



BIS announces three new rules that place significant restrictions on exports to China

International Trade Alert

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On April 28, 2020, the Department of Commerce's Bureau of Industry and Security (BIS) published two final rules and one proposed rule that will revise the Export Administration Regulations (EAR) and significantly increase restrictions on exports to China. These rules will subject many products and technologies to new US export control licensing requirements. Companies doing business in China across a wide-range of industries should consider the impacts of these rules to their supply chains and anticipate increased regulatory compliance obligations.

Under consideration since July 2019, these changes are a critical component of the Trump Administration's effort to restrict China's access to US technology. Taken together, these three rules address the challenge presented by China's "civil-military fusion" with respect to limiting exports to only civilian end users, which has been a primary concern of the Administration. Indeed, BIS currently is working on additional rule changes – expected to be published this year – that would even further restrict exports to China.

As described below, the first two of these rules take effect on June 29, 2020, and the third remains subject to public comment before a final rule is published, likely by the end of the year. The three changes to the EAR are:

1. Expansion of military end user and end use restrictions for China, Russia, and Venezuela
2. Elimination of the Civil End-Users (CIV) license exception, which authorizes exports of certain items for civilian end uses in Group D:1 countries (including China);and
3. Revision to the Additional Permissive Reexports (APR) license exception to no longer allow reexports of US items from certain third-countries to Group D:1 countries (including China).

Rule change 1: Expansion of military end use and military end user restrictions for China, Russia, and Venezuela

US export controls include restrictions in the form of a license requirement on the export, reexport, and transfer of items based on the Export Control Classification Number (ECCN) of the item, the destination, the end user, and the intended end use or application. Section 744.21 of the EAR already includes restrictions on the export, reexport, and transfer of certain items for “military end uses” in China, and to “military end users” and for “military end uses” in Russia and Venezuela. Export license applications under this restriction will now be subject to a “presumption of denial,” which means BIS is unlikely to grant the required licenses related to military end use or end users in these countries.

Effective June 29, 2020, there are five key changes to the scope of the military end user and military end use rule, including:

(1) Broaden the definition of “military end use” to include more ancillary applications.

The definition of “military end use” currently includes the use, development, production of, or the incorporation into, military items, including those on the US Munitions List under the International Traffic in Arms Regulations (ITAR), the Wassenaar Arrangement Munitions List, and certain items on the Commerce Control List (eg, 600-series items). Under the new rule, “military end use” will now include any item “that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, ‘development,’ **or** ‘production,’ of military items.” [1]

(2) Restrictions on “military end users” will now include China.

This rule change will expand the restrictions on the provision of items to “military end users” from only Russia and Venezuela, to also include China. “Military end users” include the military branches (Army, Navy, Air Force, etc.), but also “the national guard and national police, government intelligence or reconnaissance organizations, or any person or entity whose actions or functions are intended to support military end uses.”

BIS has refrained from including China in this restriction until now in part because China’s civil-military fusion makes it difficult to determine whether an end user is a “military end user.” BIS recognizes that “this expansion will require increased diligence with respect to the evaluation of end users in China.” However, such due diligence presents a significant challenge to those doing business in China given the murky distinctions between Chinese government activity in private enterprises and the inclusion of activities ancillary to military purposes in the definitions of military end user and military end uses.

(3) Expand the list of items subject to military end use and military end user restrictions.

Items subject to the military end use/end user restrictions are limited to those specifically listed in Supplement No. 2 to Part 744. This list includes products, software, and technology across a wide-range of sectors, including materials processing, electronics, telecommunications, information security, sensors and lasers, and propulsion. The expansion will add several additional products, software, and technology to the list of items controlled, including lower-level encryption items, most semiconductor equipment and technology, and aircraft parts and components.[2]

(4) Adopts Regional Stability (RS) controls for certain items.

The rule relocates existing license requirements for exports, reexports or transfers to China, Russia, and Venezuela of spacecraft-related and certain military items identified in the EAR under the “.y” paragraph of 600-series and 9x515 ECCNs. Although the license requirements for these items will remain, they will be located under each applicable ECCN and subject to RS controls. Export license applications for items subject to RS controls are considered on a case-by-case basis, consistent with US arms embargo policies, to determine whether the export, reexport, or transfer would be contrary to the US national security or foreign policy interests. The licensing policy for spacecraft-related items destined for China, however, will remain a presumption of denial.

(5) Additional Electronic Export Information filing requirements.

The Electronic Export Information (EEI) filings through the Automated Export System (AES) that identify the export information for items, including their ECCN, licensing determinations, and other shipment information, will be required for virtually all shipments to China, Russia, and Venezuela regardless of the shipment value.

These revisions to the military end use/end user restrictions create a complicated regulatory framework for doing business in China. Navigating the export requirements and conducting appropriate due diligence will be critical. Penalties for noncompliance may result if the parties have “knowledge” that their export, reexport, or transfer is with a restricted military end user or for a military end use. Under the EAR, “knowledge” includes not only positive knowledge, but a “reason to know,” including awareness or willful disregard of a high-probability that a circumstance exists (eg, that the end user may be a “military end user”).

BIS has confirmed that it will be publishing additional guidance and/or frequently asked questions to assist companies manage the challenging regulatory analysis and conduct appropriate due diligence on Chinese end users.

Rule Change 2: Elimination of License Exception Civil End-Users (CIV)

Effective June 29, 2020, BIS is eliminating License Exception Civil End-Users (CIV). License Exception CIV authorizes exports, reexports, and transfers of items that are controlled under the EAR for national security (NS) reasons to countries in Country Group D:1 (including, among others, China, Russia, Venezuela, Ukraine, and Vietnam) if the item is intended for civil end uses (and not otherwise restricted). Only limited items are eligible for License Exception CIV, as identified in the EAR, but eligible items include electronics, telecommunications equipment, radar systems, gas turbine equipment, advanced anti-friction bearings, semiconductors and semiconductor design and production technology, among others.

With the elimination of License Exception CIV, exports that have relied on this exception will now be subject to licensing requirements from BIS. However, the export or reexport to Country Group D:1 countries of NS-controlled items under the EAR are subject to a “policy of denial,” meaning that BIS will approve a license only in exceptional circumstances.

Rule Change 3: Modification of License Exception Additional Permissive Reexports (APR)

BIS has proposed modification to License Exception Additional Permissive Reexports (APR). This rule is subject to public comment and does not yet have an implementation date. License Exception APR authorizes the reexport of items subject to US export control jurisdiction from certain third countries without the need for a license from BIS provided that the reexport is authorized by the third country.

License Exception APR recognizes that the third countries that are members of an international agreement on accepted standards for export controls, known as the Wassenaar Arrangement (plus Hong Kong), have implemented appropriate licensing requirements and review standards on which the US can rely to ensure proper

export controls on items subject to US jurisdiction.

BIS, however, has proposed to modify License Exception APR such that it is no longer available for reexports of US items to Country Group D:1 countries (which includes China). BIS argues that this change is necessary because these third countries have authorized reexports of items to China that BIS would not have approved.

This change would have potentially significant consequences for exports of items from Hong Kong and the 42 Wassenaar countries (including much of Europe, Mexico, Canada, Australia, India, Japan, South Korea, and many others) if such exports are US-origin products, or, in certain circumstances, incorporate controlled US components or that are based on US technology.

Modification to License Exception APR is a proposed rule, subject to public comments that must be submitted by June 29, 2020. BIS has issued this change as a proposed rule rather than a final rule to get a better sense of the impact of this change. BIS does not have insight into how frequently License Exception APR is used, as the relevant transactions occur from third countries and are not necessarily reported to BIS. Thus, companies that rely on License Exception APR are encouraged to provide comment to BIS and may yet be able to influence the final rule.

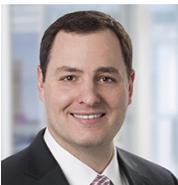
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DLA Piper's international trade practice group is monitoring these regulatory developments and interacting with key government agencies and officials regularly. Please contact any of the authors or your usual DLA Piper contact if you have questions about this article or would like to discuss how to best navigate US export controls in your business.

[1] The revised definition specifies each of the six elements of the "use" definition in the EAR, allowing for each activity, on its own, to satisfy the criteria for military end use.

[2] The items added are identified by their ECCNs and include 2A290, 2A291, 2B999, 2D290, 3A991, 3A992, 3A999, 3B991, 3B992, 3C992, 3D991, 5B991, 5A992, 5D992, 6A991, 6A996, and 9B990.

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