re-export and transfer (in country) of certain U.S. goods or technology subject to the Export Administration Regulations (EAR), which may result in severe supply chain interruption for such companies.

For entities placed on the Entity List, the question becomes: is there any legal recourse available? The answer is yes, although requesting removal may be an uphill battle.

Should an entity request removal?

The first question to ask is whether an entity should request removal from the Entity List. In order to answer that question, it is necessary to first analyze the reason why the entity was placed on the Entity List in the first place. An entity is added to the Entity List if "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." 15 C.F.R. § 744.11(b). Therefore, prior to submitting the request for removal, an entity should conduct its own due diligence and address the following:

1. What are the national security or foreign policy interests involved?
2. Does the entity pose any risk to such interests?
3. Is there a reasonable basis for the initial placement of the entity on the Entity List?

As noted above, an entity should only request removal from the Entity List *if it has reasonable grounds to believe it can provide satisfactory answers* to the above questions. If an entity is able to do so and decides to request removal after its own evaluation, it should gather information and evidence in order to prepare the request for removal.

Administrative process for removal from the Entity List

While it is generally known that the BIS oversees Commerce's "entity list" administratively, it is the End-User Review Committee (ERC) that actually manages list modifications. The ERC is composed of representatives of the Departments of Commerce (chair), State, Defense, Energy and, where appropriate, Treasury. The ERC makes 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. [78 Fed. Reg. 3317](#) (Jan. 16, 2013).

A request for removal from the Entity List shall be in writing and be mailed to: Chair, End-User Review Committee, Bureau of Industry and Security, U.S. Department of Commerce, 14th Street and Pennsylvania Avenue, NW., Room 3886 Washington, DC 20230. 15 C.F.R. § 744.16.

According to Supplement No. 5 to 15 C.F.R. Part 744, the chairperson of the ERC then forwards a copy of the removal request to all other members of the ERC. The members are then directed to review and vote on all such requests. All decisions to remove or modify the Entity List must be made by unanimous vote by the ERC. While Supplement No. 5 is somewhat vague on the criteria for removal, the Assistant Secretary for Export Administration explained in the original notice of adoption of the final rule concerning removal of persons from the Entity List that the EAR looked favorably upon (1) cooperation with the U.S. government, and (2) assurance of future compliance with EAR as important factors. [78 Fed. Reg. 3317](#).

Written removal requests should set forth detailed reasons why the entity should be removed from the Entity List. Such reasons should include information related to the two criteria identified above. For example, an entity requesting removal should consider proactively implementing and developing export compliance programs and consider providing BIS with assurances of future compliance with U.S. export laws. Additionally, an entity requesting removal might consider offering to cooperate and/or provide relevant information to the U.S. government regarding other persons of interest. Lastly, if the entity believes that it was placed on the Entity List in error, it should make compelling arguments, supported by evidence, demonstrating why the U.S. government indeed made a mistake.

The ERC is required to review and provide a written decision within 30 calendar days of receiving a request for removal. Decisions made by the ERC are final and do not allow for administrative appeals. 15 C.F.R. § 744.16(c). In addition, the submission and the ERC's decision are not made available to the public due to the nature of the information reviewed by the ERC.

Judicial review

If the ERC denies the removal request and administrative remedies are deemed exhausted, the listed individuals and entities can subsequently file a civil action with a U.S. district court seeking judicial review of the BIS's actions under the Administrative Procedure Act. In such an action, sanctioned individuals or entities may consider arguing that the BIS's decision should be reversed on grounds that it was either arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. However, it is worth noting that most courts will generally offer deferential treatment to an administrative agency's decision. Companies impacted are wise to be aware that an agency's decision cannot be overturned unless that decision violates the law or otherwise is deemed to be arbitrary or capricious.

For more information, contact [Yuanyou Yang](#) or any member of Porter Wright's [International Business & Trade](#) practice group.

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