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BIS BROADENS PROHIBITION ON EXPORTS TO CHINA, RUSSIA AND VENEZUELA FOR MILITARY END USERS OR MILITARY END USE, & MORE...

On April 28, 2020, the U.S. Department of Commerce, Bureau of Industry and Security (BIS) published a **final rule** (85 FR 23459), effective June 29, 2020, that significantly expands the existing restrictions on exporting, reexporting, and retransferring items to China, Russia, and Venezuela for military end users or military end use, without a license. Specifically, the new rule expands the scope of the restrictions to:

- Prohibit transfers to "military end users" in China, on top of existing restriction on "military end use," making the restrictions for China the same as those for Russia and Venezuela;
- Broaden the definition of "military end use" to include supporting or contributing to the use, "development" or "production" of a "military item," thereby extending the definition to encompass ancillary activities;
- Broaden the definition of "military end use" to include any of the elements of "use" (i.e., operation, installation, maintenance, repair, overhaul, or refurbishing), so that the prohibition extends to any item that supports or contributes to the operation or installation or maintenance or repair or overhaul or refurbishing or "development" or "production" of a "military item"; and
- Vastly expand the list of items subject to the military end user and end use

restrictions, to include many semi-conductors, general purpose electronic equipment, and commercial aircraft parts and components, as well as marine equipment ranging from underwater visions systems to inflatable boats and scuba gear, and information security commodities and software that qualify for mass market treatment (5A992 and 5D992). Requiring military end use and end user checks on exports and reexports of these common commercial items to China, Russia, and Venezuela will present significant new challenges for a wide swathe of companies.

Further, the new rule limits existing exemptions to the Electronic Export Information (EEI) filing requirements such that exporters will need to submit complete EEI filings for nearly every non-EAR99 export to China, Russia and Venezuela, regardless of value or reason for control (no more \$2,500 threshold, and Export Control Classification Numbers (ECCNs) required even if no license is required).

Reflecting the same national security concerns around China, Russia, Venezuela and other countries with close integration between the civil and defense sectors, BIS also published a **final rule** (85 FR 23470), also effective June 29, 2020, which eliminates License Exception Civil End Users (CIV) (15 CFR 740.5).

CONTINUED

BIS BROADENS PROHIBITION ON EXPORTS TO CHINA, RUSSIA AND VENEZUELA FOR MILITARY END USERS OR MILITARY END USE, & MORE...

CIV previously authorized exports and reexports to countries in **Country Group D:1** (other than North Korea) of items on the Commerce Control List (CCL) and controlled only for National Security (NS) reasons, provided that the items were destined to civil end users for civil end uses. Country Group D:1 includes China, Russia, Ukraine, and Venezuela, among others.¹

Finally, BIS published a **proposed rule** seeking to eliminate a portion of License Exception Additional Permissive Reexports (APR) (15 CFR 740.16) and require a license for reexports of items controlled for NS reasons from countries in Country Group A:1 and Hong Kong to countries in Country Group D:1.

Companies exporting or reexporting to China, Russia, Venezuela and other D1 countries should carefully review these final and proposed rules. As a reminder to readers outside the U.S., these provisions apply to U.S. origin items outside the U.S., as well as foreign-produced items that contain more than a de minimis amount of U.S. content or are the direct product of certain U.S. technology. The new military end use/end user rule encompasses an extremely broad range of products and technology, so many more companies will have to grapple with its restrictions, while companies already familiar with the rule will likely find that it applies to many more of their shipments. The expanded definition of "military end use" for all three destinations and the new restriction on military end users in China will require

even greater due diligence, which will be particularly challenging for shipments to China in view of China's widespread civil-military integration. The new rule on EEI will require companies to change how they (or their freight forwarders) prepare their EEI filings, to ensure that complete filings are made for nearly all non-EAR99 exports to China, Russia and Venezuela. The elimination of License Exception CIV and proposed modification of APR, while only affecting exports and reexports of NS items, will still affect a significant number of transactions, and should be carefully reviewed by exporters in the U.S., Hong Kong, and Country Group A:1 who do business with any D:1 countries.

EXPANSION OF MILITARY END USE AND END USER CONTROLS

Military End User. 744.21(a) of the EAR currently prohibits—absent a license—the export, reexport or retransfer of items that are subject to the EAR and listed in Part 744, Supplement 2, if the item is intended for "military end use" in the People's Republic of China (PRC), Russia, or Venezuela, or for a "military end user" in Russia or Venezuela. The new rule makes the scope of the restriction the same for all three destinations by prohibiting the export, reexport or retransfer of covered items to any of these countries for "military end use" or a "military end user." (In short, exporters to China must now also consider the military end user prohibition.)

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¹ Currently, Country Group D:1 consists of Armenia, Azerbaijan, Belarus, Cambodia, China, Georgia, Iraq, Kazakhstan, Kyrgyzstan, Laos, Libya, Macau, Mongolia, Moldova, North Korea [also subject to U.S. embargo] Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, Venezuela, Vietnam, and Yemen.

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Military End Use. 744.21(f) currently defines "military end use" to include incorporation into a military item (i.e., direct use), or "use," "development," or "production" of a military item (i.e., indirect use), referencing the standard definitions of "use," "development," or "production" found in Part 772. The new rule expands the restrictions on indirect use in two ways. First, it expands the definition of "military end use" to include any item in Supplement 2 that "supports or contributes to" the use, "development" or "production" of a military item, thus encompassing activities that are ancillary to the use, "development" or "production" of a military item. Second, the new rule provides that any one element of "use"—operation, installation, maintenance, repair, overhaul, or refurbishing—on its own, can constitute "military end use."

The new rule further sets forth a "presumption of denial" for any license request related to military end use or end users in the three target countries.

These expansions will require companies to conduct enhanced due diligence:

First, to determine whether an end user is not a Chinese military end user—a difficult task considering what BIS expressly calls out as "China's widespread civil-military integration," and that the definition of "military end user" includes "national armed services (army, navy, marine, air force, or coast guard), as well as 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'; and

Second, to determine whether the item at issue will support or contribute to any aspect of the development, or production, or use of a military item, including its operation, installation, maintenance, repair, overhaul or refurbishing. Note that a "military item" includes defense articles (22 CFR part 121) and items classified under ECCNs ending in "A018" and "600 series" ECCNs.

As a practical matter, entities sending covered items to China, Russia, or Venezuela will need to know not only the immediate end use of their product or technology, but whether their items will be used to support or contribute to military end uses—a qualification that is left undefined by the new rule.

EXPANSION OF ITEMS SUBJECT TO THE MILITARY END USE/END USER CONTROLS

The prohibitions in 744.21(a) of the EAR apply only to items that are listed in Part 744, Supplement 2. The new rule significantly expands that list, to include the following ECCNs: 2A290, 2A291, 2B999, 2D290, 3A991, 3A992, 3A999, 3B991, 3B992, 3C992, 3D991, 5B991, 5A992, 5D992, 6A991, 6A996, and 9B990. Further, the new rule expands the range of items covered under 3A992, 8A992, and 9A991.

CONTINUED

BIS BROADENS PROHIBITION ON EXPORTS TO CHINA, RUSSIA AND VENEZUELA FOR MILITARY END USERS OR MILITARY END USE, & MORE...

In consequence, the prohibitions will now apply to a wide range of commercial items, including many that are only controlled for anti-terrorism reasons (AT), to include many semi-conductors, general purpose electronic equipment, commercial aircraft parts and components marine equipment ranging from underwater visions systems to inflatable boats and scuba gear, and information security commodities and software that qualify for mass market treatment (5A992 and 5D992).

As a practical matter, this means that companies that did not have to worry about the Part 744 China/Russia/Venezuela military end use/user prohibitions, because they did not cover their products, must now reassess the prohibition's applicability and, if applicable, implement enhanced end user and end use due diligence for shipments to China, Russia, and Venezuela. Requiring military end use and end user checks on exports and reexports of such a broad range of common commercial items to China, Russia, and Venezuela will present significant new challenges for a wide swathe of companies.

EXPANSION OF EEI FILING REQUIREMENTS

The new rule also expands the EEI filing requirements for exports to China, Russia, and Venezuela. As a general matter, exporters do not have to make EEI filings for shipments that do not require a license and that are valued under \$2,500, and also do not have to

enter the ECCNs of items that are subject only to AT controls. However, under the new rule, these exceptions will be eliminated for shipments to China, Russia, and Venezuela, unless the shipment is EAR99, or eligible for License Exception GOV (15 CFR 740.11), or subject to another filing exemption (such as for carriage of personal luggage).

As a practical matter, companies will have to revise their procedures to submit EEI for all exports of items described on the Commerce Control List (CCL) to China, Russia and Venezuela, and to provide the applicable ECCNs for all such exports.

RELOCATION OF LICENSE REQUIREMENT FOR .Y ITEMS

Finally, the new military end user/end use rule changes the location of the license requirement for exports to China, Russia, and Venezuela of items described in the .y paragraph of a 600-series or 9x515 ECCN. Currently, the license requirement appears in 744.21(a)(2), which prohibits exporting, reexporting or retransferring .y items to China, Russia, or Venezuela without a license (except for exports to Russia relating to the International Space Station). The new rule maintains this prohibition, but moves it to the CCL, adding a reason for control of regional stability (RS) to the entries for the affected items and also adding the licensing requirement to the RS control (742.6(a)).

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This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

**ELIMINATION OF LICENSE
EXCEPTION CIV**

License Exception CIV authorizes exports and reexports of items on the CCL that have a license requirement to D:1 countries for NS reasons only, provided that the items are destined for civil end users for civil end uses only. Effective June 29, 2020, BIS is eliminating this license exception. As a result, licenses will be required to export, reexport or retransfer any items subject to the EAR and subject to an NS control to D:1 countries. Country Group D:1 currently includes China, Russia, Iraq, Ukraine, and Venezuela, as well as Armenia, Azerbaijan, Belarus, Cambodia, Georgia, Kazakhstan, Kyrgyzstan, Laos, Libya, Macau, Mongolia, Moldova, North Korea [also subject to U.S. embargo], Tajikistan, Turkmenistan, Uzbekistan, Vietnam, and Yemen.

The rule explains that BIS is eliminating CIV "due to the increasing integration of civilian and military technology development in these countries," which "could ... directly support military modernization goals contrary to U.S. national security or foreign policy interests," and which "makes it more difficult for industry to know or determine whether the end use and end users of items ...[will be] military uses or military end users." Notably, BIS cited "publicly available strategies of D:1 countries currently implementing civil-military integration strategies to obscure U.S. exporters from easily determining if a national-security controlled item will not be or is not intended to be exported, reexported or transferred ... to military uses or military end users, and U.S. Government enforcement actions identifying diversion of U.S.-origin items to military end uses and military

end users by purported civil end users in these countries." (emphasis added). These statements regarding the difficulty of making the civil versus military end-use determination have important implications for, and should be carefully considered by, companies implementing new procedures to comply with the new and more stringent military end use/end user rule for China, Russia and Venezuela, discussed above.

**PROPOSED ELIMINATION OF
LICENSE EXCEPTION APR FOR NS
ITEMS TO D:1 COUNTRIES**

License Exception APR authorizes reexports of certain items from countries in Country Group A:1 or Hong Kong provided that the reexport is consistent with an export authorization from the country of reexport, and that the item is not subject to reasons for control described in 740.16(a)(2) (including missile technology and nuclear nonproliferation). The proposed rule would amend 740.16(a)(3) to make countries in Country Group D:1 ineligible destinations for NS-controlled items under paragraph (a) of APR. As a result, a U.S. export license would be required for reexports of NS-controlled items from Hong Kong and Country Group A:1 countries to D:1 countries, even if the exporter has an export license from the relevant national authority. The proposed rule explains that "BIS has evidence of differences in licensing review standards for national-security controlled items destined to Country Group D:1, so that countries in Country Group A:1 or Hong Kong may approve a license for the reexport of a U.S.-origin item that would have been denied if exported directly from the United States." Comments on the proposed rule must be received by BIS no later than June 29, 2020.