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AUKUS MILESTONE: US DEPARTMENT OF COMMERCE DRAMATICALLY REDUCES EAR EXPORT LICENSE REQUIREMENTS FOR AUSTRALIA AND THE UK

On April 19, 2024, the US Department of Commerce's Bureau of Industry and Security (BIS) published an Interim Final Rule (the IFR) that dramatically reduced export license requirements for exports, reexports, and transfers of items subject to the Export Administration Regulations (EAR) to and within Australia and the UK^[1]. The IFR, which is effective as of April 19, removes many license requirements for EAR-controlled items to Australia and the UK, and makes other favorable adjustments for Australia and the UK, including expanding aspects of License Exceptions Aircraft, Vessels and Spacecraft (AVS), Additional Permissive Reexports (APR), and Encryption Commodities, Software, and Technology (ENC). As a result, in BIS' words, Australia and the UK now enjoy "nearly the same licensing treatment under the EAR as Canada."^[2]

The liberalization of EAR license requirements for Australia and the UK is a significant milestone for the AUKUS Trilateral Security Partnership, formed in September 2021 to "deepen diplomatic,

security, and defense cooperation in the Indo-Pacific region ... to meet the challenges of the twenty-first century," and to "streamline their collective defense collaboration while strengthening the ability to protect the sensitive technologies that underpin national security on these topics."^[3] On the same day that BIS released the IFR, the Department of State announced that it would complete the creation of new exemptions from the export license requirements for Australia and the UK under the International Traffic in Arms Regulations (ITAR) within 120 days (mid-August), in order to streamline defense trade cooperation between the three countries.

BIS is accepting public comments on the IFR until June 3, 2024, including on how the EAR could be further amended to advance AUKUS objectives and whether it should remove encryption licensing requirements for Australia and the UK under § 742.15(a)(1) of the EAR.^[4]

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¹ 89 FR 28594 (April 19, 2024), available at <https://www.federalregister.gov/documents/2024/04/19/2024-08446/export-control-revisions-for-australia-united-kingdom-united-states-aukus-enhanced-trilateral>.

² *Id.* at 28595.

³ <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/15/joint-leaders-statement-on-aukus/>

⁴ Comments may be submitted to the federal rulemaking portal (www.regulations.gov), using the regulations.gov ID BIS-2024-0019. Comments must refer to "RIN 0694-AJ58" and comply with the additional requirements noted at the beginning of the IFR.

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SUMMARY OF CHANGES

The substantive changes are summarized in the table below. (The rule also made conforming edits to certain sections of the EAR for clarity, without changing the substance; we do not catalogue those changes here.) The substantive changes significantly reduce the requirement for EAR licenses for export, reexport, and intra-country transfers to/in Australia and the UK, including for sensitive items such as 600-series, 9x515, and certain 6Axxx items.

Change in EAR license requirements	Comparison to EAR controls for Canada	Relevant EAR sections
<ul style="list-style-type: none"> ■ Removal for AU and UK of license requirements based on national security (NS), missile technology (MT), and regional stability (RS) reasons for control (Xs removed from the corresponding cells in the Commerce Country Chart). ■ As a result, absent Part 744 end-user, end-use, or US person service-based license requirements or General Prohibition 10 license requirements, 600-series items and 9x515 items (except ECCN 9A515.a.1-4, .g, and 9E515.f, which are subject to a worldwide license requirement per § 742.6(a)(9)) no longer require an EAR license to/in AU or UK. 	Aligned	§§ 738, Supp. 1, 742.4(a), .5(a), .6(a), 742.6(a)(3), 742.6(a)(9), 744.9(a)(1)(iii)
<ul style="list-style-type: none"> ■ Removal for AU and UK of additional RS1 license requirement for ECCN 0A919 foreign military commodities. ■ As a result, absent Part 744 end-user, end-use, or US person service-based license requirements, or General Prohibition 10 license requirements, foreign-made military commodities that are outside the US and not subject to the ITAR and that either (i) incorporate more than a <i>de minimis</i> amount of certain 6A or 600-series US-origin or (ii) are the direct product of 600-series technology or software under 734.9(d) no longer require an EAR license to/in AU or UK. 	Aligned	§ 742.6(a)(3)
<ul style="list-style-type: none"> ■ Removal for AU and UK of certain military end use and end user-based license requirements for certain cameras, systems, and related components (previously a license was required for all destinations except CA). ■ As a result, absent other Part 744 end-user, end-use, or US person service-based license requirements, or General Prohibition 10 license requirements, there is no longer an EAR license requirement to/in AU or UK for: (1) cameras and plug-ins in ECCNs 6A003.a.3, 6A003.a.4, or 6A003.a.6 for military end users as defined in § 744.9(d), or (2) certain ECCN 0A504, 6A002, 6A003, 6A993.a, and 8A002.d items when intended for incorporation into an ECCN 0A919 foreign "military commodity" in AU or UK. 	Aligned	§§ 744.9(a)(1)(i) and (a)(1)(iii)

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Change in EAR license requirements	Comparison to EAR controls for Canada	Relevant EAR sections
<ul style="list-style-type: none"> ■ Removal for AU and UK of license requirements for Significant Items (SI) in ECCNs 9E003.a.1-a.6, a.8, .h, .i, and .l, and related controls. ■ As a result, absent Part 744 end-user, end-use, or US person service-based license requirements, or General Prohibition 10 license requirements, hot section technology for the development, production, or overhaul of commercial aircraft engines, components, and systems no longer requires a license for AU or UK. 	Aligned	§ 742.14(a)
<ul style="list-style-type: none"> ■ Expansion of paragraph (c) of License Exception Aircraft, Vessels and Spacecraft (AVS), 15 CFR 740.15, to authorize exports of specified commodities, including spare parts, to any destination except Cuba or Country Group D:1 (excluding the PRC) for (i) vessels or planes of US, Canadian, Australian or UK registry or (ii) installations or agents of US, Canadian, Australian or UK Airlines (where an Australian or UK airline is a company that is (a) incorporated or otherwise organized in a state or territory of Australia or a country or territory of the UK, and (b) authorized by its respective government to engage in business as an airline). This amendment is consistent with the removal of MT controls for AU and UK, and results in Australian and UK aircraft/airlines being able to receive MT-controlled spare parts in most destinations (except Cuba and D1 countries other than PRC). 	Aligned	§ 740.15
<ul style="list-style-type: none"> ■ Expansion of paragraphs (d) and (f) of License Exception Additional Permissive Reexports (APR), 15 CFR 740.16, to authorize: (i) reexports from AU, UK, and CA of any item that could be exported <i>from</i> the US to the destination under any License Exception; and (ii) reexports from a foreign country <i>to</i> AU, UK, and CA of any item that could be exported from the US to AU, UK, or CA without a license. 	Aligned	§ 740.16
<ul style="list-style-type: none"> ■ Amendment of paragraph (e) of License Exception Encryption commodities, software, and technology (ENC), 15 CFR 740.17, to: (i) exempt exports under ENC to AU, UK, and CA from semi-annual reporting requirements; and (ii) require semi-annual reporting for reexports <i>from</i> AU, UK, and CA of items described in ENC (b)(2) and (b)(3)(iii), except as specified in paragraph (e)(1)(iii). ■ Addition of AU and UK to the countries that are exempt from the scope of the requirement in § 734.17(c)(1) – applicable to internet transfers of 740.17(b)(2)-eligible encryption software, encryption source code and general purpose encryption toolkits – to verify (via domain name / internet address check) that a system requesting or receiving such a transfer is not associated with a foreign government end user (e.g., “.gov,” “.gouv,” “.mil” or similar addresses). As a result, parties transferring 740.17(b)(2)-eligible software via the internet do not need to check the domain name/internet address of systems in the US, AU, UK, or CA (previously, only US and CA were exempt). 		§§ 740.17, 734.17
<ul style="list-style-type: none"> ■ Exemption of AU and UK alongside CA from unilateral reporting requirements for thermal imaging camera transactions under § 743.3(b). 	Aligned	§ 743.3(b)

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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.

WHAT HASN'T CHANGED?

- A license is still required for Australia and the UK for firearm-related items in ECCNs 0A501 (except 0A501.y), 0A502, 0A503, 0A504, 0A505.a, .b, and .x, 0D501, 0D505, 0E501, 0E502, 0E504, and 0E505. Before the IFR, these license requirements were implemented through NS1/RS1 reasons for control; having removed those controls, BIS replaced them with new Footnote 9 to the Commerce Country Chart. These license requirements apply to a slightly broader group of items than the 0x5xx controls for Canada.
- Despite the amendments to licensing requirements on item-based controls, the amendments do not change the

licensing requirements stemming from most of the catch-all end use and end user controls under EAR Part 744 or General Prohibition 10. For example, licensing requirements remain in place to/in AU and UK when an entity on the Entity List would be a party to the transaction or when there is reason to know that a violation has occurred or will occur in connection with the transaction.

For more information on the topics covered in this advisory or any other aspect of US export controls or economic sanctions, contact Partner **Tahlia Townsend**, co-chair of Wiggin and Dana's **International Trade Compliance Practice Group**.