



## Commerce Tightens Restrictions on Exports to China, Russia and Venezuela

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The Commerce Department adopted a number of new amendments to the Export Administration Regulations (EAR) which increase export restrictions for China, Russia and Venezuela. These are part of the Administration's accelerating efforts to clamp down on transfers of sensitive products and technologies to China and other foreign adversaries under the White House's 2017 National Security Strategy. The amendments create increased compliance burdens and risks for commercial and military exporters.

**Expansion of Military End Use and End User Controls.** The Commerce Department's Bureau of Industry and Security (BIS) issued a final rule on April 28, 2020 which expands the export licensing requirements for exports, reexports and transfers (in-country) of items intended for military end use or military end users in China, Russia and Venezuela. The amendment consists of a number of parts which, when taken together, significantly broaden the current Military End Use and End User controls set forth in EAR §744.21. Despite the term "military," these controls will now apply to many purely commercial transactions. The new amendment becomes effective on June 29, 2020.

Under the newly revised EAR §744.21, in addition to license requirements for items on the Commerce Control List, parties may not export, reexport or transfer (in-country) items listed in Supplement No. 2 to EAR Part 744 to China, Russia or Venezuela if at the time of such transfer the party had "knowledge" that the item is intended entirely or in part for a "military end use" or "military end user" in China, Russia or Venezuela. The term "knowledge" is defined to include "reason to know," "reason to believe" and can be inferred from an awareness of a high probability of the occurrence of future events<sup>[1]</sup>

In the first part of the amendment, BIS expanded the licensing requirement for China to cover exports for "military end users" as well as "military end use." (Previously under EAR §744.21 exports to China required a license for exports for "military end use" but not for "military end users.") By adding "military end users" for China, BIS expanded the scope of the controls on China by adding a new category of transactions that will require a license.

In addition, BIS expanded the definition of the term "military end use." By way of background, the definitions of "military end user" and "military end use" are extremely broad and incorporate many items that a reader might not initially consider in a general definition of these terms. For example, the definition of "military end user" under EAR §744.21(g) is as follows:

In this section, the term 'military end user' means the 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' as defined in paragraph (f) of this section

. (Emphasis added.)

Thus any party in China, Russia or Venezuela whose actions or functions are intended to support “military end uses” are covered under this definition. As such, private commercial companies, universities and research institutions can be “military end users” under certain circumstances.

Similarly the definition of the term “military end use,” which was expanded in the new amendment, will now read as follows:

In this section, ‘military end use’ means: incorporation into a military item described on the U.S. Munitions List (USML) (22 CFR part 121, International Traffic in Arms Regulations); incorporation into items classified under ECCNs ending in “A018” or under “600 series” ECCNs; or any item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, “development” or “production,” of military items described on the USML, or items classified under ECCNs ending in “A018” or under “600 series” ECCNs.

Under the amendment, BIS broadened the old definition by adding “any item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, “development,” or “production,” of military items.” (Emphasis added.) Once again this change significantly expands the scope of the regulation and can cover many commercial items that were not initially developed for military application or normally associated with military activities.

Further, BIS expanded the types of products, technologies and software that will be covered under the regulation. The amendment adds many items from the following ECCNs to Supplement No. 2 to part 744 to be covered under the regulation: 2A290, 2A291, 2B999, 2D290, 3A991, 3A992, 3A999, 3B991, 3B992, 3C992, 3D991, 5B991, 5A992, 5D992, 6A991, 6A996 and 9B990. Additionally, the amendment expands the range of items under ECCNs 3A992, 8A992 and 9A991 which were already included in Supplement No. 2. These include items in the materials processing, electronics, telecommunications, information security, marine and acoustic, aircraft, sensor and laser and propulsion fields. Many of the new ECCN entries are in the high digits (eg., XX991, 992, 999) which designate items with a relatively low level of export control, thus expanding the range of items covered under the regulation to many low levels of products, software and technologies. This change further expands the scope of the Military End Use/End User controls.

BIS also adopted a license review policy of “presumption of denial” in §744.21(e). Under this policy, all license applications under EAR §744.21 will be denied except in extraordinary circumstances. Thus, the amendment amounts to an effective prohibition of transactions covered under the regulation with almost no likelihood of approval by the U.S. Government.

Finally, the amendment made a number of additional changes including: (i) creating a new reason for control and review policy (for regional stability) for certain items exported to China, Russia and Venezuela; and (ii) adding Electronic Export Information filing requirements in the Automated Export System for exports to China, Russia and Venezuela.

While the regulation technically covers the three countries of China, Russia and Venezuela, the driving force behind the amendment is the Administration’s efforts to double down on restrictions on transfers of sensitive items to China that will benefit the Chinese military. U.S. officials believe many commercial companies in China are either owned by the Chinese military or indirectly provide support for Chinese military efforts. Consequently, if a U.S. company sells a product to a private commercial company in China, if the actions or functions of the Chinese company are “intended to support” the Chinese military (in whole or in part), the transaction could involve a “military end user.” Thus sales to purely commercial companies in China could be covered under the regulation if the customer has the requisite relationship with a Chinese military organization or if its actions are “intended to support” military end uses. *In light of the broad definitions of “military end use” and “military end users” in the regulation, many commercial companies in China purchasing purely commercial products could now fit within these*

*definitions.*

The amendment of EAR §744.21 creates increased compliance risks for many U.S. exporters, including exporters of purely commercial products. Many U.S. companies will now be conducting heightened due diligence reviews of their transactions with Chinese, Russian and Venezuelan customers to determine if the customers' activities are intended, directly or indirectly, to support military end uses. In light of the broad definitions of "military end use," this can cover many companies in many industries. BIS addressed this point in the preamble to the amendment:

This expansion will require increased diligence with respect to the evaluation of end users in China, particularly in view of China's widespread civil-military integration. (Emphasis added.)<sup>[2]</sup>

**Elimination of License Exception Civil End Users (CIV).** In a final rule issued on April 28, 2020, BIS amended the EAR to remove License Exception Civil End Users (CIV) at EAR §740.5. This amendment becomes effective on June 29, 2020.

License Exception Civil End Users (CIV) generally permits exports, reexports and transfers (in-country) of specified national security-controlled items to certain civil end users for civil end uses in Country Group D:1 countries, provided the exporter meets the requirements set forth in the license exception. Country Group D:1 countries are countries identified for national security concerns, including China, Russia, Venezuela and 20 other countries. BIS stated that it is removing the license exception due to "... the increasing integration of civilian and military technology development in these countries of concern." (Emphasis added.) BIS stated in the preamble in the Federal Register notice for the amendment:

BIS acknowledges many countries seek to align civil and defense technology development for many reasons—to achieve greater efficiency, innovation and growth. This can present an economic challenge to nations that export high-tech products, including the United States, as individual country goals could also directly support military modernization goals contrary to U.S. national security or foreign policy interests. This integration also makes it more difficult for industry to know or determine whether the end use and end users of items proposed for export, reexport or transfer (in-country) will not be or are not intended for military uses or military end users.<sup>[3]</sup>

Thus this amendment is a companion to the Military End Use/End User amendment discussed above — BIS is once again responding to increased fears of the close relationships between private companies and military organizations in China and other adversary countries.

**Modification to License Exception Additional Permissive Reexports (APR).** On April 28, 2020 BIS issued a proposed rule to amend the EAR by modifying License Exception Additional Permissive Reexports (APR). Under the current version of APR, reexports of certain products from countries in Country Group A:1 or Hong Kong to certain Country Group B or D:1 countries are permitted if the reexport meets the requirements under the exception. China, Russia and Venezuela are Country Group D:1 countries, and thus have access to highly controlled items under national security controls under this license exception. Under the proposed amendment, BIS would remove countries in Country Group D:1 as a category of eligible destination for national security-controlled items by amending § 740.16(a)(3) to restrict such reexports. This amendment is consistent with the elimination of license exception CIV discussed above in order to restrict reexports of sensitive products and technologies to China, Russia and Venezuela.

This is a proposed rule and has not yet gone into effect. BIS is requesting comments on how the proposed change would impact persons who currently use or plan to use License Exception APR. Comments must be submitted to BIS no later than June 29, 2020.

**Conclusion.** The new amendments continue to ratchet up the pressure by BIS to stop exports of sensitive items to China (along with Russia and Venezuela) and are part of a broader set of efforts by the U.S. Government to achieve this goal. The Administration has also been actively debating other significant China-related proposals within recent months, including amendments to the EAR *de minimis* rule and foreign direct product rule – if enacted these would expand U.S. export licensing requirements for items manufactured in China that are based on certain U.S. components or technologies. It is not yet clear if the amendments discussed above will substitute for the *de minimis* rule and direct product rule amendments or if these are still coming as well. Exporters are also expecting BIS to issue significantly expanded export restrictions on “emerging” and “foundational” technologies in the coming months. Taken together, these are likely to have a significant effect on the scope of U.S. export controls on China and other countries. The pendulum is swinging toward tighter regulation and will most likely continue in this direction for the foreseeable future. U.S. companies should be prepared for these and similar changes in the months ahead and plan their businesses accordingly.

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[1] See the definition of “Knowledge” in EAR §772.1.

[2] See Federal Register release announcing the amendment at 85 Fed. Reg. No. 82, April 28, 2020, p. 23460.

[3] See Federal Register release announcing the amendment at 85 Fed. Reg. No. 82, April 28, 2020, p. 23471.

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