How to delist a client from the US Entity List and Japan's End-User List

Removing a person or company from the US EAR Entity List is a formidable challenge, but more so when dovetailed with trying to remove the same entity from another country's equivalent list. Farhad Alavi and Daisuke Takahashi describe their experience of doing just that.

The US Entity List has been featured prominently in recent years in even the mainstream media, with the addition of a number of prominent companies like ZTE, Huawei Technologies, Gazprom, and Rosneft onto the list. This list, maintained by the Department of Commerce's Bureau of Industry and Security ('BIS'), is continually growing, and now names hundreds of entities in countries as diverse as Canada, China, Iran, and Switzerland. Limitations arising from Entity List designations can vary from relatively narrow prohibitions on certain categories of technologies to a full ban on the receipt of virtually any US-origin goods, which are subject to the Export Administration Regulations (the 'EAR'). Handling a removal can be a formidable challenge, especially when dovetailed by designation onto another country's export control list.

DESIGNATION TO THE US ENTITY LIST CAN HAVE DEVASTATING EFFECTS THAT GO BEYOND WHAT IS PRESCRIBED BY THE LAW.

We had that experience. Our client was designated onto Japan's End-User List in addition to the US Entity List. The End-User List, administered by the Ministry of Economy, Trade, and Industry ('METI'), provides exporters with information on foreign entities for which concern cannot be eliminated regarding involvement in activities such as the development of weapons of mass destruction ('WMD') and other items.

After identifying key issues and petitioning to the BIS End-User Review Committee ('ERC') and the METI's Security Trade Control Policy Division, we were informed by BIS, a year to the day from the US Entity List designation, that our client, Technology Links, would be removed from the Entity List and in early May 2020, the company was removed also from the METI End-User List. This article will present what the US Entity List and METI's End-User List designations can mean and the key considerations for removing your companies or clients from these lists based on our experience.

US Entity List designation

Designation to the US Entity List can have devastating effects that go beyond what is prescribed by the law. Legally, US Entity List designations can be limited to a narrow band of products, or in the case of Technology Links, a complete blanket ban on all goods and technologies subject to the EAR. Notably, many foreign-made products also fall under the EAR's jurisdiction because of their significant US-origin content or because they are derivative of US-origin technology. While the prohibitions are on US-origin technologies reaching the listed party, the impact is all but guaranteed to extend far beyond the United States.

Due to 'de-risking' and the increasing adoption of US-style compliance standards around the world, concerned local and third-country vendors and service providers such as banks, suppliers, and shippers will often immediately begin limiting, if not prohibiting, business with the designated entity out of fear of perceived risk, even if a given transaction is not prohibited by the listing. Almost overnight, a 'domino effect' is set in motion, choking off a company's commercial opportunities.

The Entity List is administered by the ERC, an inter-agency committee comprised of representatives of the US departments of Commerce, State, Energy, Defense, and as needed Treasury and/or other federal government agencies. Over the years, hundreds of entities around the world have landed on this list.

Removal from the Entity List is an arduous process that requires unanimous approval by all members of the ERC. Some find the designation so insurmountable that they shut down rather than challenge the listing. But that isn't an option for many listed entities, because, as due diligence screening has become increasingly advanced, it is now easier to identify problematic companies that have simply changed names. As such, business owners should take these designations very seriously as the effects can last for years to come and potentially follow owners.

METI End-User List designation

In much the same way, inclusion on METI's End-User List can have a significant restrictive effect on a company's ability to trade. While the METI explains that its End-User List is not an embargo

list, once a company is listed on the End-User List, however, it is strictly restricted from importing sensitive items from Japanese companies. Japanese companies may also refrain from transacting with a designated company in order to avoid any breach of export control regulations.

Japan's Foreign Exchange and Foreign Trade Act provides a legal basis for export controls in Japan. There are two main types of controls: the list control and the catch-all control. Under the list control, exporters are required to obtain an export licence when exporting items on the Control List to certain countries. Under the catch-all control, if the end-user is listed on the METI End-User List, exporters are required to obtain an export licence for exporting items from Japan, unless it is evident that there is no WMD concern.

The Security Trade Control Policy Division (the 'Policy Division'), METI's trade control department, reviews the End-User List. It reviews and revises the End-User List usually once a year, and more frequently if necessary. Unlike the ERC's removal process in the United States, there is neither a formal nor an institutional review procedure of METI's End-User List. However, when METI is notified that exporters failed to comply with the trade control regulations, it conducts an *ex-post* examination. This examination requires exporters to identify root causes of compliance failure and implement measures preventing the recurrence of compliance failure.

Removal from the lists

Through diligence, it is critical to identify key issues and present them to the ERC and METI's Policy Division. While each case is different, our experience demonstrates that removal from these lists is not impossible and that addressing such a challenge in a transparent manner can yield very positive results.

Counsel seeking to petition for the removal of their clients from the US Entity List should consider the following:

1. Educate the client on the gravity of the designation. Sometimes, clients do not understand what exactly the designation means. The first reaction is often that the list is merely a US issue. While this is technically true, the reality is often quite different. Even designations onto less severe BIS lists can cause considerable ripple effects globally. Seeking removal from the US Entity List should arguably be taken as seriously as a criminal white-collar investigation.
2. Understand why the party is listed. The final rule in the Federal Register announcing the addition of the company to the US Entity List will have an explanation, but counsel should establish a far clearer understanding of why the client landed on the list.
3. Understand the client's business and operations. Seeking removal is not simply a letter-writing or procedural exercise. To advocate for your client, you must understand what it does, who it deals with, and what proper level of diligence and thoroughness are required.
4. Make a compelling case. While this may appear obvious, many lawyers approach such designations in a defensive posture whereas it may be wiser to spend less time disputing facts and instead explain why the entity should be removed, including favourable facts that have transpired since the designation.

Although there is not a formal review process of the METI End-User List, from our experience, taking these steps may help lawyers get their clients a successful delisting:

1. As with the Entity List, it can be useful to conduct an internal investigation and report the result. Showing the company's commitment to transparency by conducting an internal investigation and reporting the result to the METI may be an effective tool to mitigate their security concerns on one's company.
2. Implement remedial action in earnest. As with the Entity List process, there should be a positive response that is likely to be favourably received by the government.
3. Exhibit possible negative impacts on Japanese business and products caused by the listing. Trade restrictive effects caused by the listing on METI's End-User List may negatively affect not only one's business but also a Japanese partner's business and products. Explaining how the listing would materially damage Japanese economic interests may motivate the METI to rethink the listing.
4. Request third parties to provide their independent views on one's company to METI, the ministry may consider such information more neutral and credible.
5. Collaborate with US counsel. Although METI independently reviews the METI End-User List, it is continuously collaborating with the US government in taking security measures as allies. If a client is listed both on the US Entity List and the METI End-User List, consider providing the information related to the review process of the US Entity List to METI.

In all, while the two lists are naturally different and emanate from two entirely different administrative frameworks and legal systems, the approaches can be quite similar. In a world where parties are increasingly facing enforcement action by government bodies in more than one country, our experience representing a company designated by both the United States and Japan highlights the need to view compliance in a global context and underscores the need to act accordingly. The legal effects, coupled with the reputational impact of such designations, establish the need for a serious approach.

Farhad Alavi is managing partner at Akrivis Law Group in Washington DC and Daisuke Takahashi is a partner attorney at Shinwa Sohgoh Law Offices in Tokyo.

AKRIVISLAW.COM
SHINWA-LAW.JP
WWW.DTAKAHASHI.COM

This article first appeared in issue 93 of WorldECR, the journal of export controls and sanctions, October 2020.
www.worldecr.com