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International Trade

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BIS ADOPTS LONG-AWAITED "AFFILIATE RULE"

The U.S. Department of Commerce's Bureau of Industry and Security ("BIS") published an interim final rule on September 29, 2025, adopting an "Affiliate Rule" under the Export Administration Regulations ("EAR") based on, and closely resembling, the "50 Percent Rule" issued by the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC"). Effective immediately, the Affiliate Rule applies Entity List, Military End-User ("MEU") List, and certain Specially Designated Nationals ("SDN") List restrictions to unlisted foreign subsidiaries/affiliates owned 50 percent or greater by such restricted parties.

BIS is accepting comments on the Affiliate Rule through October 29 and, in response to comments from interested or affected parties, could further revise the Affiliate Rule or issue guidance.

The Affiliate Rule will add significant layers of complexity to EAR compliance for exporters, particularly those exposed to China, where many restricted parties are present.

BACKGROUND

In February 2008, OFAC introduced the 50 Percent Rule, expanding the "blocking" restrictions associated with SDNs to entities owned 50 percent or greater, directly or indirectly, by such blocked persons. OFAC expanded its application of the 50 Percent Rule in 2014 to include entities owned 50 percent or greater, *individually or in the aggregate*, directly or indirectly, by SDNs. The goal of the 50 Percent Rule was to prevent the diversion of export-controlled items while reducing administrative burdens on OFAC.

In contrast, BIS historically has used a "legally distinct" standard in administering its restricted party lists, formally applying restrictions only to listed entities. With regard to unlisted subsidiaries, BIS previously cautioned exporters to review and resolve red flags to confirm that such subsidiary will not divert items to its export-restricted parent, without automatically applying restrictions to the subsidiary as a matter of law.

The new Affiliate Rule sees BIS align its diversion risk policies with OFAC, and automatically apply restrictions to entities majority-owned by parties designated on the Entity List, MEU List, and/or SDN List (under certain OFAC sanctions programs).

DEVELOPMENTS

New BIS Equivalent of "50 Percent" Rule

As described above, the Affiliate Rule expands the reach of Entity List, MEU List, and certain SDN List restrictions by applying such restrictions to foreign unlisted affiliates/subsidiaries owned 50 percent or greater, individually or in the aggregate, directly or indirectly, by one or more companies blocked under such programs. The Affiliate rule ***does not*** apply to U.S. affiliates/subsidiaries.

"Most Restrictive" Standard

Notably, if an unlisted subsidiary/affiliate is owned 50 percent or more by a combination of entities subject to Entity List, MEU List, or SDN List restrictions, the Affiliate Rule provides that the "***most restrictive***" license conditions (i.e., license requirements, exception eligibility, and review policy) applicable to any of the owners flow down to the unlisted subsidiary/affiliate.

Implications Under Foreign Direct Product ("FDP") Rules

Certain FDP rules in the EAR apply restrictions to foreign-made items that are the "direct product" of certain technology or software subject to the EAR for purposes of exports to certain end users on the Entity List.

Under the Affiliate Rule, exports to unlisted foreign end users owned 50 percent or greater by relevant Entity List parties will now be subject to one of the FDP rules if other conditions are met. Notably, as under the "most restrictive" standard described above, where an end user is owned 50 percent or more by multiple Entity List parties that are subject to different FDP rules, each of the FDP rules applicable to the owners in turn will apply to the unlisted entity they own.

Requirement to Resolve Red Flags / Confirm Ownership Percentage(s)

The interim final rule creates a new Red Flag 29, establishing that when there is any degree of ownership in an unlisted subsidiary/affiliate by a listed entity, the exporter has an "*affirmative duty to determine the percentage of ownership*" of such listed entity or, in the event that the exporter cannot do so, it must obtain a license from BIS or use an applicable license exception.

License Application Procedures

The interim final rule creates new license application and submission procedures for transactions involving exports, reexports, or transfers to foreign affiliates/subsidiaries covered by the Affiliate Rule.

- If an applicant has confirmed that a foreign party is covered by the Affiliate Rule, the applicant "*must specify the names of the listed parties or parties that own an aggregate 50 percent or more, directly or indirectly, individually or in aggregate, of that entity(ies) listed on the license application, including identifying the percentage of ownership by listed parties and identifying the method that the applicant used to make that determination*."

- If an applicant cannot confirm the ownership percentage of the foreign affiliate/subsidiary, the applicant "*must specify the names of the listed party or parties that own that entity and explain the due diligence conducted to determine the percentage of ownership, including providing an explanation for why percentage of ownership was not able to be determined*."

Temporary General License

To assist with compliance, the interim final rule provides for a Temporary General License ("TGL") authorizing transactions with certain impacted entities until either November 28, 2025 or December 1, 2025. (The rule refers to both dates, so presumably will BIS clarify this in due course.) Specifically, the TGL authorizes transactions with impacted entities in BIS Country Groups A:5 and A:6, and also with impacted entities outside of those countries that are joint ventures with non-listed, non-restricted entities headquartered in the United States or Country Groups A:5 or A:6.

KEY TAKEAWAYS

- The Affiliate Rule will present significant new challenges for export compliance, particularly for companies involved in or exposed to China-related business, as many companies in China are designated on the Entity List, MEU List, and SDN List and often own unlisted companies through opaque ownership structures.

- It is important for companies to conduct reasonably tailored due diligence, incorporate terms and conditions in contracts regarding trade compliance, and consider when and how to deploy enhanced diligence processes such as questionnaires, certifications, discreet in-country inquiries, and audit rights.

- BIS emphasizes that "*the [publicly available] Consolidated Screening List ("CSL") will no longer comprise an exhaustive listing of foreign entities subject to Entity List license requirements*" and recommends exporters consider the use of private sector screening resources.

- Exporters should exercise increased caution when contracting with foreign parties not covered by the Affiliate Rule (*i.e.*, not 50 percent or more owned by a blocked company) if such foreign party has "*significant minority ownership by, or other significant ties to (e.g., overlapping board membership or other indicia of control)*" entities subject to Entity List, MEU List, or SDN List restrictions.

- Exporters can be held liable for violations of the Affiliate Rule on a strict liability basis.

- BIS has cautioned that financial institutions and freight forwarders should be aware of related compliance obligations arising from the interim final rule.

- BIS has updated its Entity List Frequently Asked Questions ("FAQs") to align with the new Affiliate Rule. Exporters are encouraged to refer to the FAQs.

For more information on export control developments, please contact Anthony Rapa, Rachel D. Evans, or another member of our International Trade group.

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