Notes

Contrary to National Security: The Rise of the Entity List in U.S. Policy Towards China and Its Role in the National Security Administrative State

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Among the myriad policies the United States administers to address national security challenges posed by China, few have drawn as much attention and ire in recent years as the Entity List. The Entity List is a list of foreign parties, including corporations, and universities, prohibited—on national security grounds—from receiving certain U.S. technology, such as high-performance computers and surveillance equipment. The list has acutely impacted U.S.-China relations, restricting U.S. exporters' access to China's massive market and leading to notable legal contests, including Chinese entities tapping U.S. law firms to seek removal from the list and U.S. companies asserting the list violates a due process right to conduct business overseas.

Notwithstanding these concerns, the Entity List remains poorly understood. Its governing regulations are hard to navigate. Further, while the list has been active since 1997, it is now far more expansive and rigorously enforced than at its founding, with 180 Chinese entities added in 2020 alone. Against this backdrop,

this Note outlines how the Entity List developed into a key tool in U.S. strategy to address national security concerns regarding China. It argues that the list marks an effective strategy within a broader trend whereby administrative agencies routinely issue national security-justified decisions targeting entities. But challenges remain, including minimal administrative recourse for affected parties and negligible review by the federal judiciary. Addressing these, this Note proposes reforms to promote an understanding of how the list works, minimize litigation, and reduce negative trade impacts.

INTRODUCTION 455
I. RETOOLING THE ENTITY LIST TO ADDRESS PRC MILITARY-CIVIL FUSION 461
A. PRC Military-Civil Fusion Presents Unique Challenges 462
B. The Entity List Responds to PRC Military-Civil Fusion 464
1. Overview of the Entity List 465
2. Expanded Bases for Entity List Additions: The Pivotal 2008 Final Rule 469
3. Entity List Additions Respond Effectively to National Security Threats 472
C. Congress' Passage of the ECRA Expands BIS Authority to Investigate Violations 475
II. SITUATING THE ENTITY LIST WITHIN ADMINISTRATIVE NATIONAL SECURITY 477
A. Overview of "Administrative National Security" 477
1. The Entity List and Individualization 478
2. Coordinated Adjudication of Entity List Additions .. 481
3. Procedural Safeguards: Removal Proceedings and Appeals 484
4. Assessing the Entity List's Administrative Safeguards 489
B. Entity List and The Role of the Courts 491
1. Seeking Preliminary Injunctions for Entity List Removal 492

2. Due Process and *Ultra Vires* Claims to Contest Entity List Violations 495
3. The Limits of Discovery: Qin as an Example 497
III. PROPOSALS FOR REFORM TO THE ENTITY LIST 499
A. Strengthening the Judiciary's Role: Heightened Review of Entity List Adjudications 500
B. Proposing Procedural Modifications for the Entity List's Administrative Process 502
1. Ensuring Specific and Articulable Facts for List Additions 502
2. Increasing Transparency in the Entity List Removal Process 504
3. Amplifying the Validated End-User List 505
CONCLUSION 506

INTRODUCTION

In August 2015, Shuren Qin, a Chinese national residing in Wellesley, Massachusetts, requested a price quotation from a Mississippi company for hydrophones, a technology that monitors underwater sounds, including submarine movements.[1] Qin,[2] who ten years earlier had founded LinkOcean Technologies—a firm based in Qingdao, People's Republic of China (PRC), that imports underwater technologies—told the supplier that the hydrophones were intended for Xi'an Shiyou University[3] and would be used to study marine life.[4] The supplier hesitated, expressing concern that the hydrophones were destined

1. First Superseding Indictment ¶¶ 16, 33, United States v. Qin, No. 18-CR-10205 (D. Mass. Oct. 30, 2018), 2018 WL 10152123 [hereinafter First Superseding Indictment]; *see also* Matthew Braga, *Listening In: The Navy Is Tracking Ocean Sounds Collected by Scientists*, ATLANTIC (Aug. 18, 2014), https://www.theatlantic.com/technology/archive/2014/08/listening-in-the-navy-is-tracking-ocean-sounds-collected-by-scientists/378630 [https://perma.cc/5KVE-EGNN].

2. In Chinese, the defendant's name is "Qin Shuren"—since the government, in its indictment, anglified his name such that his family name "Qin" appeared as his last name in the First Superseding Indictment, this Note will continue to refer to him as "Qin" and the case name will refer to his last name only, see *supra* note 1.

3. First Superseding Indictment, *supra* note 1, ¶ 33.

4. *Id.* ¶¶ 4, 25.

not for Xi'an Shiyou, but another university, Northwestern Polytechnical University (NWPU).[5] The distinction is key: NWPU is on the Entity List, [6] a list of parties prohibited from receiving certain U.S.-origin items because they have engaged in activities contrary to U.S. national security, such as supporting the Chinese military.[7] Thus, if the supplier sold the hydrophones to Qin, and Qin sold to NWPU, the supplier would violate U.S. law. But Qin insisted that NWPU was not in the picture, and he obtained sixty hydrophones, including a shipment sent via DHL.[8]

Qin's statements were false: After LinkOcean obtained the hydrophones, it delivered them to NWPU.[9] Subsequently, Qin contacted undercover agents with Homeland Security Investigations—who posed as employees of U.S. corporation Riptide Autonomous Solutions[10]—and sought to buy other underwater technology, including autonomous underwater vehicles.[11] Qin ultimately pled guilty to smuggling $100,000 worth of underwater technology to NWPU.[12]

Qin is emblematic of a broader trend: Over the past decade, the United States has drastically expanded the scope and enforcement of the Entity List to ensure institutions such as NWPU do not obtain technology—including artificial intelligence and surveillance technology—sought by the PRC government.[13] This expansion has only increased of late: In October 2022, the United States announced new export controls on advanced computing integrated circuits, expanding restrictions on twenty-eight entities in the PRC.[14] In this context, the

5. *Id.* ¶ 33.

6. Entity List: Revisions and Additions, 66 Fed. Reg. 24264, 24265 (May 14, 2001) (adding NWPU to the list).

7. 15 C.F.R. § 744 (2021); Emma Bingham & Kara Greenberg, *What is the U.S. Entity List?*, WIRE CHINA (May 31, 2021), https://www.thewirechina.com/2020/05/31/what-is-the-u-s-entity-list/ [https://perma.cc/QR48-B84H].

8. First Superseding Indictment, *supra* note 1, ¶ 33.

9. *Id.*

10. United States v. Qin, No. 18-CR-10205, 2020 WL 7024650, at *2 (D. Mass. Nov. 30, 2020).

11. First Superseding Indictment, *supra* note 1, ¶¶ 1–26.

12. Press Release, U.S. Att'y's Off. Dist. Mass., Chinese National Sentenced for Illegal Exports to Northwestern Polytechnical University, U.S. Dep't of Just. (Sept. 9, 2021), https://www.justice.gov/usao-ma/pr/chinese-national-sentenced-illegal-exports-northwestern-polytechnical-university [https://perma.cc/Y7WF-3KZE].

13. *See generally* BUREAU OF INDUS. & SEC., DON'T LET THIS HAPPEN TO YOU: ACTUAL INVESTIGATIONS OF EXPORT CONTROL AND ANTIBOYCOTT VIOLATIONS (2020) [hereinafter BIS, DON'T LET THIS HAPPEN TO YOU].

14. Entity List, 87 Fed. Reg. 62186, 62186 (Oct. 13, 2022).

Entity List aims to prevent the use of U.S. technology in collaborations between PRC universities, commercial sectors, and the PRC military—collaborations known as "PRC military-civil fusion."[15] This prominent role for the Entity List differs sharply from its comparatively humble origins. When the Department of Commerce first announced the list in 1997, it framed it as a supplementary tool to country-based controls[16] that would be focused on restricting access by entities in the Middle East to nuclear technology.[17] The list focused on a narrow set of especially dangerous (primarily nuclear) technologies,[18] and just a few entities were added annually.[19]

Not anymore. The Entity List, overseen by the Bureau of Industry and Security (BIS), a component of the Department of Commerce, has experienced a seismic transformation in its approach towards the PRC, generally to Congressional praise.[20] The transformation has taken myriad forms. One is sheer scope: The U.S. government announced the addition of 58 PRC entities in 2018, and 180 in 2020.[21] The additions continued in 2022, with the BIS announcing in August 2022 that it would add seven PRC aerospace corporations to the list, including China Aerospace Science and Technology Corporation and Zhuhai Orbital Control Systems,[22] primarily out of concern that these corporations could divert U.S. aerospace

15. *See infra* Section I.A.

16. Entity List, 62 Fed. Reg. 4910, 4910 (Feb. 3, 1997).

17. *See* Jeremy Ney, *United States Entity List: Limits on American Exports*, HARV. KENNEDY SCH. BELFER CTR. FOR SCI. & INT'L AFFS. (Feb. 2021), https://www.belfercenter.org/publication/united-states-entity-list-limits-american-exports [https://perma.cc/UP5X-JB59].

18. IAN F. FERGUSSON ET AL., CONG. RSCH. SERV., R46814, THE U.S. EXPORT CONTROL SYSTEM AND THE EXPORT CONTROL ACT OF 2018, 23 (2021).

19. For example, a 1997 Final Rule added a corporation in Pakistan well-known for its affiliations to nuclear development programs. Revisions to the Export Administration Regulations: Additions to Entity List: National Development Centre, Pakistan; and Indian Rare Earths, Ltd., India, 62 Fed. Reg. 35334, 35335 (June 30, 1997); Ney, *supra* note 17.

20. *See generally* Simon Lester, *BIS Nominees Testify at Senate Hearing*, CHINA TRADE MONITOR (Sept. 21, 2021), https://www.chinatrademonitor.com/bis-nominees-testify-at-senate-hearing/ [https://perma.cc/P9KT-YQBW]. Senator Pat Toomey stated: "In the face of China's drive for dominance in key tech sectors, BIS is as important as it's ever been . . . . BIS effectively has the power to reshape the supply chains of entire industries." *Id.*

21. *See* Ney, *supra* note 17.

22. Addition of Entities to the Entity List, 87 Fed. Reg. 51876, 51876–80 (Aug. 24, 2022).

technology to military applications.[23] Another notable shift is in the ambit of issues the list seeks to address. National security concerns have extended beyond military threats to include telecommunications companies like Huawei,[24] and the list has recently been employed to target entities such as the Academy of Military Medical Sciences, which was added for attempts to acquire biotechnology in service of "brain-control weaponry."[25] Another dimension is rigorous enforcement.[26] For example, California-based Dynatex International was fined for conspiracy to export semiconductor manufacturing equipment to Chengdu GaStone Technology Company, which is on the list, demonstrating that the United States, in its enforcement of the list, now actively seeks to identify export conspiracies *before* restricted items are exported to prohibited parties.[27] The list has underpinned U.S. geostrategic initiatives, restricting PRC companies involved in militarizing the South China Sea.[28]

This is not to say the PRC is the *sole* focus of the Entity List—far from it.[29] But its PRC focus suggests that the Entity List, nominally

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23. Press Release, Bureau of Indus. & Sec., Commerce Adds Seven Chinese Entities to Entity List for Supporting China's Military Modernization Efforts, U.S. Dep't of Com. (Aug. 23, 2022), https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3121-2022-08-23-press-release-seven-entity-list-additions/file [https://perma.cc/DHD5-WN2H] (Matthew Axelrod, Assistant Secretary of Commerce for Export Enforcement, asserted that enforcement of export controls "[can] prevent the diversion of sensitive technologies to the Chinese military-civil fusion program . . . .").

24. Addition of Entities to the Entity List, 84 Fed. Reg. 22961, 22961–62 (May 21, 2019) (adding Huawei and sixty-eight non-U.S. affiliates to the Entity List, after "[t]he [End-User Review Committee] . . . determined that there is reasonable cause to believe that Huawei Technologies . . . has been involved in activities . . . contrary to [U.S.] national security . . .").

25. Addition of Certain Entities to the Entity List and Revision of an Entry on the Entity List, 86 Fed. Reg. 71557, 71558 (Dec. 17, 2021).

26. *See* BIS, DON'T LET THIS HAPPEN TO YOU, *supra* note 13, at 10, 38.

27. *In re* Dynatex Int'l, Bureau of Indus. & Sec., (Aug. 16, 2021), https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2021/1323-e2676/file [https://perma.cc/6EZH-92QE].

28. *See infra* Section I.B.

29. The Entity List continues to be used to counter nuclear development projects, terrorist networks, and a range of actors acting contrary to U.S. interests. *See* 15 C.F.R. § 744 (Supp. 4 2022) (the complete list of listed entities). Further, since Russia's invasion of Ukraine, the BIS has imposed heightened requirements on military-end users in Russia and Belarus, including adding a case-by-case license review policy for exports of certain food and medicine to designated military-end users in those countries. *See* Export Administration Regulations: Revisions to Russia and Belarus Sanctions and Related Provisions; Other Revisions, Corrections, and Clarifications, 87 Fed. Reg. 34131, 34133 (June 6, 2022). The revisions address concerns that imports of food and medicine "may significantly contribute to the sustainment and reconstitution of Russian military forces engaged in combat in Ukraine." *Id.*

the same as when administered in 1997, has shifted substantially from its original mandate. The new role of the Entity List—which was concretized further in the fall of 2022, as the Biden administration sought to utilize export controls to ensure the United States maintains as "large of a lead as possible" with respect to critical technologies[30]—raises urgent complexities about the current and future role of the list within American export policy. These complexities stand at the nexus of national security, administrative law, and economic policy. As *Qin* shows, the PRC government has established collaborations with universities and corporations to obtain sensitive technology,[31] and the United States has responded by restricting such entities' access to U.S. exports, citing various national security concerns.[32] But new responsibilities offer new challenges. For example, as the number of listed PRC entities tops 400, the interagency committee that determines the addition of entities faces intricate decisions regarding what national security risks to address.[33] Compliance challenges, including for U.S. shipping companies which face a strict liability standard, are also increasing.[34] A related challenge is economic: U.S. companies, such as the Mississippi supplier in *Qin*, must be alert to mere transit points on the way to a listed entity.[35] U.S. corporations report lost trade because of such restrictions.[36] Meanwhile, PRC corporations, expressing

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30. *See* Jake Sullivan, Nat'l Sec. Advisor, Remarks at the Special Competitive Studies Project Global Emerging Technologies Summit (Sept. 16, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/16/remarks-by-national-security-advisor-jake-sullivan-at-the-special-competitive-studies-project-global-emerging-technologies-summit/ [https://perma.cc/8ELJ-7BYY]:

> On export controls, we have to revisit the longstanding premise of maintaining "relative" advantages over competitors in certain key technologies. We previously maintained a "sliding scale" approach that said we need to stay only a couple of generations ahead. That is not the strategic environment we are in today. Given the foundational nature of certain technologies, such as advanced logic and memory chips, we must maintain as large of a lead as possible.

31. First Superseding Indictment, *supra* note 1, ¶¶ 4–6; *see also infra* Section I.A.

32. *See, e.g.*, Addition of Certain Entities to the Entity List, 86 Fed. Reg. 33119, 33119 (June 24, 2021); *infra* Section I.A.

33. *See, e.g.*, Ellen Nakashima & Jeanne Whalen, *Key Security Agencies Split over Whether to Blacklist Former Huawei Smartphone Unit*, WASH. POST (Sept. 21, 2021, 7:00 PM), https://www.washingtonpost.com/national-security/huawei-honor-security-export/2021/09/19/6d49d27c-17ef-11ec-b976-f4a43b740aeb_story.html [https://perma.cc/KB3H-GQFA].

34. *See infra* Section II.B (discussing compliance challenges faced by shipping corporation FedEx).

35. First Superseding Indictment, *supra* note 1, ¶¶ 1–10.

36. *See generally USCBC: Export Control Fears Hindering Sales of U.S. Goods to China*, INSIDE TRADE (Aug. 6, 2021, 8:30 AM), https://insidetrade.com/daily-news/uscbc-

frustration at the list,[37] often seek domestic suppliers, cutting U.S. exporters out of their market.[38] Adding to the fray, the PRC has enacted—but not yet implemented—its *own* entity list to target corporations that comply with the U.S. regime.[39]

Against this backdrop, and in response to substantial confusion raised in litigation about the procedures governing additions to and enforcement of the list,[40] this Note seeks to clarify how the Entity List functions as an administrative tool to address U.S. policy towards the PRC. To do so, it outlines the list's technical operation and traces its evolution to two general shifts in U.S. foreign policy. One shift is the expansion of national security rationales to justify trade policy.[41] Another, perhaps more critical shift is the rise of what Professor Elena Chachko calls "administrative national security," or the robust use of executive agencies to address national security concerns through highly targeted, individualized measures.[42]

This Note asserts that the Entity List effectively implements constitutive aspects of administrative national security and marks, both in principle and practice, a useful response to PRC efforts to use

export-control-fears-hindering-sales-us-goods-china?destination=node/171933 [https://perma.cc/2793-U2AZ].

37. *Mei Zai Jiang 11 Jia zhongqi Lie Ru Shiti Qingdan Zhuanjia: Bei "La Hei" Hou Jiben Bu Keneng "Bian Bai"* (美再将 11 家中企列入实体清单 专家：被"拉黑"后基本不可能"变白") [*The United States Again Lists 11 Chinese Entities on the Entity List: Expert Says Being Blacklisted Is Irreversible*] SINA WEIBO (July 21, 2021, 8:12 PM), https://news.sina.cn/2020-07-21/detail-iivhvpwx6697428.d.html [https://perma.cc/YLA8-WRNN].

38. *See* Liza Lin, *Tech War with U.S. Turbocharges China's Chip-Development Resolve*, WALL ST. J. (Nov. 16, 2020, 10:50 AM), https://www.wsj.com/articles/tech-war-with-u-s-turbocharges-chinas-chip-development-resolve-11605541132 [https://perma.cc/PDZ3-Q8HU].

39. Shāng Wù Bu Líng Nián Dì 4 Hao Bù Kě Kào Shí Tǐ Qīng Dān Guī Dìng ("商务部令 2020 年第 4 号 不可靠实体清单规定") [Order No. 4 of 2020 on the List of Unreliable Entities] (promulgated by the Ministry of Commerce, Sept. 19, 2020) Ministry of Com., Sept. 19, 2020, http://www.mofcom.gov.cn/article/b/fwzl/202009/20200903002593.shtml [https://perma.cc/UYX6-H42Y].

40. *See infra* Section II.B.

41. *See* J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020, 1031 (2020) ("[N]ational security pervades even relatively mundane decisions regarding trade and investment," such as export restrictions.); Charles Capito, Brandon L. Van Grack & Logan Wren, *Recent Additions to Entity List Part of Broader U.S. Effort Targeting Spyware,* LAWFARE (Nov. 29, 2021, 8:01 AM), https://www.lawfareblog.com/recent-additions-entity-list-part-broader-us-effort-targeting-spyware [https://perma.cc/E3Y9-BZ7C] ("During the Obama administration, the U.S. government leaned on the broad language in 15 C.F.R. § 744 to target an expanded range of companies for conduct . . . perceived as threatening U.S. national security . . . .").

42. Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1063 (2020).

commercial and academic entities to obtain sensitive technology. Yet the status quo is not sustainable, as it has led to inadvertent violations by U.S. shipping corporations, uncertainty for U.S. exporters, and ongoing litigation of parties seeking removal. This Note addresses these issues from an administrative law lens, asserting that the list often strays too far from fair administrative principles, such as when it adds a PRC entity without providing justificatory facts or fails to offer substantive opportunities for listed parties to seek removal.[43] In such instances, the list generates uncertainty over the basis for additions, undermines its effectiveness as series of targeted adjudications to protect national security, and warrants reform.

This Note proceeds in three parts. Part I outlines how the Entity List counters nodes of collaboration between the PRC military and commercial and academic sectors. Part II situates the Entity List within administrative national security. It outlines how the list is part of a broader trend to target individual entities and shows that administrative safeguards governing the list, including minimal judicial review, are less substantive than other similar measures, such as sanctions administered by the Department of Treasury. Part III responds to concerns about the list in the context of U.S.-PRC relations and proposes reforms designed to increase transparency in the Entity List's operation, give parties more access to its processes, and mitigate the varied litigation that has resulted from the list, including PRC corporations seeking injunctions after being placed on the list, and U.S. corporations contesting penalties for violating the list's restrictions.

I. RETOOLING THE ENTITY LIST TO ADDRESS PRC MILITARY-CIVIL FUSION

This Part outlines how the Entity List addresses PRC military-civil fusion. Section I.A outlines the features of PRC military-civil fusion; Section I.B examines how the list addresses it. Section I.C explores how the Export Control Reform Act of 2018 (ECRA) expands the Department of Commerce's authority to enforce the list and asserts that its passage signals robust future use of the list.

43. Before an entity can be added to the list, there must be "specific and articulable facts" to justify its addition. Authorization to Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States, 73 Fed. Reg. 49311, 49311 (Aug. 21, 2008).

A. PRC Military-Civil Fusion Presents Unique Challenges

Military-civil fusion refers to a PRC strategy in which actors across sectors—including military, commercial, and academic sectors—collaborate to advance China's national power.[44] Efforts to gain access to technology underpin civil-military fusion efforts.[45] Hu Jintao, as vice chairman of the Chinese Communist Party's (CCP's) Central Military Commission, implemented the modern form of the strategy in the 1990s as he aimed to use private sector actors to foster relationships with foreign companies and obtain key technology.[46] Such foreign technology could help develop the PRC military.[47] In 2007, Hu formally announced "fusion" as a policy at the seventeenth Party Congress.[48] Under the leadership of Xi Jinping, who became Party Chairman in 2012,[49] military-civil fusion has expanded, including the formation of a Military-Civilian Integration Development Committee.[50]

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44. *See* EMILY DE LA BRUYÈRE & NATHAN PICARSIC, DEFUSING MILITARY-CIVIL FUSION: THE NEED TO IDENTIFY AND RESPOND TO CHINESE MILITARY COMPANIES 6–7 (2021), https://www.fdd.org/wp-content/uploads/2021/05/fdd-monograph-defusing-military-civil-fusion.pdf [https://perma.cc/C7Q5-WTGS].

45. *See* U.S. DEP'T OF STATE, MILITARY-CIVIL FUSION AND CHINA 1 (2020), https://www.state.gov/wp-content/uploads/2020/05/What-is-MCF-One-Pager.pdf [https://perma.cc/9DXX-C674] ("[T]echnologies . . . targeted under MCF include quantum computing, big data, semiconductors, 5G . . . and AI.").

46. *See* DE LA BRUYÈRE & PICARSIC, *supra* note 44, at 8.

47. *See generally id.* at 6–10; Daniel Alderman, *An Introduction to China's Strategic Military-Civilian Fusion*, *in* CHINA'S EVOLVING MILITARY STRATEGY 397, 400 (Joe McReynolds ed., 2016) (In 2009, Hu Jintao described a national campaign to "establish and build a civil-military integrated weapons equipment research and production system, . . . while improving the national defense mobilization system.").

48. *See generally* Audrey Fritz, *China's Evolving Conception of Civil-Military Collaboration*, CTR. FOR STRATEGIC & INT'L STUDS.: TRUSTEE CHINA HAND (Aug. 2, 2019) ("The first authoritative reference to MCF as a guiding principle appeared in former Chinese leader Hu Jintao's report to the 17th Party Congress in 2007, in which he urged the country to 'take a path of military-civilian fusion with Chinese characteristics.'"), https://www.csis.org/blogs/trustee-china-hand/chinas-evolving-conception-civil-military-collaboration [https://perma.cc/WWN6-H4F3].

49. Chris Buckley, *China's New President Nods to Public Concerns, but Defends Power at Top*, N.Y. TIMES (Mar. 14, 2013), https://www.nytimes.com/2013/03/15/world/asia/chinas-new-leader-xi-jinping-takes-full-power.html [https://perma.cc/K28F-45RM].

50. Xi Jinping Zhuchi Zhaokai Zhongying Junmin Ronghe Fazhan Weiyanhui Di Er Ci Huiyi (习近平主持召开中英军民融合发展委员会第二次会议) [*Xi Jinping Presides over Second Meeting of the Central Military-Civilian Fusion Development Committee*] XINHUA (Oct. 15, 2018, 7:29 PM), http://www.xinhuanet.com/politics/2018-10/15/c_1123562440.htm

PRC military-civil fusion is driven primarily through collaborations between corporate entities and the government. Large state-owned entities (SOEs) stand at the top, with an array of subsidiaries operating beneath them that pursue the SOE-identified goals.[51] Ten state-owned military-industrial conglomerates are central to fusion.[52] These entities, which include China Electronic Corporation (CETC), pursue national defense research, including intelligence analysis, while also establishing telecommunications infrastructure capabilities in a commercial capacity.[53] Many state-owned projects operate abroad.[54] When CETC or similar companies establish projects abroad, the "output" is fused: The PRC furthers a project whereby commercial entities harness from abroad technology that the PRC military incorporates into its capabilities.[55] Military-civil fusion may occur in more covert fashions, including coordination between the PRC government and telecommunications giant Huawei to advance its expansion of intelligence capabilities abroad and assert its technological footprint.[56]

Fusion also manifests in the military-academic complex.[57] The PRC military pursues a range of collaborations, including with

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[https://perma.cc/A5Zj-VFED]; *see also* Tai Ming Cheung, *From Big to Powerful: China's Quest for Security and Power in the Age of Innovation* 3, (East Asia Inst., Working Paper, 2019), https://www.eai.or.kr/avanplus/filedownload.asp?o_file=20190404165246554432 33.pdf&uppath=/data/bbs/kor_workingpaper/&u_file=WorkingPaper_TaiMingCheung.pdf [https://perma.cc/GL8U-ZD7E].

51. *See generally* ANDREW SZAMOSSZEGI & COLE KYLE, UNITED STATES-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION, AN ANALYSIS OF STATE-OWNED ENTERPRISES AND STATE CAPITALISM IN CHINA 3 (2012) ("SOEs and their wholly-owned subsidiaries are likely to pursue the goals of the state.").

52. *See* DE LA BRUYÈRE & PICARSIC, *supra* note 44, at 10.

53. *Id.*

54. *Id.*

55. *Id.* at 9 ("Beijing does not simply share inputs to power between civilian and military entities. Beijing also fuses outputs. Beijing uses both military and civilian players and positioning to project a new kind of national power and shape the global order in the CCP's favor.").

56. *See* Lindsay Maizland & Andrew Chatzky, *Huawei: China's Controversial Tech Giant*, COUNCIL ON FOREIGN RELS. (Aug. 6, 2020, 8:00 AM), https://www.cfr.org/backgrounder/huawei-chinas-controversial-tech-giant [https://perma.cc/PY5D-JZQ2]; *see also* PERMANENT SELECT COMM. ON INTEL., 112TH CONG., INVESTIGATIVE REPORT ON THE U.S. NATIONAL SECURITY ISSUES POSED BY CHINESE TELECOMMUNICATIONS COMPANIES HUAWEI AND ZTE 8, 33 (2012) (report authored by Chairman Mike Rogers and Ranking Member C.A. Dutch Ruppersberger).

57. *See The China Defense Universities Tracker*, AUSTL. STRATEGIC POL'Y INST. (Nov. 25, 2019), https://www.aspi.org.au/report/china-defence-universities-tracker [https://perma.cc/E5BM-VKLB].

research institutions.[58] For example, NWPU, a key player in the *Qin* case,[59] engages in research central to China's defense programs, particularly for autonomous underwater technologies.[60] NWPU is one of the "Seven Sons of National Defense," which are administered by the Ministry of Industry and Information Technology.[61] The Seven Sons have previously engaged in joint research projects with American technology companies, including on big data and integrated circuit design.[62] The majority of these projects focus on science and technology developments with dual-use applications,[63] a primary focus of the Entity List.[64]

B. The Entity List Responds to PRC Military-Civil Fusion

The rise of the Entity List, particularly under the Trump and Biden administrations, to address the PRC—and the list's sectoral shift towards technology such as semiconductor manufacturing equipment[65]—reflects the U.S. foreign policy priority of preventing PRC entities from obtaining technology that could further its advantage in

58. *See* Lorand Laskai, *Civil-Military Fusion: The Missing Link Between China's Technological and Military Rise*, COUNCIL ON FOREIGN RELS. (Jan. 29, 2018, 10:00 AM), https://www.cfr.org/blog/civil-military-fusion-missing-link-between-chinas-technological-and-military-rise [https://perma.cc/U8SW-F76S] ("[T]he . . . Strategic Support Force, which is responsible for space, cyber and electronic warfare, has . . . sign[ed] cooperation agreements with research universities and . . . station[ed] officers within an unnamed software development company.").

59. *See* First Superseding Indictment, *supra* note 1, ¶ 6; *see also infra* Section II.B.

60. *See* First Superseding Indictment, *supra* note 1.

61. *See* Jeffrey Stoff, *Sino-Foreign Research Collaboration*, *in* CHINA'S QUEST FOR FOREIGN TECHNOLOGY: BEYOND ESPIONAGE 169, 171 (William C. Hannas & Didi Kirsten Tatlow eds., 2020).

62. *See* Ryan Fedasiuk & Emily Weinstein, *Universities and the Chinese Defense Technology Workforce*, CTR. FOR SEC. & EMERGING TECH. 3 (Dec. 2020), https://cset.georgetown.edu/wp-content/uploads/CSET-Universities-and-the-Chinese-Defense-Technology-Workforce.pdf [https://perma.cc/9ESY-EZQU].

63. *Id.* at 7 ("[T]he Seven Sons . . . focus predominantly on science and technology with dual-use applications.").

64. *See infra* Section I.B.

65. *See generally* Emily S. Weinstein, *Beijing's 'Re-Innovation' Strategy is Key Element of U.S.-China Competition,* BROOKINGS INST. (Jan. 6, 2022), https://www.brookings.edu/techstream/beijings-re-innovation-strategy-is-key-element-of-u-s-china-competition [https://perma.cc/35EA-HQUT]. The Entity List has proven especially effective in restricting PRC corporations' access to machines necessary to produce semiconductor chips, which are critical to developing commercial and military infrastructure, including communication networks and energy grids. *Id.*

a range of sectors, including telecommunications, navigational expertise, and surveillance.[66] That the list is a key part of countering PRC military-civil fusion is apparent from frequent final rules adding entities.[67] Less apparent are key evolutions in how the Entity List operates as an instrumentality. Perhaps in part because the Entity List has retained the same name since first administered in 1997, it is tempting to assume that the list is the same tool today as when it was first administered. But that is not the case. As this Section shows, not only has the list evolved in its scope, it has also developed as an instrumentality, including in the standard used to determine whether to add an entity, and the agencies involved in additions. Changes in the underlying operation of the list underpin its efficacy as a tool to address unique challenges posed by PRC military-civil fusion.

1. Overview of the Entity List

In 1997, the Department of Commerce's Bureau of Export Administration (BEA), which became the BIS in 2002,[68] published the first listing of the Entity List and announced the list's creation.[69] In that final rule, BEA cited the Export Administration Act (EAA) of 1979 as its primary authority for creating such a list,[70] a statute that warrants further consideration.

The EAA provided significant authority to the President—and to the agencies to which he delegated that authority—to regulate exports to foreign countries and to limit trade "determined by the

66. *See generally* William A. Carter, *Understanding the Entities Listing in the Context of U.S.-China AI Competition*, CTR. FOR STRATEGIC & INT'L STUDS. (Oct. 15, 2019), https://www.csis.org/analysis/understanding-entities-listing-context-us-china-ai-competition [https://perma.cc/KX7E-E239]; Ney, *supra* note 17.

67. In 2019, 58 PRC parent companies (not including their subsidiaries) were added to the Entity List, and in 2020, 180 PRC entities were added to the List. *See* Ney, *supra* note 17; *see also* FERGUSSON ET AL., *supra* note 18, at 23.

68. Industry and Security Programs; Change of Agency Name, 67 Fed. Reg. 20630, 20631 (Apr. 18, 2002) ("The new name more accurately reflects the breadth of the Bureau's activities in the spheres of national, homeland, economic, and cyber security.").

69. Entity List, 62 Fed. Reg. 4910, 4910 (Feb. 3, 1997) [hereinafter Entity List]; *Entity List*, BUREAU OF INDUS. & SEC., https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list [https://perma.cc/EG4T-CJ8J] (describing the Entity List as "a list of names of certain foreign persons . . . subject to specific license requirements for the export . . . of specified items").

70. Export Administration Act of 1979, Pub. L. No. 96-72 §§ 1–4, 93 Stat. 503, 503–06 (1979).

President to be against the national interest."[71] Despite its grant of broad authority, the EAA marked a liberalizing measure after the stringent near-embargo approach of the 1950s,[72] and it emphasized the need both to promote the economic interests of U.S. exporters and address national security concerns.[73] Long before PRC military-civil fusion was a key concern, Congress provided a clear policy statement to regulate exports that "could make a significant contribution to the military potential of any country . . . [and] be detrimental to the national security of the United States."[74] However, the EAA made little mention of entities and in the few instances that it did, it concerned agreements aiming for the "encouragement of technical cooperation."[75]

After the passage of the EAA, the Department of Commerce implemented the Export Administration Regulations (EAR).[76] The EAR regulates civilian items and dual-use items, or an item "that has civil applications as well as terrorism and military . . . applications."[77] Exports are construed broadly under the EAR,[78] and include shipments,[79] "deemed exports" (the items that are transferred to a foreign person in the United States),[80] and "re-exports," including the "actual shipment of an item subject to the EAR from one foreign country to

71. *Id.* § 3.

72. FERGUSSON ET AL., *supra* note 18, at 4–5.

73. Export Administration Act § 2.

74. *Id.* §§ 1–4.

75. *Id.* § 5 (permitting U.S. firms to enter into agreements with foreign governments, to which exports were otherwise restricted for national security reasons, in instances where an "intergovernmental agreement" calls for the "encouragement of technical cooperation"). Notably, the requirement did not apply to universities and colleges. *Id.* In contrast, restrictions on universities are central to the Entity List's efforts to address the PRC, and academic collaborations do not receive any exceptions. 15 C.F.R. § 744 (Supp. 4 2022).

76. 15 C.F.R. §§ 730–744 (1996). The list of covered entities is contained in 15 C.F.R. § 744 (Supp. 4 2022).

77. For example, a district court determined that a 2011 Jeep Grand Cherokee was a "dual-use transport vehicle which was fitted with materials to provide ballistic protection." United States v. 2011 Jeep Grand Cherokee, No. 12 CV 00018, 2013 WL 12106221, at *5 (W.D. Tex. Oct. 9, 2013).

78. 15 C.F.R. § 730.3 (2013) ("In essence, the EAR control any item warranting control that is not exclusively controlled for export, reexport, or transfer (in-country) by another agency of the U.S. Government . . . .").

79. 15 C.F.R. § 734.13 (2016).

80. *Id.*

another."[81] Items subject to the EAR are classified under the Commerce Control List (CCL).[82]

Limitations on exports of certain items to specified countries[83] constituted BEA's primary approach to export controls during the 1980s and 1990s, and remain a key part of BIS's approach, including in addressing the PRC.[84] But by the mid-1990s, the Department of Commerce grew concerned that individual entities were undermining U.S. national security by diverting restricted items to end-users, including to militaries acting against the interests of the United States.[85] It decided to add a new tool: the Entity List.[86] While the EAA of 1979 did not provide for any entity-based controls, its text clearly allowed for it.[87] In announcing the Entity List, BEA cited the EAA as its statutory authority, framed the list as a supplementary tool to bolster proliferation prevention, and alerted exporters to its new obligations under the list.[88]

The Entity List restricts exports to entities, not countries.[89] An End-User Review Committee (ERC) oversees decisions to add entities to the list, and additions require majority vote.[90] The specific

81. 15 C.F.R. § 734.14 (2016).

82. 15 C.F.R. § 774 (Supp. 1 2021). For example, Category 4 covers Computers; Category 8, Marine-related technology.

83. *See* 15 C.F.R. § 738 (Supp. 1 2021). Supplement Number One provides the Commerce Country Chart, which specifies licensing requirements for exports to listed countries and the reason for control. *Id.*

84. *E.g.*, Expansion of Export, Reexport, and Transfer (in-Country) Controls for Military End Use or Military End Users in the People's Republic of China, Russia, or Venezuela, 85 Fed. Reg. 23459, 23460 (Apr. 28, 2020) (announcing a "new reason for control and the associated review policy for regional stability for certain items exported to China, Russia, or Venezuela . . .").

85. FERGUSSON ET AL., *supra* note 18, at 23–25 (2021).

86. Entity List, *supra* note 69 ("To provide notice informing the public of an entity subject to this rule, this rule establishes a list of entities that are ineligible to receive specified items without a license.").

87. The EAA gave discretion to the President to "prohibit or curtail the export of any goods or technology subject to the jurisdiction of the United States" when doing so could advance the policy goals of the act, one of which was "to further the sound growth and stability of its economy as well as to further its national security and foreign policy objectives. Export Administration Act of 1979, Pub. L. No. 96-72 §§ 3, 5, 93 Stat. 503, 504–13 (1979).

88. Entity List, *supra* note 69.

89. *See id.*

90. 15 C.F.R. § 744.16(d) (2020) ("The End-User Review Committee (ERC), composed of representatives of the Departments of Commerce (Chair), State, Defense, Energy and, where appropriate, the Treasury, generally makes decisions regarding additions to, removals from or changes to the Entity List . . . .").

regulations governing the Entity List are contained in Part 744, "Control Policy: End-User and End-Use Based Controls,"[91] and the list of controlled entities is in Supplement Number Four.[92] End-user controls provide that an exporter, unless it has obtained a special license, cannot export specified items to listed entities, even though a license would not be required for export to the country where the entity is located.[93] For example, the Entity List provides a presumption of license denial for all controlled items when exported to NWPU.[94] If sending items subject to the EAR, an exporter must apply for, and obtain, a license before conducting trade with NWPU. If the exporter is not shipping to NWPU, it must verify it is not exporting a controlled item to an entity that could transfer the export to NWPU.[95] The exporter must check two other lists: the Military End-User List,[96] which prohibits exports where specified militaries are parties to the transaction, and the Unverified User List, or entities whose bona fides BIS has tried but failed to verify.[97] Both lists operate in close connection with the Entity List.

Throughout the first decade it was administered, the Entity List primarily addressed entities connected with nuclear weapons development and aerospace projects, reflecting the U.S. foreign policy priority of mitigating nuclear proliferation.[98] Additions were infrequent, and when final rules were published, they often contained just a few entities.[99] Between 1997 and 2009, fewer than five entities were added per year, with two exceptions: in 2001, when twenty-five entities were

91. 15 C.F.R. §§ 744.1, 744.21 (1996).

92. 15 C.F.R. § 744 (Supp. 4 2022).

93. *See, e.g.*, Evan Berlack, "*End-Use" Controls in the Export Administration Regulations* 2–5, *reprinted in* COPING WITH U.S. EXPORT CONTROLS (Practicing L. Inst., 2007).

94. 15 C.F.R. § 744 (Supp. 4 2022).

95. *Id.* In *Qin*, for example, Qin purchased sonobuoys from U.S. agents posing as employees from Riptide Autonomous Solutions. United States v. Qin, No. 18 CR 10205, 2020 WL 7024650, at *2 (D. Mass. Nov. 30, 2020). In contrast, if Riptide sold the sonobuoys to Qin directly, Riptide could have committed an Entity List violation through a "deemed export"—or an export to a non-U.S. national—of a restricted item, even if the sale took place entirely within U.S. borders.

96. *See* 15 C.F.R. § 744.21 (2021) (providing for "[r]estrictions on certain 'military end use' or 'military end user' in Burma, the People's Republic of China, the Russian Federation, or Venezuela"); 15 C.F.R. § 744 (Supp. 7 2020) (listing entities that are subject to the military end-user list, including the Second Institute of Oceanography in Hangzhou).

97. *See* 15 C.F.R. § 744.15; 15 C.F.R. § 744 (Supp. 6 2022) (listing entities subject to the unverified user list).

98. Ney, *supra* note 17.

99. *See* 15 C.F.R. § 744 (Supp. 4 2022).

added from Pakistan and the PRC;[100] and in 2008, when over sixty entities were added, primarily from the United Arab Emirates, Malaysia, and Iran.[101] When the Bureau of Export Administration first added entities in the PRC in June 1997, it included just three PRC entities, one of which was the China Academy of Engineering Physics—widely-known as a critical site for nuclear weapons development.[102] Nuclear weapons remained the central concern in 1999, when BEA added five Russian entities for "suspected export control violations involving weapons of mass destruction."[103] The Department of Commerce announced additions of PRC entities at a low rate for the next seventeen years, adding, on average, several per year.[104]

2. Expanded Bases for Entity List Additions: The Pivotal 2008 Final Rule

The Entity List now marks a key component of the U.S. response to PRC military-civil fusion and addresses a host of national security issues, whether restricting access to telecommunications equipment or items with military applications, such as hydrophones.[105] While scholars have documented this shift by cataloguing list additions,[106] often overlooked is the principle underpinning that shift: critical amendments to the regulatory standards governing the list that have proven instrumental to targeting of PRC military-civil fusion.

Prior to 2007, BIS added entities for one of six reasons, each of which concerned a specific end-use.[107] For example, BIS could add an entity if it determined that the entity used technology for

100. 15 C.F.R. § 744 (Supp. 4 2021); *see also* Entity List: Revisions and Additions, 66 Fed. Reg. 24264, 24264 (May 14, 2001) ("This rule adds to the Entity List twelve entities located in the People's Republic of China (PRC).").

101. *See* 15 C.F.R. § 744 (Supp. 4 2021).

102. *See* Revision to the Export Administration Regulations: Additions to the Entity List, 62 Fed. Reg. 35334, 35334 (June 30, 1997); *see also Chinese Academy of Engineering Physics,* AUSTR. STRATEGIC POL'Y INST., https://unitracker.aspi.org.au/universities/chinese-academy-of-engineering-physics [https://perma.cc/EL2N-RUCQ].

103. Additions to Entity List: Russian Entities, 63 Fed. Reg. 40363, 40363 (July 29, 1998).

104. 15 C.F.R. § 744 (Supp. 4 2022).

105. *See* Ney, *supra* note 17.

106. *Id.*

107. Authorization to Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States, 72 Fed. Reg. 31005, 31005 (June 5, 2007) ("The reasons for which BIS may place an entity on the Entity List are stated in §§ 744.2, 744.3, 744.4, 744.6, 744.10 and 744.20 of the EAR.").

maintenance of a nuclear reactor or engaging in biological weapons development.[108] But in June 2007, BIS announced a proposed rule that aimed to provide BIS greater latitude in determining to add an entity to the list.[109] Specifically, BIS stated:

> Entities for which 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 . . . may be added to the Entity List pursuant to this section.[110]

During notice and comment, U.S. businesses expressed concern over the proposed standard.[111] But BIS formally adopted it in August of 2008, asserting that the standard could ensure items were not used in ways "inimical" to U.S. interests, and only minimally disrupt trade.[112] In addition to the revised standard, the BIS rule stated that an ERC consisting of "representatives of the Departments of Commerce, State, Defense, Energy and, if appropriate in a particular case, the Treasury," would make revisions to the Entity List.[113]

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108. 15 C.F.R. §744.2 (2014) (providing for restrictions on nuclear end-uses*); Id.* § 744.4 (providing for restrictions on chemical and biological weapons end-uses).

109. Authorization to Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States, 72 Fed. Reg. at 31005 ("BIS believes that such targeted application of license requirements would provide the flexibility to deter use of items . . . subject to the EAR in ways . . . inimical to the interests of the United States with minimal costs to and disruption of legitimate trade.").

110. 15 C.F.R. § 744.11 (2021).

111. *See, e.g.*, Boeing, Comment Letter on Proposed Rule to Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States (Aug. 17, 2007), https://efoia.bis.doc.gov/index.php/documents/public-comments/720-expanded-entity-list/file [https://perma.cc/B72H-ZLAW] ("Boeing is concerned that the unprecedented scope of this Proposed Rule could have unintended consequences that could present a problem for exporters . . . ."); Indus. Coal. on Tech. Transfer, Comment Letter on Proposed Rule: Authorization to Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States (Aug. 3, 2007), https://efoia.bis.doc.gov/index.php/documents/public-comments/720-expanded-entity-list/file [https://perma.cc/23P8-LQKH].

112. Authorization to Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States, 73 Fed. Reg. 49311, 49311 (Aug. 21, 2008) ("[S]uch targeted application of license requirements provides the flexibility to prevent items subject to the EAR from being used in ways that are inimical to the interests of the United States, with minimal costs to and disruption of legitimate trade.").

113. *Id.*

The standard marked a shift from an approach that focused on *how* an entity might use an item, to an approach that inquired into the activities in which the entity was engaged.[114] The standard includes both entities that pose a security threat and those acting contrary to foreign policy interests.[115] It is temporally expansive: Prior activities posing a threat ("has been involved") *or* future activities ("significant risk of becoming involved") can justify addition.[116] The Final Rule also requires additions to be based on "specific and articulable facts."[117] The business community has sought greater clarity on this standard,[118] though BIS has provided relatively minimal specificity in list additions. For addition of entities involved in South China Sea militarization, the Final Rule states the precise activity that justifies a finding of "contrary to national security," while in others, the Final Rule simply states the *conclusion* that the listed entity has acted "contrary to national security," without providing justificatory facts.[119] The specific facts standard thus functions mainly as an internal mandate.[120]

An entity can constitute a per se national security threat by, for example, enhancing the capabilities of the PRC military or failing to facilitate the EAR's effective administration. The regulations provide non-exclusive examples of "illustrative activities that could be contrary to the national security or foreign policy interest of the United States."[121] The first three are specific activities that constitute national

114. *Id.* ("Under this rule, the activities at issue need not involve items or activities that are subject to the EAR in order for the entity to be placed on the Entity List.").

115. *See, e.g.*, Addition of Certain Entities to the Entity List, 86 Fed. Reg. 33119, 33119 (June 24, 2021) ("Specifically, the ERC determined that the subject entities are engaging in or enabling activities contrary to U.S. *foreign policy interests*.") (emphasis added).

116. 15 C.F.R. § 744.11 (2021).

117. *Id.*

118. *See, e.g.*, Boeing, *supra* note 111 ("[I]t would be important for industry to know what . . . universe of conduct would lead to the imposition of a licensing requirement.").

119. *Compare* Addition of Entities to the Entity List, and Revision of Entries on the Entity List, 85 Fed. Reg. 52898, 52899 (Aug. 27, 2020) (specifying entity engagement in South China Sea militarization), *with* Addition of an Entity to the Entity List, 83 Fed. Reg. 54519, 54520 (Oct. 30, 2018) (stating in its addition of Fujian Jinhua Integrated Circuit Company that the company "poses a significant risk of becoming involved in activities that could have a negative impact on the national security interests of the United States" without providing further detail).

120. At least one federal district court has stated explicitly that BIS is not required to disclose such facts. "The EARs do not specifically require the defendants to disclose to a listed entity the facts supporting the listing decision." Changji Esquel Textile Co. v. Raimondo, 573 F. Supp. 3d 104, 116 (D.D.C. 2021).

121. 15 C.F.R. § 744.11 (2021).

security concerns.[122] In contrast, examples four and five are enforcement violations, including an entity's failure to comply with an end-use check.[123] Specifically, 15 C.F.R. § 744.11(b)(5) allows BIS to add entities if it would "enhance[] BIS's ability to prevent violations of the EAR." [124] Using this new latitude, BIS has taken proactive measures,[125] emphasizing in recent additions concerning PRC entities that it uses Entity List additions to enhance prevention of potential violations.[126]

3. Entity List Additions Respond Effectively to National Security Threats

PRC military-civil fusion presents unique national security challenges. Because commercial enterprises are often fused with military goals, exports to PRC entities can pose acute national security risks. The Entity List, coupled with other efforts,[127] has constituted an

122. *Id.* (listing "[s]upporting persons engaged in acts of terror," enhancing the military capable of governments that have supported acts of terrorism, and transferring weapons in "a manner that is contrary to United State national security or foreign policy interests," as illustrative acts contrary to U.S. national security).

123. *Id.* § 744.11(b)(4)(i):

> Prevention of the accomplishment of an end use check conducted by or on behalf of BIS or the Directorate of Defense Trade Controls of the Department of State by: The entity precluding access to . . . or providing false or misleading information about parties to the transaction or the item to be checked.

124. *Id.* § 744.11(b)(5) (2021).

125. *See, e.g.*, Addition of Certain Entities to the Entity List, 84 Fed. Reg. 54002, 54003 (Oct. 9, 2019) (emphasis added):

> [T]he ERC has determined that the conduct of these twenty-eight entities raises sufficient concern that prior review of exports, reexports or transfers (in-country) of all items subject to the EAR involving these entities . . . *will enhance* BIS's ability to prevent items subject to the EAR from being used in activities contrary to [U.S. foreign policy] . . . .

126. *Id.* (asserting that "prior review of exports, reexports or transfers (in-country) of all items subject to the EAR involving these entities . . . will enhance BIS's ability to prevent items subject to the EAR from being used in activities contrary to the foreign policy of the United States").

127. *See, e.g.*, Press Statement, U.S. Dep't of State, Protecting and Preserving a Free and Open South China Sea (Jan. 14, 2021), https://2017-2021.state.gov/protecting-and-preserving-a-free-and-open-south-china-sea/index.html [https://perma.cc/V69F-TJHQ]:

> [T]he Department of State is imposing visa restrictions on People's Republic of China (PRC) individuals, including executives of state-owned enterprises and officials of the Chinese Communist Party and People's Liberation Army (PLA) Navy, responsible for, or complicit in, either the large-scale reclamation, construction, or militarization of disputed outposts in the South China Sea.

effective measure in precisely targeting discrete points of military-civil coordination.

The list's role in countering PRC efforts to militarize the South China Sea represents one area of notable effectiveness. In 2013, PRC began to construct artificial islands in the region.[128] The Philippines, menaced by PRC's efforts, earned a favorable ruling from the Permanent Court of Arbitration, which asserted that China violated the Philippines' sovereign rights.[129] Still, PRC's behavior in the South China Sea remained largely unchanged.[130] The Entity List marked a key countermeasure. In August 2020, the ERC listed PRC entities that "enabled China to reclaim and militarize disputed outposts in the South China Sea."[131]

The Entity List possessed two critical assets. First, the broad ambit of "activities contrary to national security" allowed BIS to pivot from a focus on an entity's use of listed items to its conduct. After the 2008 rule change, BIS does not need evidence that the PRC companies were receiving sensitive EAR-listed technologies.[132] Instead, the ERC could assert their conduct alone, that is, efforts to "reclaim and militarize disputed outposts," justified addition. Second, the list enabled BIS to target national security risks while minimizing negative trade impacts: BIS could address entities involved in shipbuilding tied to the PRC military—including China Communications Construction

128. CAITLIN CAMPBELL & NARGIZA SALIDJANOVA, U.S.-CHINA ECON. & SEC. REV. COMM'N, SOUTH CHINA SEA ARBITRATION RULING: WHAT HAPPENED AND WHAT'S NEXT 1–2 (2016), https://www.uscc.gov/sites/default/files/Research/Issue%20Brief_South%20China%20Sea%20Arbitration%20Ruling%20What%20Happened%20and%20What%27s%20Next071216.pdf [https://perma.cc/ZF4E-XHE9].

129. Press Release, Permanent Ct. of Arb., The South China Sea Arbitration (*Phil. v. China*) (July 12, 2016), https://docs.pca-cpa.org/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf [https://perma.cc/GMK3-CRW9].

130. Kate O'Keeffe & Chun Han Wong, *U.S. Sanctions Chinese Firms and Executives Active in Contested South China Sea*, WALL ST. J. (Aug. 26, 2020, 9:18 PM), https://www.wsj.com/articles/u-s-imposes-visa-export-restrictions-on-chinese-firms-and-executives-active-in-contested-south-china-sea-11598446551?mod=hp_lead_pos2. [https://perma.cc/RH5F-3DWL].

131. Addition of Entities to the Entity List, and Revision of Entries on the Entity List, 85 Fed. Reg. 52898, 52899 (Aug. 27, 2020).

132. Authorization to Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States, 73 Fed. Reg. 49311, 49311 (Aug. 21, 2008) ("Under this rule, the activities at issue need not involve items or activities that are subject to the EAR in order for the entity to be placed on the Entity List.").

Company and its subsidiaries tied to South China Sea effort[133]—without limiting export of all sensitive items to the PRC writ large.

The addition of Huawei (along with sixty-eight non-U.S. affiliates), in contrast, exemplifies how the Entity List responds to threats less explicitly the product of, but still connected to, military-civil fusion.[134] Such threats constitute more abstract national security concerns. In 2019, the ERC determined that Huawei was acting contrary to U.S. national security interests, emphasizing that Huawei had been indicted in the Eastern District of New York for export violations.[135] Yet, as studies of PRC military-civil fusion demonstrate, it is not only the PRC-based corporation, but also PRC global subsidiaries, which are central to PRC efforts abroad.[136] Huawei has established dozens of global affiliates, at times in pursuits directly antithetical to U.S. foreign policy interests, including establishment of facial recognition programs in Zimbabwe and a mobile payments and social credit system in Venezuela.[137] Reflecting these concerns, the Final Rule emphasized, "Huawei's affiliates present a significant risk of acting on Huawei's behalf to engage in such activities."[138] The Entity List has a unique asset: Whereas country-based export controls targeting would fail to address these affiliates, which operate globally, the Entity List addresses the plural sources of a national security threat.

To be sure, the Entity List is imperfect. One potential challenge is under-inclusiveness. Given the interconnectedness of PRC corporations and government,[139] a PRC corporation not listed could obtain restricted items and ship them within the PRC. Over-

133. Addition of Entities to the Entity List, and Revision of Entries on the Entity List, 85 Fed. Reg. at 52899 ("The ERC determined to add China Communications Construction Company Dredging Group Co. Ltd.; China Communications Construction Company Guangzhou Waterway Bureau [and over six other subsidiaries or affiliates] . . . for engaging in activities contrary to U.S. national security interests.").

134. Addition of Entities to the Entity List, 84 Fed. Reg. 22961, 22961 (May 21, 2019) ("[T]his final rule also adds to the Entity List sixty-eight non-U.S. affiliates of Huawei located in twenty-six destinations: Belgium, Bolivia, Brazil, Burma, Canada, Chile, China, Egypt . . . .").

135. *Id.* ("To illustrate [activities contrary to national security], Huawei has been indicted in the U.S. District Court for the Eastern District of New York on 13 counts of violating U.S. law . . . .").

136. *See generally* Sangeet Paul Choudary, *China's Country-as-Platform Strategy for Global Influence*, BROOKINGS INST. (Nov. 19, 2020), https://www.brookings.edu/techstream/chinas-country-as-platform-strategy-for-global-influence [https://perma.cc/QD7V-BDM4].

137. *Id.*

138. Addition of Entities to the Entity List, 84 Fed. Reg. at 22961–62.

139. *See* Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261, 261 (2016); *see also supra* Section I.A.

inclusiveness is another potential vulnerability. As a federal court stated expressly, BIS is not required to provide in its published final rules the precise "specific and articulable facts" that generate the national security concern.[140] Some list additions are thus facially conclusory, stating an entity is a national security threat without identifying precisely how.[141] Indeed, even where final rules do provide specific details, such as the South China Sea Rule identifying entities involved in militarization,[142] they do not articulate precisely how limiting exports will hinder such entities.[143]

C. Congress' Passage of the ECRA Expands BIS Authority to Investigate Violations

In 2018, Congress passed the Export Controls Reform Act of 2018[144] as part of a National Defense Authorization Act (NDAA) for Fiscal Year 2019.[145] The ECRA repealed the EAA and provided permanent authority to the President, Secretary of Commerce, and other officials to implement export controls pursuant to the EAR.[146] While the ECRA left the EAA primarily unchanged, Congress implemented several changes that will likely facilitate, or even amplify, the current intensive enforcement of the Entity List to address military-civil fusion.[147]

First, the ECRA requires BIS to control the export of emerging and foundational technologies "essential to the national security of the United States."[148] Second, the ECRA provides greater authority to the

140. Changji Esquel Textile Co. Ltd. v. Raimondo, 573 F. Supp. 3d 104, 116 (D.D.C. 2021), *aff'd*, 40 F.4th 716 (D.C. Cir. 2022).

141. *See supra* Section I.B.2.

142. Addition of Entities to the Entity List, Revision of Entry on the Entity List, and Removal of Entities From the Entity List, 85 Fed. Reg. 83416, 83421 (Dec. 22, 2020) (to be codified at 15 C.F.R. § 744 (2021)).

143. Addition of Entities to the Entity List, and Revision of Entries on the Entity List, 85 Fed. Reg. 52898, 52899 (Aug. 27, 2020).

144. 50 U.S.C. §§ 4801–52.

145. John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (2018). As part of the NDAA, Congress also passed the Foreign Investment Risk Review Modernization Act (FIRRMA), which expands the powers of the Committee on Foreign Investment in the United States (CFIUS). *Id.* § 1721.

146. *See* FERGUSSON ET AL., *supra* note 18, at 2–11.

147. *Id.* at 18.

148. 50 U.S.C. § 4817; *see also* Identification and Review of Controls for Certain Foundational Technologies, 85 Fed. Reg. 52934, 52934 (Aug. 27, 2020). How BIS will identify such technologies is beyond this Note's scope.

BIS to investigate suspected violations, including for BIS to investigate violations overseas.[149] In contrast, the EAA stated only that the BIS could investigate "any person," but did not provide expressly for overseas investigations.[150] Third, whereas the EAA makes only a general mention of investigations and provides no express authority for undercover operations,[151] the ECRA provides that BIS may use available funds for undercover investigations,[152] including to purchase property and conduct commercial businesses where "necessary for detection and prosecution of violations of this [part]."[153] The authority provided to BIS to investigate abroad thus resembles that of the Department of Homeland Security, which has recently expanded overseas operations.[154] Despite BIS's expanded authority, Homeland Security will likely continue to lead investigations of Entity List violations.[155]

149. 50 U.S.C. § 4820(a)(4) ("[T]he Secretary, on behalf of the President, may exercise, in addition to relevant enforcement authorities of other Federal agencies, the authority to . . . conduct investigations within the United States and outside the United States consistent with applicable law.").

150. Export Administration Act of 1979, Pub. L. No. 96–72, § 12, 93 Stat. 503, 530 (1979) (providing that the "the head of any department or agency exercising any function. . . may make such investigations and obtain such information from . . . make such inspection of the books, records, and other writings, premises, or property of . . . any person").

151. *Id.* Prior to the ECRA, BIS utilized undercover companies to enforce the Entity List, as well as other violations of the EAR, though the undercover operations were primarily led by the Department of Homeland Security. *See, e.g.*, Press Release, Off. Pub. Affs., Chinese National Sentenced to Three Years for Attempting to Illegally Export High-Grade Carbon Fiber to China, U.S. Dep't of Just. (Aug. 31, 2017), https://www.justice.gov/opa/pr/chinese-national-sentenced-three-years-attempting-illegally-export-high-grade-carbon-fiber [https://perma.cc/VC95-CLVG] (detailing the use of an undercover company to sell Fuyi Sun, a PRC national, high-grade carbon fiber which Sun attempted to export to the PRC military. The undercover entity was "created by the Department of Homeland Security, Homeland Security Investigations (HSI) and 'staffed' by HSI undercover special agents . . . ."); Press Release, U.S. Att'y's Off., Eastern Dist. N.Y., Chinese National Sentenced to 57 Months' Incarceration for Attempting to Illegally Export Aerospace-Grade Carbon Fiber, U.S. Dep't of Just. (Dec. 10, 2013), https://www.justice.gov/usao-edny/pr/chinese-national-sentenced-57-months-incarceration-attempting-illegally-export [https://perma.cc/Y8ZD-EPLX] ("Zhang was arrested after traveling to the United States to meet with an undercover agent . . . to obtain a sample of the specialized fiber, which has applications in the defense . . . industry . . . .").

152. 58 U.S.C. § 4820(b).

153. *Id.* § 4820(b)(1)(A)–(B).

154. *See generally* Ron Nixon, *Homeland Security Goes Abroad. Not Everyone Is Grateful*, N.Y. TIMES (Dec. 26, 2017), https://www.nytimes.com/2017/12/26/world/americas/homeland-security-customs-border-patrol.html [https://perma.cc/T5ZY-EWNR].

155. *See generally* AARON ARNOLD & DANIEL SALISBURY, HARV. KENNEDY SCH. BELFER CTR. FOR SCI & INT'L AFFS., THE LONG ARM: HOW U.S. LAW ENFORCEMENT EXPANDED ITS EXTRATERRITORIAL REACH TO COUNTER WMD PROLIFERATION NETWORKS 17–18 (2019),

The expansion of BIS authority to conduct overseas investigations and undercover investigations suggests BIS might take a more offensive approach toward list enforcement, which could undermine cooperation with European allies.[156] Increased enforcement might also result in a greater number of businesses that will confront, and potentially be charged for, violations of the Entity List—at once improving the list's efficacy from the valence of national security, and simultaneously generating concerns amongst businesses and limiting access to PRC markets.[157]

II. SITUATING THE ENTITY LIST WITHIN ADMINISTRATIVE NATIONAL SECURITY

A. Overview of "Administrative National Security"

The national security administrative state, as articulated by Professor Chachko, refers to administrative agencies making technical bureaucratic decisions that target individual threats to protect national security, often through complex interagency processes.[158] Agencies act with considerable discretion within broad mandates from Congress or the President and often coordinate with other agencies.[159] Adjudications, or the formulation of an agency order, are at the core of administrative national security.[160] The administrative national security state administers U.S. policy in a range of areas, including economic sanctions, security watchlists, and targeted killings.[161]

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https://www.belfercenter.org/sites/default/files/2019-03/TheLongArm_Mar19.pdf [https://perma.cc/B83U-UG2W] (discussing the Homeland Security Investigations (HSI), which oversees the Counterproliferation Investigations Program and seeks to prevent "sensitive technologies and weapons from reaching . . . foreign adversaries . . .").

156. *Id.* at 51–53 (discussing impact of extraterritorial enforcement of export controls on international relations).

157. *See infra* Section II.B.2.

158. *See generally* Chachko, *supra* note 42, at 1075 ("Technology has advanced the individualization of U.S. foreign and security policy in two ways: the individualization of threats and the individualization of capabilities . . . . [C]omputational capabilities now make 'finding a needle in a haystack' not only possible, but practical.") (citing EXEC. OFF. OF THE PRESIDENT, BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES 1–9 (2014)).

159. Chachko, *supra* note 42, at 1066 ("Because applying general standards and rules to individuals is at the core of administrative national security, it is best understood as an emerging practice of administrative adjudication . . . .").

160. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1212 (2013).

161. *See* Chachko, supra note 42, at 1063.

This Section maps the Entity List onto key features of administrative national security—individualization, interagency coordination, and adjudication—and asserts that while the Entity List generally aligns with existing conceptions of it, the list presents new complexities, including fewer safeguards as compared with similar measures, such as sanctions.

1. The Entity List and Individualization

Individualization refers to the shift in post-Cold War foreign policy from security measures directed towards nations and governments, to those directed towards specific actors.[162] In the 1990s, U.S. Presidents increasingly imposed sanctions on individual "foreign persons" who "materially contributed" to acquiring biological or chemical weapons.[163] Targeted sanctions are now routinely used to address political parties and corporations.[164] For example, the U.S. Department of Treasury's Office of Foreign Assets Control (OFAC) administers OFAC sanctions, which aim to accomplish a wide range of "foreign policy and national security goals."[165]

Specific sanctions programs include Chinese Military Companies Sanctions.[166]

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162. *Id.* at 1073 ("[I]nterrelated factors contributed to the individualization of U.S. foreign and security policy . . . the war on terror, technology, and frustration with the ineffectiveness and humanitarian costs of broad economic sanctions.").

163. *E.g.*, Exec. Order No. 12,938, § 1, 59 Fed. Reg. 59099, 59099 (Nov. 14, 1994).

164. CHRISTOPHER CASEY ET AL., CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 22 (2020).

165. *See Office of Foreign Assets Control – Sanctions Programs and Country Information,* U.S. DEP'T OF TREAS., https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information [https://perma.cc/K48E-25ZJ] ("[OFAC] administers a number of different sanctions programs. The sanctions can be either comprehensive or selective, using the blocking of assets and trade restrictions to accomplish foreign policy and national security goals."); Exec. Order No. 13,848, 83 Fed. Reg. 46843, 46843 (Sept. 14, 2018) ("[T]he ability of persons located, in whole or in substantial part, outside the United States to interfere in or undermine public confidence in United States elections . . . constitutes an . . . extraordinary threat to the national security . . . of the United States."); Casey, *supra* note 164, at 28–29.

166. Exec. Order No. 14,032, § 1, 86 Fed. Reg. 30145, 30145 (June 3, 2021) (imposing sanctions on certain entities connected with PRC military because "additional steps are necessary to address . . . the threat posed by the military-industrial complex of the . . . [PRC] and its involvement in military, intelligence, and security research and development programs, and weapons and related equipment production under the PRC's Military-Civil Fusion strategy"); *see also* Exec. Order 13,959, § 1, 85 Fed. Reg. 73185, 73185 (Nov. 17, 2020); *infra* Part III

The Entity List epitomizes this shift *par excellence*: It targets specific entities, with precision at the level of a corporation or institution, its subsidiaries, and address.[167] The addition of the list in 1997 and its growth thus mark a corollary development, in the realm of export controls, of a broader U.S. foreign policy shift to individual-based national security measures.

Individuality is constitutive of the list in several respects. First, additions themselves are highly individualized: Each final rule provides individual names, addresses, corporate subsidiaries, and aliases of entities.[168] This level of specificity resembles OFAC's sanctions for designated nationals.[169] Second, the list specifies distinct review policies where warranted. For example, PRC biotechnology corporation AGCU Scientech receives case-by-case review for licenses sought for items necessary to treat infectious diseases,[170] while China National Offshore Oil Corp. Ltd. receives a license exception for certain joint ventures *not* in the South China Sea.[171] Furthermore, over fifty PRC entities that otherwise have a presumption of denial for all items subject to the EAR receive exceptions for items when "released to members of a 'standards' organization,"[172] which develop global standards to ensure technology created by different companies in different countries can interface.[173] Still, most PRC entities receive a presumption of denial for all items, and exporting to a listed company

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(discussing Xiaomi's lawsuit to obtain removal after placement on the Chinese Military Companies Sanctions list).

167. 15 C.F.R. § 744 (Supp. 4 2022).

168. *Id.*

169. *Alphabetical Listing of Specially Designated Nationals and Blocked Persons*, U.S. DEP'T OF TREAS., OFF. OF FOREIGN ASSETS CONTROL (Jan. 21, 2022), https://www.treasury.gov/ofac/downloads/sdnlist.pdf [https://perma.cc/EB78-YYW6].

170. Addition of Entities to the Entity List, Revision of Entry on the Entity List, and Removal of Entities From the Entity List, 85 Fed. Reg. 83416, 83421 (Dec. 22, 2020).

171. Addition of Entity to the Entity List, and Addition of Entity to the Military End-User (MEU) List and Removals from the MEU List, 86 Fed. Reg. 4862, 4862 (Jan. 14, 2021) (imposing a license requirement "except for crude oil . . . or for items required for the continued operation of joint ventures with persons . . . not operating in the South China Sea").

172. 15 C.F.R. § 744 (Supp. 4 2022). One example is the Entity List entry for HiSilicon Tech in Jiangsu, PRC. *See id.*

173. *See, e.g.*, Ari Schwartz, *Standards Bodies Are Under Friendly Fire in the War on Huawei*, LAWFARE (May 5, 2020, 8:00 AM), https://www.lawfareblog.com/standards-bodies-are-under-friendly-fire-war-huawei [https://perma.cc/XN3G-FV8Q] ("[C]larifying guidance must be issued to enable American companies to effectively engage in international standards-setting efforts and avoid further harm to the . . . U.S. economy.").

carries red flags.[174] Thus, specific license review policies aiming to minimize trade impacts provide minimal practical trade benefits.

The Entity List is also specific at the level of revisions, which occur frequently.[175] In some revisions, BIS removes aliases of listed entities based on new insights into the entity's corporate structure. For example, a December 2020 rule added PRC corporation "Kuang-Chi Group" and alias "Guangi Science Co., Ltd," but a subsequent rule removed that alias to "reflect the entity's correct organizational structure."[176] Revisions also involve additions of aliases. For example, after SeaJet Co. Ltd. was added in September 2018,[177] the ERC identified "alternate business names" under which SeaJet was operating and updated the entry for SeaJet to include additional aliases.[178] Both revisions epitomize how the Entity List is iterative: As the ERC obtains intelligence concerning an entity, it can modify the list, such that PRC corporations cannot simply evade the Entity List by establishing separate aliases.

The Entity List is also an adaptive tool. A national security concern as identified by any one of the agencies composing the ERC, such as militarization in the South China Sea, catalyzes not just one Entity List response, but a series of responses. After the ERC determined in August 2020 to add entities involved in militarization efforts in the South China Sea, it followed in August 2021 with the addition of another entity, China National Offshore Oil Corporation, LTD.[179] In a notable testament to the list's precision—as well as its compliance burdens—the ERC determined a year later, in June 2022, to revise the

174. *See Red Flag Indicators*, BUREAU OF INDUS. & SEC, https://www.bis.doc.gov/index.php/licensing/embassy-faq/faq/51-how-long-does-qualification-under-authorization-veu-last#faq_118 [https://perma.cc/N8EP-29Z3] ("[T]ransactions of any nature with listed entities carry a 'red flag' [and] U.S. companies [should] proceed with caution with . . . such transactions.").

175. In contrast, Entity List removals are infrequent and difficult to obtain. *See infra* Part III.

176. Addition of Certain Entities to the Entity List; Revision of Existing Entry on the Entity List; Removal of Entity From the Unverified List; and Addition of Entity to the Military End-User (MEU) List, 86 Fed. Reg. 36496, 36496 (July 12, 2012).

177. Addition of Certain Entities to the Entity List, Revision of Entries on the Entity List and Removal of Certain Entities From the Entity List, 83 Fed. Reg. 44821, 44821 (Sept. 4, 2018). ERC added SeaJet after it "determined that [the PRC corporation] unlawfully procured and diverted U.S.-origin armored vehicles to . . . [North] Korea." *Id.*

178. Addition of Entities, Revision of Entries, and Removal of Entity From the Entity List; and Revision of Entry and Removal of Entity From the Military End-User List (MEU) 86 Fed. Reg. 29190, 29192 (June 1, 2021).

179. Addition of Entity to the Entity List, and Addition of Entity to the Military End-User (MEU) List and Removals From the MEU List, 86 Fed. Reg. 4862, 4862 (Jan. 14, 2021).

addition of China National Offshore Oil Corporation.[180] In the initial entry, the ERC provided that export licenses were required not just for exports to China Offshore Oil Corporation, but also to entities from specified countries operating in the South China Sea.[181] In the revised June 2022 rule, the ERC sought to provide greater clarity by actually providing the longitude and latitudinal coordinates, as well as a map, of the area which was subject to the "limitation on the exclusion from the license requirement."[182] The addition, and its subsequent modification, likely reflected a growing understanding of the entities involved in the South China Sea, the precise scope of the region of which the ERC was concerned, and epitomizes the ERC's capacity to calibrate the list to evolving manifestations of identified threats.[183] In this sense, the list functions similarly to OFAC sanctions: OFAC modifies sanctions to address evolving sources of the threats and new understandings of companies engaging with the PRC military.[184]

2. Coordinated Adjudication of Entity List Additions

Each Entity List addition is an adjudication, or "the process of formulating an agency order, typically involving the application of law to particular facts."[185] Adjudications are generally divisible into three categories: Types A, B, and C.[186] Type A adjudication,[187] governed by the Administrative Procedures Act (APA), refers to formal adjudication presided over by an administrative law judge. It must comply with the formal procedures of the APA,[188] including offering "interested parties" an opportunity to attend and submit evidence at an

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180. Addition of Entities, Revision and Correction of Entries, and Removal of Entities From the Entity List, 87 Fed. Reg. 38920, 38923 (June 28, 2022).

181. Addition of Entity to the Entity List, and Addition of Entity to the Military End-User (MEU) List and Removals From the MEU List, 86 Fed. Reg. at 4863.

182. Addition of Entities, Revision and Correction of Entries, and Removal of Entities From the Entity List, 87 Fed. Reg. 38920, 38923 (June 28, 2022).

183. *Id.*

184. *See, e.g.*, Exec. Order No. 14,032, § 1, 86 Fed. Reg. 30145, 30145 (June 3, 2021) (imposing sanctions on certain entities connected with PRC military because "*additional steps are necessary to* address the national emergency declared in Executive Order 13959 . . .") (emphasis added).

185. Vermeule, *supra* note 160, at 1212.

186. MICHAEL ASIMOV, EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 3 (2016).

187. Administrative Procedure Act, 5 U.S.C. § 551(7).

188. *Id.* §§ 554, 556–57.

agency hearing after agency adjudication,[189] and notice of a proposed rule-change.[190] The APA also provides that a district court can review a challenged agency action[191] to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[192] Type B adjudications are also formal adjudications requiring an evidentiary hearing,[193] while Type C adjudications do not "occur through legally required evidentiary hearings."[194] Type C processes, typical in administrative national security,[195] provide minimal procedural protections.[196] The process used by OFAC provides an example. Entities which OFAC designates for sanctions can mount challenges under the APA,[197] but OFAC's administrative process falls within Type C: OFAC provides no evidentiary hearing prior to issuing its decision, and it is granted significant agency discretion for determining what reasons it provides for a license denial.[198]

Classifying the Entity List within adjudicative standards suggests that it is a Type C adjudication. Because Congress explicitly

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189. *Id.* § 554.

190. *Id.* § 553 ("General notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof . . . .").

191. 5 U.S.C. § 704 (final agency action requirement); *see also* Bowen v. Massachusetts, 487 U.S. 879, 880 (1988); 5 U.S.C. § 702 (2012) (waiving government's sovereign immunity and stating that "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof").

192. 5 U.S.C. § 706.

193. *See* ASIMOV, *supra* note 186, at 5–6 ("Hearing schemes in Type B adjudication usually contain most or all of the same formal elements and protections for private parties of Type A adjudication . . . .").

194. *Id.* at 5.

195. *See* Chachko, *supra* note 42, at 1113 ("The vast majority of agency adjudication today [including administrative national security] is informal adjudication not subject to the APA's formal adjudication requirements . . . .").

196. *See* ASIMOV, *supra* note 186, at 89–91.

197. *See, e.g.*, Epsilon Elecs. Inc. v. U.S. Dep't of Treas., 857 F.3d 913, 919 (D.D.C. 2017) (applying the arbitrary and capricious standard in upholding civil penalty imposed by OFAC); Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treas., 686 F.3d 965, 976 (9th Cir. 2012) ("The judicial review provisions of the Administrative Procedure Act . . . govern challenges to OFAC's designation decisions.") (citing Alaska Dep't of Env't Conservation v. EPA, 540 U.S. 461, 496–97 n.18 (2004)).

198. *See* Reporting, Procedures and Penalties Regulations, Procedures, 31 C.F.R. § 501.801(5) (2019) (providing that an applicant can request explanation of the reasons for a denial of a license application but offering no further insight into the procedure used to process and adjudicate such requests).

excluded the regulations from APA review,[199] it is not Type A. There is no requirement to provide notice of proposed rulemaking, nor opportunity for public participation.[200] Unlike Type B, which requires that interested parties have an opportunity to inspect an "exclusive record,"[201] the Entity List has no required evidentiary proceedings.[202] Similarly, appeals are not confined to a closed evidentiary universe.[203] Further, as courts have recognized in other informal adjudicatory decisions,[204] the ERC is not required to provide notice ahead of additions nor respond to party requests to review potentially exculpatory evidence.[205]

Another key aspect of Entity List adjudications is their interagency process. Interagency efforts,[206] including fact-finding and

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199. Export Control Reform, Authority and Administration of Controls, 50 U.S.C. § 4821 ("[T]he functions exercised under this subchapter shall not be subject to sections 551, 553 through 559, and 701 through 706 of title 5 . . . ."). Prior to ECRA enactment, final rules announcing additions to the Entity List customarily stated the additions were exempt from the APA under the general exception for administrative decisions involving foreign affairs and military functions. Revision to the Export Administration Regulations: Additions to the Entity List, 62 Fed. Reg. 35334, 35334 (June 30, 1997) ("The provisions of the [APA] . . . requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States . . . .").

200. *See, e.g.*, Addition of Certain Entities to the Entity List, Revision of Entries on the Entity List and Removal of Certain Entities from the Entity List, 83 Fed. Reg. 44821, 44823 (Sept. 4, 2018). Further, there is no thirty-day delay before the rule can take effect. *Id.*

201. *See* ASIMOV, *supra* note 186, at 19–20.

202. Bureau of Indus. & Sec., U.S. Dep't of Com., Control Policy: End-User and End-Use Based, 15 C.F.R. § 744 (Supp. 5 2022).

203. 15 C.F.R. § 756.2(d) (2020) ("[T]he Under Secretary shall consider any recommendations, reports, or relevant documents available to BIS in determining the appeal, but shall not be . . . prevented from considering any other information, or consulting with any other person or groups, in making a determination . . . .").

204. *See, e.g.*, Johnson v. Vilsack, 833 F.3d 948, 955 (8th. Cir. 2018) (upholding decision by U.S. Food and Drug Administration where there was "no procedure for questioning evidence submitted by the opposing party, *much less* an evidentiary hearing . . .") (emphasis added).

205. *See, e.g.*, Addition of Certain Entities to the Entity List, 84 Fed. Reg. 54002, 54004 (Oct. 9, 2019) ("This action is exempt from the Administrative Procedure Act . . . requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date.").

206. For example, investment restrictions directed towards PRC companies determined to be involved in military and intelligence research involve interagency determinations. *See* Exec. Order No. 14,032, § 1, 86 Fed. Reg. 30145, 30145 (June 3, 2021) (emphasis added):

> The following activities by a United States person are prohibited: the purchase or sale of any publicly traded securities . . . of any person listed in the Annex . . .

investigations, are common within administrative national security.[207] The Entity List epitomizes this aspect of administrative national security. The ERC, chaired by the Department of Commerce and composed of representatives from the Departments of Commerce, State, Defense, Energy, and "where appropriate, the Treasury," determines whether to add entities to the list.[208] While the process for adding entities is governed by an interagency approach, BIS oversees the promulgation and enforcement of the regulations.[209] Still, the interagency composition has been critical in making effective determinations. For example, in its addition of Huawei, the ERC referenced Huawei's sanctions violations, cited the Department of Treasury's intelligence into Huawei's financial streams, and pointed to the Justice Department's superseding indictment outlining Huawei's previous export violations, suggesting interagency insight coalesced to buttress the ERC's decision to add.[210]

3. Procedural Safeguards: Removal Proceedings and Appeals

As Type C adjudications, the Entity List does not contain many procedural mechanisms parties adversely affected by administrative decisions might seek. Still, there are several important "safeguarding" processes, including removal proceedings. These basic protections constitute what administrative scholars such as Michael Asimov identify as fundamental protections in *any* administrative scheme, as they are critical to ensuring basic due process rights.[211]

> determined by the Secretary of the Treasury, in *consultation with* the Secretary of State, and, as the Secretary of the Treasury deems appropriate, the Secretary of Defense . . . .

207. *See generally* Chachko, *supra* note 42, at 1084–99 (discussing the importance of interagency coordination in U.S. targeted killing programs, including "regular meetings attended by more than a hundred officials," as well as in other contexts, such as OFAC designations, which are reviewed by Departments of State and Justice).

208. 15 C.F.R. § 744.11 (2020); 15 C.F.R. § 744 (Supp. 5 2020)

209. *Hearing on U.S.-China Relations in 2021: Emerging Risks Before the U.S.-China Economic and Security Review Commission*, 117th Cong. 157, 159 (2021) (prepared statement of Jeremy Pelter, Acting Undersecretary, Bureau of Indus. & Sec.) ("BIS is unique among U.S. government agencies with export control responsibilities in its co-location of licensing and enforcement . . . within a single agency.").

210. Addition of Entities to the Entity List, 84 Fed. Reg. 22961, 22962 (May 21, 2019).

211. *See* ASIMOV, *supra* note 186, at 25 ("Essentially, the due process clauses provide procedural protections for private individuals and business interests threatened by loss of liberty or property interests.") To be sure, Asimov recommends additional safeguards for type C adjudications, including statement of reasons and opportunity to submit evidence. *Id.*

First, turning to removal proceedings: As with other entity-specific lists such as OFAC sanctions,[212] removal proceedings constitute a pivotal safeguard to the Entity List.[213] Given the significant economic and reputational impact of being listed, coupled with the fact that an entity has no opportunity to contest an entity listing *prior* to when the listing is made, removal proceedings have assumed significant importance, particularly for listed PRC entities seeking U.S. origin items and for the U.S. corporations seeking to trade with them.[214] Recognizing the importance of removal in 2007, BIS solicited comments for a proposed removal provision, receiving a positive reaction from business leaders.[215] BIS adopted the current removal provision in its 2008 Rule, allowing entities to request removal from the list.[216]

Such proceedings function as follows. The ERC oversees removal proceedings, which commence by request of a listed entity, or by a proposal for removal by an agency on the ERC. In the first scenario, a listed entity requests its "listing be removed or modified."[217] The request, which must be addressed to the ERC chair, does not entitle the requesting party to an administrative hearing, but instead functions as an application. Upon receiving the request, the ERC chair circulates it to the ERC's agencies, which review the request and vote as a committee within thirty days of circulation.[218] For an entity to be removed, its request must be unanimously approved by the ERC.[219]

at 98–103; s*ee also infra* Part III (arguing the ERC should more consistently provide justificatory facts for list additions).

212. *See* ASIMOV, *supra* note 186, at 94 (discussing administrative processes for removal from OFAC lists).

213. *See* 15 C.F.R. § 744.16(e) (2020).

214. *E.g.*, Yuanyou (Sunny) Yang, *Can an Entity be Removed From the BIS Entity List?*, PORTER WRIGHT (July 27, 2020), https://www.porterwright.com/media/can-an-entity-be-removed-from-the-bis-entity-list/ [https://perma.cc/6GZW-4S3J].

215. *E.g.*, Arthur Shulman, *Letter Re: Comments on Proposed Rule*, WIS. PROJECT ON NUCLEAR ARMS CONTROL (Aug. 6, 2007), https://efoia.bis.doc.gov/index.php/documents/public-comments/720-expanded-entity-list/file [https://perma.cc/7R7V-FRR7].

216. Authorization to Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States, 73 Fed. Reg. 49311, 49311–12; 15 C.F.R. § 744.16(e).

217. 15 C.F.R. § 744.16(e).

218. 15 C.F.R. § 744 (Supp. 5 2020) ("The ERC will vote on each proposal no later than 30 days after the chairperson first circulates it to all member agencies unless the ERC unanimously agrees to postpone the vote.").

219. *Id.*

The decision, which cannot be appealed,[220] is communicated to the requester in writing.[221] Alternatively, any agency within the ERC can request removal or modification and members of the ERC are required to review and vote on the request.[222] If the ERC votes to modify, the decision constitutes an amendment to the Entity List. Relatedly, the regulations provide that the ERC will conduct "regular reviews" of the list to ensure it reflects any updated insight into the listed entity and its activities.[223]

One flaw in current removal proceedings is lack of information and transparency: Supplement Number Five to section 744, which outlines the removal process, does not state the criteria a listed entity must meet,[224] and many Entity List removals provide only minimal information as to why the entity was removed.[225] Listed parties seeking removal thus must turn to other sources of information. Final rules provide some guidance, though the contents of such rules generally are of limited value to entities already listed. In a final rule announcing the removal from the Entity List of French aviation company Toulouse Air Spares (SAS), the ERC stated it "took into account [its] cooperation with the U.S. Government [and] assurances of future compliance with the EAR." [226] Other pertinent information includes BIS's

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220. *Id.* ("The decision of the ERC (or the ACEP or EARB or the President, as may be applicable in a particular case) shall be the final agency decision on the request and shall not be appealable under part 756 of the EAR.").

221. 15 C.F.R. § 744.16(e) (2011).

222. 15 C.F.R. § 744 (Supp. 5 2020).

223. *Id.*:

> The [ERC] will conduct regular reviews of the Entity List . . . . The review will include analysis of whether the criteria for listing the entity are still applicable and research to determine whether the name(s) and address(es) of each entity are accurate and complete and whether any affiliates of each listed entity should be added or removed.

224. *Id.*

225. In some instances, removals are based in updated information the ERC has obtained, but the ERC does not provide the specific basis for its removal. For example, in a removal of a Russian entity from the MEU List, the Final Rule stated that it removed "Korporatsiya Vsmpo Avisma OAO," a known alias for "Korporatsiya VSMPO AVISMA," because "the ERC determined it was not a 'military end user' based on the criteria in § 744.21(g) and (f)." Addition of Entity to the Entity List, and Addition of Entity to the Military End-User (MEU) List and Removals from the MEU List, 86 Fed. Reg. 4862, 4862 (Jan. 14, 2021).

226. Removal of Persons From the Entity List Based on Removal Request; Implementation of Entity List Annual Review Changes; and Implementation of Modifications and Corrections to the Entity List, 78 Fed. Reg. 3317, 3317 (Jan. 16, 2013); Removal of Entity from the Entity List, 86 Fed. Reg. 31909, 31909 (June 16, 2021) (providing for the removal of Satori Corporation but stating only that the ERC made the decision "based on information BIS

guidelines for best practices for Entity List compliance. For example, BIS has provided "eight guiding principles when assessing the effectiveness of a company's export compliance program."[227] Such principles include that a corporation implement export compliance training, "publicly support compliance policies," and frequently conduct risk assessments.[228] These principles are directed to exporters and thus are most directly applicable to corporations that are seeking to avoid Entity List violations, rather than to be removed from the Entity List.[229] Thus, the usefulness of the principles to a listed entity would depend on the basis for which the corporation was seeking removal. If a PRC corporation seeking removal were added to the entity list on grounds that it is impeding the effective administration of the Entity List, such as through transshipping items to listed entities, the corporation might seek to rebut such a showing in its request for removal by demonstrating an effective compliance program.[230]

It remains very difficult to be removed from the Entity List, though PRC entities have succeeded in requesting and obtaining removal in limited instances, including two notable removals in June 2022.[231] In practice, a party seeking removal might take several routes, that is, acknowledging that it did in fact act contrary to U.S. national security (e.g., coordinated with the PRC military) and commit to no longer doing so; contesting the evidentiary basis for BIS's addition; or pointing to an error in the list, such as an address inaccurately attributed to the entity. Given the extent of PRC military-civil fusion,

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received pursuant to § 744.16 of the EAR and the review the ERC conducted in accordance with procedures described in supplement no. 5 to part 744 of the EAR").

227. *See* BIS, DON'T LET THIS HAPPEN TO YOU, *supra* note 13, at 20.

228. *Id.*

229. *Id.*

230. OFAC takes a similar route. *See* Chachko*, supra* note 42, at 1099 ("A blocked person may contest the basis for the designation. The person may propose 'remedial steps' that would negate the basis for the designation."); 31 C.F.R. § 501.807 (2018).

231. *See, e.g.*, Addition of Entities, Revision and Correction of Entries, and Removal of Entities From the Entity List, 87 Fed. Reg. 38920, 38925 (June 30, 2022) (removing PRC entity Nanchang O-Film Tech from the Entity List upon Nanchang's request for removal pursuant to the removal provision in § 744.16(e) and emphasizing that the ERC conducted further review that warranted removal); *id.* (removing one of the three listed addresses for the PRC entity Oriental Logistics Group Ltd. based upon information received pursuant to a § 744.16(e) removal request); *cf. Filing a Petition for Removal from an OFAC List*, U.S. DEP'T OF TREAS., https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list [https://perma.cc/SJ4Y-XJ7T]. In contrast to the infrequent removal of entities, OFAC asserts that administrative review "offers a genuine opportunity to challenge designations" and removes hundreds of names from the Specially Designated Nationals and Blocked Persons List each year. *Id.*

and the pressure upon and economic incentives for PRC corporations to collaborate,[232] the first approach would be unlikely to persuade the ERC. Similarly, contesting BIS's evidentiary basis is an uphill battle, especially considering the "specific and articulable" facts that must be identified before an entity is added. To facilitate justified removals, BIS could make it clearer to the public that it thoroughly addresses removal requests, while also providing greater insight into why formerly-listed parties such as Nanchang were removed.[233]

In addition to removal, another rudimentary safeguard is administrative review, or a "second look" at the ERC's decision.[234] Notably, listed entities cannot appeal, but agencies within the ERC can: "If a member agency is not satisfied with the outcome of the vote of the ERC that agency may escalate the matter to the Advisory Committee on Export Policy (ACEP)."[235] The first level of appeal is adjudicated by the ACEP.[236] A member agency dissatisfied with ACEP's decision may escalate the matter to the Export Administration Review Board (EARB), which consists of cabinet level officials, and then to the President.[237]

The appellate process has impacted the lists composition in a case involving Honor, a PRC smartphone company formerly owned by Huawei.[238] There, two ERC members—the Departments of Defense and Energy—voted to add Honor to the Entity List, while two other ERC members—the Departments of Commerce and State—voted against addition.[239] The decision was then appealed to ACEP, and Honor appears to have escaped addition, leading to calls from three Senate Republicans to add Honor to the list.[240] The dispute

232. *See supra* Section I.A.

233. *See infra* Part III.

234. *See* ASIMOV, *supra* note 186, at 102.

235. 15 C.F.R. § 744 (Supp. 5 2020).

236. *Id.*; *see also* Exec. Order No. 12981, § 5, 60 Fed. Reg. 62981, 62984 (Dec. 5, 1995) ("ACEP is established and shall have as its members the Assistant Secretary of Commerce for Export Administration, who shall be Chair of the ACEP, and Assistant Secretary-level representatives of the Departments of State, Defense, and Energy . . . .").

237. 15 C.F.R. § 744 (Supp. 5 2020).

238. *See* Ellen Nakashima & Jeanne Whalen, *Key Security Agencies Split over Whether to Blacklist Former Huawei Smartphone Unit*, WASH. POST (Sept. 21, 2021, 7:00 PM), https://www.washingtonpost.com/national-security/huawei-honor-security-export/2021/09/19/6d49d27c-17ef-11ec-b976-f4a43b740aeb_story.html [https://perma.cc/5ACX-4EUH].

239. *Id.*

240. *See* Simon Lester, *New Calls by Republicans to Add Huawei Spin-off Honor to Entity List*, CHINA TRADE MONITOR (Oct. 14, 2021), https://www.chinatrademonitor.com/new-calls-

shows that interagency composition can facilitate a balancing of economic and security considerations pivotal to ensuring Entity List additions are justified. But the transparency was an exception: ERC votes are not generally publicized.[241]

4. Assessing the Entity List's Administrative Safeguards

The efficacy of the Entity's List's administrative safeguards, particularly in achieving BIS's aim to balance the promotion of legitimate trade with protecting national security,[242] deserves further attention. To be sure, assessing administrative fairness might seem misguided for an export control that depends on discretion and expertise to undermine complex nodes of PRC military-civil fusion. Indeed, some administrative best practices suggested by Asimov, such as notice and comment, are impractical in the Entity List context. Requiring notice and comment in the Entity List context could undermine efficiency in preventing certain entities from receiving sensitive items,[243] and create a window during which listed entities could receive listed items.[244] On the other hand, implementing more robust administrative safeguards is critical. In its current form, the Entity List risks becoming a permanent, prolonged fixture of listed entities, with negative

by-republicans-to-add-huawei-spin-off-honor-to-entity-list/ [https://perma.cc/Z8WM-C2BV].

241. *E.g.*, Addition of Certain Persons to the Entity List; and Removal of Person from the Entity List Based on a Removal Request, 80 Fed. Reg. 8524, 8526 (Feb. 18, 2015) (not providing which ERC members voted to add).

242. *Hearing on U.S.-China Relations in 2021: Emerging Risks Before the U.S.-China Economic and Security Review Commission*, 107th Cong. 157–60 (2021) (prepared statement of Jeremy Pelter, Acting Undersecretary, Bureau of Indus. & Sec.) ("[U]nilateral controls must be carefully analyzed to assess their effectiveness on the target and impact on important U.S. industry sectors.").

243. Addition of Certain Persons to the Entity List; and Removal of Person from the Entity List Based on a Removal Request, 80 Fed. Reg. 8524, 8526 (Feb. 18, 2015):

> If this rule were delayed to allow for notice and comment . . . entities being added to the Entity List by this action would continue to be able to receive items without a license and to conduct activities contrary to the national security or foreign policy interests of the United States.

244. *E.g.*, Addition of Certain Entities to the Entity List, Revision of Entries on the Entity List and Removal of Certain Entities from the Entity List, 83 Fed. Reg. 44821, 44823 (Sept. 4, 2018). Issuance of a proposed rule might also incentivize a potentially listed Entity to seek such items. *See, e.g.*, Addition of Certain Persons to the Entity List; and Removal of Person from the Entity List Based on a Removal Request, 80 Fed. Reg. 8524, 8526 (Feb. 18, 2015):

> [P]arties may receive notice of the U.S. Government's intention to place these entities on the Entity List if a proposed rule is [issued]. . . [D]oing so would create an incentive for these persons to either accelerate receiving items subject to the EAR to conduct activities that are contrary to [U.S.] national security . . . .

effects for exporters and U.S. shipping companies.[245] Further, as the PRC considers implementing its own entity list, which could put U.S. companies in the crosshairs of competing export regimes,[246] better communication of the facts justifying list additions, and access to removals, will be key to ensuring the list resists accusations that it consists of overly broad national security justifications. While it is difficult to anticipate the PRC response to any such changes in the Entity List, the United States could effectively preempt accusations of an overly broad export tool by proactively streamlining the list in its current form.

That the Entity List could implement additional procedural safeguards is demonstrated by placing the Entity List in conversation with other similar administrative national security measures at the nexus of industry and security. First, when compared directly with individualized sanctions administered by OFAC,[247] the Entity List offers comparatively few opportunities for meaningful removal proceedings.[248] Second, consider the Entity List in relation to the Communist Chinese Military Companies List of companies in which U.S. individuals are prohibited from investing.[249] Addition to that list requires explicit connection with the PRC military.[250] There is no such requirement to be added to the Entity List. To be sure, as Part I showed, such a connection can be difficult to identify given PRC military-civil fusion. But the fact that an *explicit* connection is not required means that parties challenging list additions have even *less* material to rebut their status as a national security threat than parties challenging addition to the Communist Chinese Military Companies List. Third, the Entity List at times risks rendering "national security" a conclusion rather than a fact-based assessment, as seen where the ERC does not provide "specific and articulable facts" justifying the additions.[251] While

245. *See, e.g.*, INSIDE TRADE, *supra* note 36.

246. *E.g.*, Vincent Chow, *US Companies Face Compliance Dilemma as China Readies 'Unreliable Entity' List*, LAW.COM (Sept. 22, 2020, 3:32 PM), https://www.law.com/international-edition/2020/09/22/us-firms-face-compliance-dilemma-as-china-readies-unreliable-entity-list/ [https://perma.cc/A282-LLCG].

247. 31 C.F.R. § 501.807 (2018) ("A blocked person seeking unblocking or a person seeking the unblocking of a vessel may request a meeting with the Office of Foreign Assets Control . . . .").

248. *See infra* Section III.B.2 (contrasting OFAC removal proceedings with Entity List removal proceedings).

249. Exec. Order No. 13959, §§ 1–4, 85 Fed. Reg. 73185, 73185–87 (Nov. 12, 2020).

250. *Id.*

251. *See* 15 C.F.R. § 744.11 (2021); *infra* Part III; *see also* Addition of an Entity to the Entity List, 83 Fed. Reg. 54519, 54519 (Oct. 30, 2018). The addition of Fujian Jinhua

framing national security broadly is necessary when specific threats are obfuscated behind commercial-military collaborations, doing so without counterbalancing administrative checks threatens to undermine a primary mechanism of administrative national security, *adjudications*, through an overly broad principle. As Professor Heath has argued, the expansion of national security rationales in international trade demands greater administrative oversight, or "governance over national security measures," to ensure such claims are not overused.[252] Requiring the ERC to provide more detailed accounts of its decisions is thus warranted in some instances.[253]

B. Entity List and The Role of the Courts

The vast majority of parties added to the Entity List—and parties charged with violating it—never challenge the administrative action in federal court.[254] The primary reason is that, although Entity List additions and violations are both final agency actions,[255] a challenging party confronts near-insurmountable obstacles in disputing either an addition or a violation. Not only does the federal judiciary grant deference to administrative decisions involving national

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Integrated Circuit Company arguably constituted a conclusory addition without specific facts, as BIS stated only that the company "poses a significant risk of becoming involved in activities that could have a negative impact on the national security interests of the United States." *Id.*

252. *See* Heath, *supra* note 41, at 1080–81. Heath outlines how nations increasingly use national security justifications to evade compliance with international trade requirements, such as a nation arguing before the World Trade Organization (WTO) that its decision to impose tariffs was justified on national security grounds. *Id.* at 1029–30. Heath argues for more effective administrative procedures, including uniform standards amongst nations as to what qualifies as a "national security" claim. *Id.* at 1082. While this Note focuses on administrative process governing the Entity List, uniformity across nations regarding the threshold for when an entity becomes a national security threat will be increasingly important should PRC implement its proposed Unreliable Entities List.

253. *See infra* Part III.

254. *Compare Violation Tracker Summary Page*, GOOD JOB FIRST, https://violation-tracker.goodjobsfirst.org/agency/BIS [https://perma.cc/N4LL-4BB3] (listing hundreds of parties fined by BIS for export violations, including Entity List violations), *with* Changji Esquel Textile Co. v. Raimondo, 573 F. Supp. 3d 104, 108 (D.D.C. 2021) (citing minimal precedent for challenges to list additions), *and* Fed. Express Corp. v. U.S. Dep't of Com., 486 F. Supp. 3d 69, 73 (D.D.C. 2020) (citing minimal precedent for challenges to list violations).

255. Agency actions must be final to be challenged in court. Chachko, *supra* note 42, at 1133. Decisions adjudicated by administrative agencies within administrative national security, including measures that "target[] a specific person or entity by name," would likely satisfy the "agency action" requirement, as they mark the consummation of agency decision-making and create immediate legal consequences. *Id.* at 1136.

security,[256] but review under the APA's "arbitrary and capricious" standard is unavailable.[257]

But there are notable exceptions. In a typical dispute, the government emphasizes the broad deference granted to BIS to enforce national security measures, while the non-governmental party asserts that, because the list bears on an individual's capacity to conduct trade, the real issue is a due process right to market access.[258] This Section uses three cases to highlight this tension and demonstrate the minor role the judiciary has in reviewing Entity List adjudications, considering: (1) a PRC entity challenging its addition to the list;[259] (2) a major U.S. shipping corporation challenging the strict liability standard for violations;[260] and (3) a PRC individual, Shuren Qin, seeking to use discovery tools to build his defense case.[261]

1. Seeking Preliminary Injunctions for Entity List Removal

On July 22, 2020, BIS added Changji Esquel Textile Co. ("Changji"), a subsidiary of textile company Esquel Group, to the Entity List, on grounds that it had engaged in human rights violations.[262] One year later, on July 6, 2021, Changji challenged the Entity List designation in the federal district court for the District of Columbia,

256. Stephen I. Vladeck, *The Exceptionalism of Foreign Relations Normalization*, 128 HARV. L. REV. F. 322, 323 (2015).

257. 50 U.S.C. § 4821.

258. PRC defendants charged with violating the Entity List, as well as other EAR provisions, have frequently asserted that the regulations violate due process. Such challenges have been widely unsuccessful. *See, e.g.*, United States v. Guo, 634 F.3d 1119, 1123 (9th Cir. 2011) (quoting United States v. Kim, 449 F.3d 933, 943 (9th Cir. 2006)) (rejecting due process argument that the EAR is unconstitutionally vague because the EAR specify the qualifications for the listed thermal imaging cameras which defendant conspired and attempted to export to the PRC, and noting that the EAR scienter requirement "alleviates any concern over the complexity of the regulatory scheme" because scienter requirements "mitigate[s] a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed"); United States v. Cheng, 392 F. Supp. 3d. 141, 151 (D. Mass. 2019) (finding no due process violation in enforcement of EAR regulations); United States v. Wu, 711 F.3d 1, 13 (1st Cir. 2013) (same).

259. *Changji*, 573 F. Supp. 3d at 104.

260. Fed. Express Corp. v. U.S. Dep't of Com., 486 F. Supp. 3d 69, 73 (D.D.C. 2020).

261. United States v. Qin, No. 18-CR-10205, 2020 WL 7024650, at *1 (D. Mass. Nov. 30, 2020).

262. Addition of Certain Entities to the Entity List; Revision of Existing Entries on the Entity List, 85 Fed. Reg. 44159, 44159–60 (July 22, 2020) (citing Changji's involvement in "human rights violations and abuses in the implementation of China's campaign of forced labor and high-technology surveillance . . . in the Xinjiang Uyghur Autonomous Region . . .").

seeking a preliminary injunction for removal from the Entity List.[263] Simultaneously, Changji sought removal by writing to the ERC.[264] The United States urged Changji to wait for the ERC's decision before moving for preliminary injunction, and on July 31, the ERC stated that it would in fact remove Changji from the list, "subject to certain conditions."[265] But Changji pressed forward in litigation, contending that given the negative publicity, economic harm, and its discontent with the terms of the conditional removal (which were *not* made public), preliminary injunction was in its best interest.[266] After the district court denied Changji's motion, Changji appealed to the Circuit Court for the District of Columbia.[267] Judge Katsas determined the court had jurisdiction to hear the appeal and affirmed the district court's denial on the same grounds,[268] calling the *ultra vires* challenge a "Hail Mary pass."[269]

The details of *Changji* are worth examining because the case provides a litmus test for listed parties seeking preliminary injunction. A good candidate for preliminary injunction is surely one where the ERC *itself* recommends conditional removal, a recommendation which undermines the committee's original addition.[270] Changji's failure to obtain an injunction highlights the difficulty in using the judiciary to obtain prompt removal from the Entity List.

To succeed on a preliminary injunction, a party must demonstrate likelihood of success on the merits, irreparable harm, and that

263. Plaintiffs' Motion for Preliminary Injunction at 1, *Changji*, 573 F. Supp. 3d (No. 21-CV-01798).

264. *See* Defendant's Redacted Statement of Points and Authorities in Opposition to Plaintiff's Motion for a Preliminary Injunction at 1, *Changji*, 573 F. Supp. 3d (No. 21-CV-01798).

265. Joint Motion to Vacate Hearing Date & Extend Def. Deadline to Oppose Preliminary Injunction by 30 Days at 1–3, *Changji*, 573 F. Supp. 3d (No. 21-CV-01798). The motion provided no specific conditions and stated, "[t]he parties are currently engaging in . . . discussions regarding those conditions." *Id.*

266. *See* Plaintiffs' Motion for Preliminary Injunction at 1, *Changji*, 573 F. Supp. 3d (No. 21-CV-01798) ("Plaintiffs are suffering ongoing irreparable harm as the result of . . . inclusion . . . on . . . the Entity List.").

267. *See generally* Changji Esquel Textile Co. v. Raimondo, 40 F.4th 716 (D.C. Cir. 2022).

268. *Id.* at 719 (citing 28 U.S.C. §1292(a)(1) as the basis for its jurisdiction to review the district court's interlocutory order).

269. *Changji*, 40 F.4th at 722 (citing Nyunt v. Chairman, Broad. Bd. of Governors, 589 F.3d 445, 449 (D.C. Cir. 2009)).

270. Counsel for Changji advanced this argument in its recent brief on appeal to the D.C. Circuit. Brief for Plaintiffs-Appellants Changji Esquel Textile Co., Ltd. at 25–26, *Changji*, 40 F.4th (No. 21-CV-05219).

removal will further an important public interest.[271] The district court, finding Changji failed on the first, did not consider the other two elements.[272] On the merits front, the court rejected Changji's central argument that the ERC acted *ultra vires* when it designated Changji without citing to one the "five enumerated areas" listed in the ECRA.[273] An *ultra vires* challenge has three elements, the third and most demanding of which requires that the challenging party show that the agency "plainly acts in excess of its delegated powers."[274] Here, the court emphasized that the statutory bases for export are illustrative, *not* exclusive,[275] and provide the agency discretion to add entities for a range of bases.[276] The court pointed in particular to subsection sixteen, which states that the Executive may take "any other action as is necessary to carry out this subchapter . . . ."[277] For the court, restricting a suspected human rights violators' access constituted "any other action" necessary to use export controls to advance a national security interest, a holding that points to the significant discretion BIS enjoys when making list additions.[278] Changji's addition thus fell within the statute's plain meaning.[279]

Changji establishes a few critical precedents in how courts will likely interpret judicial challenges to list additions. First, Judge Walton clarified that the ERC is *not* required to disclose the "specific and articulable" facts justifying its additions.[280] Second, he made clear that even if it *were* required to disclose such facts, brief statements by the ERC—such as the Final Rule justifying Changji's addition on grounds it used "forced labor involving members of Muslim minority

271. *Changji*, 573 F. Supp. 3d at 110.

272. *Id.* at 117. On appeal, the circuit court similarly concluded that it would not consider the other preliminary injunction factors unless the challenging party raised a "serious legal question," which it failed to do. *Id.* at 726.

273. *Changji*, 573 F. Supp. 3d at 111, *aff'd*, 40 F.4th 716 (D.C. Cir. 2022); 50 U.S.C. § 4811(2) (providing five reasons as bases for export controls necessary to protect the "national security and foreign policy of the United States . . .").

274. *See Changji*, 40 F.4th at 722 (affirming the district court's findings). On appeal, Judge Katsas emphasized that the court should apply "substantial deference" to the Executive in matters of national security. *Id.* at 723.

275. *Changji*, 573 F. Supp. 3d at 112–16.

276. *Id.*; 50 U.S.C. § 4813(a)(16).

277. 50 U.S.C. § 4813(a)(16).

278. *Changji*, 573 F. Supp. 3d at 114.

279. *Id.* at 113.

280. *Id.* at 116–17; *see also* Changji Esquel Textile Co. v. Raimondo, 40 F.4th 716, 726 (D.C. Cir. 2022) (affirming Judge Walton's determination and asserting that *ultra vires* review "presents no occasion to flyspeck an order's factual findings or explanation").

groups"—would suffice to meet the requisite standard.[281] And third, he refused to critically examine Changji's core piece of evidence—its "affirmative evidence of clean audits, corporate sustainability, and ethical business practice"—on grounds that such evidence would be useful *only* were the court to be deciding if the addition were "arbitrary and capricious" under the APA.[282] But because the ECRA expressly excludes APA review, the court, Judge Walton explained, cannot consider the strength of plaintiff's evidence in relation to that of the government.[283] Finally, that Judge Katsas readily rejected Changji's host of arguments on appeal suggests that appellate review of district court decisions on Entity List challenges is minimal.[284]

Changji does not necessarily doom subsequent parties seeking preliminary injunctions for Entity List removal. But it comes close. Judge Walton's opinion suggests courts will all but accept the ERC's conclusion for an addition, with paltry consideration of the facts underlying it. In *Changji*, those facts appear present.[285] But in a case where they were not, the judiciary's minimal involvement would fail to ensure the list is held to account to its own standard.[286]

2. Due Process and *Ultra Vires* Claims to Contest Entity List Violations

Parties fined for shipping listed items to listed entities have asserted due process and *ultra vires* challenges. In one such case, shipping company FedEx, which has previously settled with BIS for fines involving exporting controlled items to listed PRC entities,[287] sought

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281. *Changji*, 573 F. Supp. 3d at 109.

282. *Id.* at 117.

283. *Id.* (citing Eagle Tr. Fund v. U.S. Postal Serv., 811 Fed. App'x 669, 670 (D.C. Cir. 2020) ("[T]his challenge ultimately asserts a 'purported lack of reasoned decisionmaking' remarkably akin to 'a heartland arbitrary-and-capricious challenge under the APA . . . .'").

284. *Changji*, 40 F.4th at 720–26.

285. *See, e.g.*, James Millward, *Letter to the Editor*, WIRE CHINA (Sept. 1, 2021), https://www.thewirechina.com/2021/09/01/letter-to-the-editor-september-3-2021/ [https://perma.cc/Z5DC-E273] ("[S]anctions over atrocities in the Uyghur region have been laser-focused on complicit individuals and companies . . . .").

286. See *infra* Section III.A.

287. *E.g.*, Press Release, Bureau of Indus. & Sec., FedEx Settles Charges of Causing, Aiding and Abetting Unlicensed Exports, U.S. Dep't of Com. (Jan. 4, 2012), https://www.bis.doc.gov/index.php/all-articles/65-template/press-release/232-fedex-settles-charges-of-causing-aiding-and-abetting-unlicensed-exports [https://perma.cc/46KS-L96D] ("FedEx caused, aided and abetted acts prohibited by the regulations when it facilitated the

injunctive relief for penalties imposed for Entity List violations.[288] FedEx specifically challenged fifty-three violations of the EAR, including Entity List violations.[289] In its lawsuit, FedEx asserted that the Entity List rendered it impossible for FedEx to provide global shipping services, asserting that the Department of Commerce had unreasonably deputized FedEx in enforcing its regulatory scheme.[290] The court dismissed these claims; FedEx appealed.[291]

At the district court, FedEx offered a due process claim and an *ultra vires* claim.[292] On due process, determining that the only right at issue was FedEx's limited right to conduct global shipping operations and thus applying rational basis review, the court held that a strict liability regime rationally advanced the government's interest in protecting national security interests.[293] FedEx's *ultra vires* argument claimed that the Department of Commerce should have classified it as transporting restricted items, a violation which requires a knowledge showing and which the government likely could not have met.[294] The court conceded that FedEx persuasively argued that the Department of Commerce misclassified FedEx's particular violation as "aiding and

unlicensed export of flight simulation software to Beijing University of Aeronautics and Astronautics . . . .").

288. Complaint for Declaratory, Injunctive, and Other Relief 1, Fed. Express Corp. v. U.S. Dep't of Com., 486 F. Supp. 3d 69 (D.D.C. 2019) (19-CV-01840).

289. In connection with the violations, FedEx agreed to audit its export control compliance measures and pay a fine of $500,000, for violation of aiding and abetting Entity List violations, a strict liability charge. *See* Order Related to Federal Express Corporation d/b/a FedEx Express ¶ 1, *In re* Fed. Express Corp., 17-BIS-0006 (Apr. 24, 2018); *Fed. Express*, 486 F. Supp. 3d at 72.

290. Complaint for Declaratory, Injunctive, and Other Relief ¶¶ 8–9, *Fed. Express*, 486 F. Supp. 3d (No.19-CV-01840) ("[T]he EAR essentially deputize FedEx to police the contents of the millions of packages it ships daily even though doing so is a virtually impossible task, logistically, economically, and in many cases, legally.").

291. *See generally* Notice of Appeal to D.C. Circuit Court, Fed. Express Corp. v. U.S. Dep't of Com., 39 F.4th 756 (D.C. Cir. 2022) (No. 20-5337).

292. Fed. Express Corp. v. U.S. Dep't of Com., 486 F. Supp. 3d 69, 75–77 (D.D.C. 2020), *aff'd sub nom.*, Fed. Express Corp. v. U.S. Dep't of Com., 39 F.4th 756 (D.C. Cir. 2022)

293. *Id.* at 76 ("National security and foreign policy are core matters of legitimate federal concern . . . and the EAR rationally relate to those concerns by preventing hostile foreign actors from obtaining materials or technology that could harm U.S. interests.") (citing Holder v. Humanitarian L. Project, 561 U.S. 1, 33–34 (2010)).

294. Complaint for Declaratory, Injunctive, and Other Relief ¶ 5, *Fed. Express*, 486 F. Supp. 3d (19-CV-01840) ("To comply with the Export Controls, FedEx screens the names and addresses of its shippers and the designated recipients prior to delivering any package . . . to identify whether the sender and/or recipient are an entity or person on the EAR's "Entity List."); 15 C.F.R. § 736.2(1) (2021) (requiring knowledge).

abetting" (instead of the more accurate "transporting"), but nevertheless rejected the claim, asserting FedEx could not reach the "patent misconstrual" critical to an *ultra vires* challenge.[295]

In its amended complaint, FedEx argued that to comply with the strict liability standard, it would need to inspect each package potentially destined for controlled entity.[296] The case epitomizes the difficult line shippers must walk between continuing to do business with PRC's immense market and confronting the accompanying risks in doing so.[297]

3. The Limits of Discovery: Qin as an Example

Parties seeking information during the discovery phase of prosecutions for Entity List violations face several challenges. First, courts often deny discovery requests on national security grounds.[298] Second, the requirement for information-seeking parties to demonstrate that evidence sought could alter the "quantum of proof"[299] is difficult to meet: *Any* export of a sensitive item to a listed entity is a potential violation, and evidence that an item has *multiple* uses, or that the end-user might have only civilian goals, is unhelpful. Discovery disputes in Entity List and other litigation involving the Export Administration Regulations thus appear to be rare.[300]

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295. *Fed. Express*, 486 F. Supp 3d at 81–82 (citing Hunter v. FERC, 569 F. Supp. 2d 12, 16 (D.D.C. 2008)).

296. Complaint for Declaratory, Injunctive, and Other Relief ¶¶ 39–42, *Fed. Express*, 486 F. Supp. 3d (19-CV-01840) ("Even if FedEx were to inspect the contents of every package for reexport that it delivers, the company would not have enough information to make highly technical determinations to assess whether an item outside the U.S. is an 'item subject to the EAR.'").

297. *See generally The People's Republic of China: U.S.-China Trade Facts,* OFF. OF THE U.S. TRADE REP., https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china [https://perma.cc/K983-CUPH] ("U.S. goods and services trade with China totaled an estimated $615.2 billion in 2020."). Potential clashes with PRC's unreliable entity list, should it be administered, will also present novel concerns for shippers like FedEx, which could be penalized under the PRC regime for compliance with U.S. regulations. *See* Chow, *supra* note 246.

298. Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103, 128–38 (2017) (discussing latitude granted to judges to reject discovery requests where the government asserts a national security justification for preventing access to documents during discovery).

299. United States v. Maniktala, 934 F.2d 25, 28 (2d. Cir. 1991) (citing United States v. Ross, 511 F.2d 757, 762 (5th Cir. 1975)).

300. *See, e.g.*, United States v. Cheng*,* 849 F.3d 516, 517 (D. Mass. 2019) (no discovery dispute); United States v. Wu, 711 F.3d 1, 21 (1st Cir. 2013) (same).

The *Qin* case offers a unique example where a defendant sought to use discovery to obtain more information concerning BIS's classification and enforcement mechanisms. Qin was charged with causing the illegal export of sensitive items, including hydrophones and sonobuoys, to NWPU, a university on the Entity List. Prior to pleading, Qin filed several motions, including an unsuccessful motion to suppress information obtained from his laptop by Customs and Border Patrol,[301] as well as a discovery motion seeking information to support his claim that the exports were for commercial, not military, purposes.[302] Qin sought evidence of the government's knowledge of commercial uses of hydrophones,[303] and he also requested the specific export control classification numbers (ECCN) for items he was charged with exporting.[304]

The government responded by asserting that evidence of hydrophones' commercial use was immaterial,[305] distinguishing *Qin* from a facially analogous dispute in *United States v. Wu*.[306] The defendant in *Wu* was charged with exporting items subject to the Arms Export Control Act to the PRC[307] and sought information showing that exported items had commercial uses.[308] Whereas in *Wu* evidence of commercial use could substantiate a rebuttal to the requisite mens rea of knowingly exporting defense articles, under the Entity List,

301. Shuren Qin's Memorandum in Support of Motion for Discovery Concerning Warrantless Seizures and Searches of Electronic Devices, United States v. Qin, No. 18-CR-10205, 2019 WL 6887874 (D. Mass. Mar. 26, 2019).

302. Shuren Qin's Motion for Discovery of Specific Material and/or Exculpatory Information at 4, *Qin*, No. 18-CR-10205 [hereinafter Qin's Motion for Specific or Exculpatory Material]; *see also* FED. R. CRIM. P. 16(a)(1)(E). Although access to exculpatory information is a right enjoyed by defendants, defendants must first show that the request information can "significantly . . . alter the quantum of proof in . . . [defendant's] favor." *Maniktala*, 934 F.2d at 28 (citing *Ross*, 511 F.2d at 762–63).

303. Government's Opposition to Defendant's Motion for Discovery of Specific Material and/or Exculpatory Information at 3, *Qin*, No. 18-CR-10205.

304. *Id.* at 13.

305. *Id.* at 1–2.

306. United States v. Wu, 680 F. Supp. 2d 287, 291 (D. Mass. 2010) (requiring production of information "[i]f either the Department of State's or . . . Commerce's files have any evidence that tends to support a defense of lack of willfulness (i.e., a manufacturer's indications that articles allegedly exported have normal commercial uses)").

307. *See* 22 U.S.C. § 2778 (2014) ("[T]he President is authorized to control the . . . export of defense articles . . . .").

308. *Wu*, 680 F. Supp. 2d at 291.

evidence of commercial use is unhelpful, as the problem is not *how* the item is being used but *to whom* it is going.[309]

Qin pled guilty before the motion's resolution, but the court signaled acceptance of the government's assertions.[310] The court also rejected Qin's request for the specific ECCN numbers of the items he exported. Under the Entity List classification system, an entity listing creates a national security concern for *all* sensitive items that are contained within the Commerce Control List.[311] Thus, whether the basis for an ECCN classification is "national security," "terrorism," or "other," the export of that item to a listed entity would constitute a national security risk *regardless* of the ECCN classification. To be sure, even if Qin obtained the ECCN classifications, he faced an uphill battle.[312]

Qin suggests that, in light of the court's deference to national security interests and the difficulty in proving that sought-after information is exculpatory, discovery will not be particularly helpful to parties challenging Entity List violations.

III. Proposals For Reform to The Entity List

This Part considers how BIS might retool the Entity List to address concerns raised by defendants and litigants in the context of its increased use to address PRC military-civil fusion. Section III.A discusses expanded judicial review. Section III.B offers administrative reforms to the list to address concerns raised in litigation and promote public trust in the list's processes.

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309. Government's Opposition to Defendant's Motion for Discovery of Specific Material and/or Exculpatory Information at 15, *Qin*, No. 18-CR-10205:

> [T]he controls here have nothing to do with the nature of the exported parts . . . but rather . . . the entity in the PRC who received . . . the parts . . . . [W]hether or not the exported products themselves raise national security concerns is not relevant to defendant's innocence or guilt . . . .

310. Transcript of Motion Hearing at 24, *Qin,* No. 18-CR-10205. In response to Qin's assertion that "we want from the Government . . . what they think the ECCN numbers should be because there can be conflict about that issue," the court replied, "[i]t seems like a little bit of a stretch." *Id.*

311. *Id.* at 27.

312. Other evidence, such as Qin's admission to a Naval Criminal Investigative Service agent that he sought military-grade equipment, undercut any claim of commercial intentions. United States v. Qin, 18-CR-10205, 2020 WL 7024650, at *2 (D. Mass. Nov. 30, 2020).

A. Strengthening the Judiciary's Role: Heightened Review of Entity List Adjudications

While heightened judicial review of Entity List adjudications is highly improbable and would require Congress to amend the export administration regulations that provide an exemption from the APA, it is still worth considering the implications of raising the standard of review of Entity List additions. If entities could challenge additions not just on *ultra vires* grounds, but also under the "arbitrary and capricious" standard provided by the APA, the ERC might be pressed to provide more "specific and articulable facts." An APA requirement could thus serve as a positive catalyst for greater transparency as to why a certain entity was added.

Considering the potential impact of the APA's "arbitrary and capricious" on the Entity List is difficult. Doing so requires examination of the evidence upon which the ERC made its determination, which is not publicly available. But an analogy can help. In *Xiaomi v. Department of Defense*, PRC corporation Xiaomi challenged the decision by the Department of Defense (DoD) to add it to a list of Chinese Community Military Companies (CCMC), or companies affiliated with the PRC military.[313] Once Xiaomi was listed, U.S. individuals were prohibited from investing in it. In key respects, Executive Order 13,959 bears similarities to the Entity List: It prohibits dealing with corporations out of concern that they are supporting activities antithetical to national security, especially PRC military-civil fusion.[314] But in another key respect, they differ: Unlike EAR regulations, which exclude APA review, Section 1237 of the NDAA for Fiscal Year 1999, which authorizes the President to designate PRC companies as CCMCs, does not.[315] In fact, the D.C. Circuit has held

313. *See* Xiaomi Corp. v. U.S. Dep't of Def., No. 21-CV-00280, 2021 WL 950144, at *1 (D.D.C. Mar. 12, 2021) (designation as a PRC military company "forbids all U.S. persons from purchasing or otherwise possessing Xiaomi's publicly traded securities or any derivatives of said securities").

314. Exec. Order No. 13,959, § 1, 85 Fed. Reg. 73185, 73185 (Nov. 12, 2020) (prohibiting U.S. persons from investing in any CCMC, including a prohibition on any "transaction in publicly traded securities, or any securities that are derivative of, or are designated to provide investment exposure to such securities of any [CCMC]").

315. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, 112 Stat. 2160 (as amended by Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 § 1222, 118 Stat. 1811, 1821). President Trump's Executive Order was issued pursuant to section 1237 of the 1999 NDAA on grounds that such companies met the criteria listed in section 1237(b)(4)(B) (defining CCMC as among other definitions any person that is "owned or controlled by the People's Liberation Army"). Exec. Order No. 13,959, § 4, 85 Fed. Reg. 73185, 73186–87 (Nov. 12, 2020).

that agency decision-making that implements an executive order issued under the International Emergency Economic Powers Act (IEEPA) is subject to APA review.[316] The court's approach to Xiaomi's motion for a preliminary injunction thus provides a window into the burden the government would bear in justifying Entity List additions were it made subject to APA review.

In its motion for preliminary injunction, Xiaomi argued that the addition was "arbitrary and capricious" and that DoD lacked the sufficient evidence necessary to justify the addition.[317] The court agreed, finding the decision to add Xiaomi was backed only by a "conclusory statement" that Xiaomi was a CCMC.[318] The court also found that Xiaomi would "suffer irreparable harm in the form of serious reputational . . . injuries."[319]

The *Xiaomi* decision suggests that if the Entity List were required to meet the APA standard, BIS would need to provide more "specific and articulable facts" to meet the "satisfactory explanation" requirement, or risk that some of its additions could be successfully challenged in court. Entity List additions are final agency actions.[320] As such, if Congress were to place these adjudications within the APA's standards, they would need to be supported by a satisfactory explanation.[321] Under this proposal, BIS would be required to provide greater factual bases, though it would *not* need to make additions on the basis of a definitive set of factors in every case (the range of distinctive national security threats would make such a uniform approach impractical). Still, a slightly heightened factual requirement could help some entities navigate the list, build greater trust, and allow entities to change their practices. For example, Changji might have argued that ERC did not provide specific facts to show how its practices were connected with forced labor. Similarly, under the APA, Jinhua Electronics could assert that the addition failed to meet the "specific" facts requirement.[322] But in most instances, final rules likely provide

316. *See* TikTok Inc. v. Trump, No. 20-CV-2658, 2020 WL 7233557, at *13 (D.D.C. Dec. 7, 2020) (citing Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 162 (D.C. Cir. 2003)).

317. *See* Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 15, *Xiaomi*, No. 21-280.

318. *Xiaomi*, 2021 WL 950144, at *5.

319. *Id.* at *1.

320. 5 U.S.C. § 704; Bennett v. Spear, 520 U.S. 154, 178 (1997).

321. Dickinson v. Zurko, 527 U.S. 150, 164 (1999).

322. *See* Addition of an Entity to the Entity List, 83 Fed. Reg. 54519, 54519 (Oct. 30, 2018). The addition of Fujian Jinhua Integrated Circuit Company arguably constituted a

sufficient justificatory facts. Consider the Final Rule adding Huawei, which states express activities Huawei engaged in that were contrary to national security and would likely qualify as a "satisfactory explanation."[323]

To be sure, the Entity List will *not* be subject to APA review given Congress' express exemption. Still, the ERC might ameliorate concerns about the Entity List's adjudicative process by seeking to ensure that all list additions, where possible in light of national security constraints, meet the "satisfactory explanation" required under the APA.

B. Proposing Procedural Modifications for the Entity List's Administrative Process

Heightened judicial review of the Entity List is improbable, making other reforms—such as retooling the Entity List's administrative process—key to addressing concerns about its enforcement, economic impact, and compliance challenges. This Section proposes three reforms.

1. Ensuring Specific and Articulable Facts for List Additions

The extent to which BIS provides "specific and articulable facts" justifying its addition of PRC entities varies significantly.[324] Varying degrees of specificity in list additions undermines the list's consistency. By providing a consistently high degree of specificity and offering more uniformity in the facts it provides to justify list additions, BIS could heighten public trust, increase compliance, and provide more avenues for parties judicially contesting list additions.

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conclusory addition without specific facts. BIS stated simply that the company "poses a significant risk of becoming involved in activities that could have a negative impact on the national security interests of the United States." *Id.* The final rule did not provide additional facts.

323. Addition of Entities to the Entity List, 84 Fed. Reg. 22961, 22961–62 (May 21, 2019).

324. *See supra* note 115 and accompanying text; *cf.* Addition of Entities to the Entity List, Revision of Entry on the Entity List, and Removal of Entities From the Entity List, 85 Fed. Reg. 83416, 83416 (Dec. 22, 2020) (providing specific facts justifying each addition).

For example, BIS has offered varying degrees of factual specificity regarding list additions, at times within the same Rule.[325] Consider the ERC's decision from December 2020 to add the Beijing Institute of Technology "for acquiring and attempting to acquire U.S.-origin items in support of programs for the People's Liberation Army."[326] The addition could hardly be described as "specific facts." Instead, BIS offered its conclusion. In contrast, in its addition of ROFS Microsystems and five PRC individuals, BIS justified the addition by citing specific facts, stating "[t]here is reasonable cause to believe that these individuals, in coordination with Tianjin University . . . systematically coordinated and committed more than a dozen instances of theft of trade secrets from U.S. corporations,"[327] and citing the indictment charging the same five PRC individuals with conspiracy to commit espionage—a high degree of factual specificity.[328]

Ensuring that the ERC offers specific facts underpinning its addition could help corporations better navigate the list and promote transparency. In its current form, when the list provides only conclusions to justify list additions, as in the addition of Beijing Institute of Technology, it risks creating mistrust.[329] Second, providing factual bases for additions could enhance compliance. On the U.S. side, corporations have asserted Entity List compliance requires the difficult task of discerning the ultimate end-user of a product, as occurred when the non-listed PRC firm LinkOcean transshipped hydrophones to the

325. *See supra,* note 115 and accompanying text; *see also* Addition of Entities to the Entity List and Revision of an Entry on the Entity List, 84 Fed. Reg. 29371, 29372 (July 24, 2019) (describing how Sugon, Wuxi Jiangnan Institute of Computing Technology, and the National University of Defense Technology (NUDT) are leading China's development of exascale high performance computing, and outlining the "military end users and end users of [Sugon's] high performance computers").

326. *See, e.g.*, Addition of Entities to the Entity List, Revision of Entry on the Entity List, and Removal of Entities From the Entity List, 85 Fed. Reg. at 83416.

327. *Id.*

328. *Id.*; *see also* Addition of Entities to the Entity List, 84 Fed. Reg. at 22961 (describing specific activities that justified the addition of Huawei).

329. *See, e.g.*, Addition of an Entity to the Entity List, 83 Fed. Reg. 54519, 54519 (Oct. 30, 2018). In BIS's October 2018 addition of Fujian Jinhua Integrated Circuit Company, BIS stated simply that the company "poses a significant risk of becoming involved in activities that could have a negative impact on the national security interests of the United States." *Id.* at 54520. While the likely basis of Fujian's addition later emerged, including an indictment against Fujian for theft of intellectual property, BIS did not state the precise basis for its additions. *See also China Chipmaker Fujian Jinhua Pleads Not Guilty to US Theft Charges*, REUTERS (Jan. 9, 2019, 9:57 PM), https://www.reuters.com/article/us-fujian-jinhua-china-court/china-chipmaker-fujian-jinhua-pleads-not-guilty-to-us-theft-charges-idUSKCN1P4080 [https://perma.cc/7X2V-TT9U].

listed NWPU.[330] Providing greater evidence could help. For example, in its addition of Beijing Institute of Technology, the ERC might offer insight into specific manufacturers from which Beijing Institute of Technology has attempted to acquire sensitive items, and the specific items the Institute would most likely seek to acquire.

2. Increasing Transparency in the Entity List Removal Process

While any party designated on the Entity List can seek removal by requesting that "its listing be removed or modified,"[331] current regulations provide a high standard for removal (unanimous vote) and insufficient actionable guidance on navigating the removal process.[332]

BIS has stated that greater review of the Entity List is necessary.[333] To achieve this goal, BIS should make the removal process more transparent and publicize criteria by which entities can obtain removal.[334] For example, OFAC allows a party to "submit arguments or evidence . . . to establish that insufficient basis exists for the designation" (as does the Entity List); it also offers insight into the precise information a party seeking unblocking might provide.[335] To that end, BIS might provide a case study of an entity that has obtained removal, outlining the evidence it submitted or the compliance programs it implemented. Allowing greater access to removal could ensure that entities for which compliance has become a priority can reform their corporate practices to obtain removal. Similarly, a PRC corporation alert

330. *See, e.g.*, INSIDE TRADE, *supra* note 36; *see also* United States v. Qin, No. 18-10205, 2019 WL 6887879, at *1 (D. Mass Mar. 26, 2019).

331. 15 C.F.R. § 744.16 (2020). To obtain removal, the ERC must unanimously vote in favor of removal. *Id.*

332. *See supra* Section II.A.3.

333. Authorization to Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States, 73 Fed. Reg. 49311, 49319 (Aug. 21, 2008) ("[M]ore systematic review . . . of the Entity List is desirable and would make the List more useful to the public.").

334. To be sure, making removals more transparent does not necessarily increase the number of entities that will be removed. For some entities such as Huawei, Department of Commerce Secretary Raimondo has stated that there is "no reason" for removal. Eric Martin, *Biden Commerce Pick Sees 'No Reason' to Lift Huawei Curbs*, BLOOMBERG (Feb. 3, 2021), https://www.bloomberg.com/news/articles/2021-02-04/biden-commerce-pick-sees-no-reason-to-pull-huawei-from-blacklist [https://perma.cc/HK7Q-GW5Y].

335. 31 C.F.R. § 501.807 (2018) ("A person blocked may submit arguments or evidence that the person believes establishes that insufficient basis exists for the designation. The blocked person also may propose remedial steps on the person's part, such as corporate reorganization . . .which . . . would negate the basis for designation.").

to the evidentiary bases for which a listed entity could be removed could prepare its case against Entity List placement.[336] This could promote compliance and reduce the number of lawsuits like the one involving Changji.

3. Amplifying the Validated End-User List

Expansion and greater publicization of a program allowing approved entities to receive restricted items marks a final key reform. In 2007, BIS introduced its validated end-user (VEU) program to facilitate exports to legitimate end-users, primarily in the PRC.[337] The program allows an entity to be "approved in advance" to receive items without a license which otherwise would require one.[338] To qualify, an entity must meet stated requirements, such as permitting the Department of Commerce to conduct an initial on-site visit.[339] BIS aimed to use the VEU-listed to facilitate more U.S. exports to the PRC, particularly semiconductor manufacturers.[340] Entities added to the VEU list, including Shanghai-based Semiconductor Manufacturing International Corporation (SMIC) emphasized that the VEU-status facilitated their overall business operations and stabilized trade with U.S. exporters.[341] SMIC was later removed, a bellwether of the VEU's challenges.[342]

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336. *See also* BIS, DON'T LET THIS HAPPEN TO YOU, *supra* note 13, at 10 ("The Entity List thereby serves as an incentive for listed foreign parties to implement effective internal compliance programs to stop the diversion of U.S.-origin items to unauthorized destinations, uses, or users, thereby providing a basis for removal.").

337. Revisions and Clarification of Export and Reexport Controls for the People's Republic of China (PRC); New Authorization Validated End-User, 72 Fed. Reg. 33646, 33647 (June 19, 2007) ("To facilitate legitimate exports to civilian end-users, BIS establishes in this rule a new authorization Validated End-User.").

338. 15 C.F.R. § 748.15 (2017).

339. *Id.* § 748.15(a)(2).

340. Revisions and Clarification of Export and Reexport Controls for the People's Republic of China (PRC), 72 Fed. Reg. at 33646, 33646 ("As the PRC has increased its participation in the global economy, bilateral trade has grown rapidly . . . . This . . . expanded economic relationship is beneficial for both nations . . . .").

341. *SMIC Attains Validated End-User Status from U.S. Government, Semiconductor Manufacturing International Corporation*, SMIC (Oct. 19, 2007), https://www.smics.com/jp/site/news_read/4294 [https://perma.cc/3754-TSMN].

342. Amendment to the Export Administration Regulations: Removal of Semiconductor Manufacturing International Corporation From the List of Validated End-Users in the People's Republic of China, 81 Fed. Reg. 87426, 87426 (Dec. 5, 2015) (revising 15 C.F.R. § 748); SAIF M. KHAN, U.S. SEMICONDUCTOR EXPORTS TO CHINA: CURRENT POLICIES AND TRENDS 5

U.S.-PRC trade tensions make it extraordinarily unlikely that the program will re-emerge within the foreseeable future.[343] Still, considering expansion of the VEU program helps reveal how the United States might, in the future, reconceptualize the list to address some of the concerns its present incarnation has raised. While the VEU program might be seen as a liberalizing measure, it could paradoxically offer the United States more control over foreign access to technology, or at least greater control over the source of that technology. Indeed, as the Entity List continues to expand, unlisted PRC entities could enjoy competitive advantages—that is, access to U.S. technology. Allowing certain entities to demonstrate bona fides as validated end-users could counteract the current trajectory whereby PRC corporations, unwilling to trade with U.S. corporations for fear of being listed, seek technology elsewhere.[344] On the U.S. business side, the VEU program could alleviate due process concerns. As FedEx emphasized, the list's wide ambit requires an often-impractical level of screening. More active use of a VEU list could allow companies like FedEx to minimize this burden by providing certainty that designated entities implement compliance programs. Finally, a VEU program could offer greater access to sensitive technologies for standards-setting bodies that develop guidelines for new technologies such as 5G systems.[345] To be sure, however, the current trajectory of the PRC's more isolationist approach, and increasing resistance to transparency, makes impracticable such reforms.

CONCLUSION

The Entity List has evolved from a tool at the periphery of U.S. export controls, now marking a pivotal instrument in the complex sphere of administrative national security measures. This Note's examination of dozens of list additions, and the litigation that has resulted in limited instances, reveals that the list has effectively implemented a

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(2020), https://cset.georgetown.edu/wp-content/uploads/U.S.-Semiconductor-Exports-to-China-Current-Policies-and-Trends.pdf [https://perma.cc/S9A2-TNC9] ("[I]n 2016, SMIC . . . began collaborating with the Chinese government . . . in a way that would violate its VEU status . . . .").

343. *See* Sullivan, *supra* note 30 (emphasizing that the United States no longer aims to maintain a sliding scale in trade whereby it remains several generations ahead, but instead, seeks to obtain as "large of a lead as possible").

344. *Secretive Chinese Committee Draws Up List to Replace U.S. Tech*, BLOOMBERG (Nov. 16, 2021, 4:00 PM), https://www.bloomberg.com/news/articles/2021-11-16/secretive-chinese-committee-draws-up-list-to-replace-u-s-tech [https://perma.cc/T7M5-8F6W].

345. *See, e.g.*, Schwartz, *supra* note 173.

constitutive principle in administrative national security—highly individualized, updated measures, determined using evidence gathered by multiple agencies—to address PRC military-civil fusion and related national security threats, whether to prevent a PRC university from obtaining hydrophones, a Chinese shipbuilding company operating in the South China Sea from obtaining marine technology, or Huawei from using U.S. software in surveillance programs. While the list was not designed to target such concerns, the Department of Commerce has retooled it in critical ways, most notably in the 2008 "contrary to national security" standard, and obtained the discretion necessary to address the myriad threats posed by PRC entities. But the minimal oversight provided by the federal judiciary, and justified due process concerns raised by U.S. and PRC businesses, make urgent reforms that can promote greater transparency and overall procedural fairness. By retooling the Entity List's procedures, BIS can continue to militate against national security concerns while reducing litigation, fostering trust, and limiting the list's negative impact on trade.

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