



Professional Perspective

Expanded Export Restrictions to China, Russia, and Venezuela

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On April 27, 2020, the U.S. Department of Commerce, Bureau of Industry and Security announced three separate rules under the Export Administration Regulations (EAR) that will make it harder to export, reexport, and transfer goods, software, and technology that are subject to the EAR to and within certain countries, including China.

Specifically, the BIS announced two final rules that expand restrictions on the export of certain items for “military end uses” and “military end users” in China, Russia, or Venezuela and eliminate License Exception Civil End-User (CIV), which allows exports without a license of certain items intended for civilian use to China and other countries where a license would otherwise be required. These two rules are effective June 29, 2020.

In addition, the BIS issued a proposed rule that would remove a group of countries, including China, Vietnam, Armenia, Yemen, and others, from the License Exception Additional Permissive Reexports (APR), which allows reexport of certain items from specified countries without a license provided that certain conditions are met, including authorization from the reexporting country’s government. Interested parties may submit their comments on the proposed rule until June 29, 2020.

The two final rules (and the proposed rule, if implemented) would likely have a significant impact on exports, reexports, and transfers to certain countries, including China. Companies potentially affected by these changes, including those that currently utilize License Exceptions CIV and APR, should evaluate whether these changes would restrict their current or anticipated exports, reexports, and transfers of items subject to EAR and whether they would need to submit a license application. In addition, companies should ensure that they have robust due diligence procedures to determine whether the end user for the exported item is or is not a Chinese military end user. Below is an overview of the changes contained in the two final rules and the proposed changes in the proposed rule.

Expansion of Export Restrictions for Military End Use or Military End User in China, Russia, or Venezuela

The BIS [announced](#) a significant expansion of the current restrictions on exports, reexports, and transfers of certain items to “military end uses” or “military end users” in China, Russia, and Venezuela.

Expansion of China Licensing Requirements

Under the current rule, the licensing requirements for China only restrict exports, reexports, and transfers to “military end uses,” and not “military end users,” while both “military end uses” and “military end users” are included for Russia and Venezuela. The final rule expands the licensing requirements for China to restrict exports, reexports, and transfers to “military end users” in addition to “military end use.” As a result, exports, reexports, and transfer of certain specified items would require a license if the exporter has “knowledge” (including any reason to know) that the item is intended for a military end use or military end user in China, Russia, or Venezuela.

This is a significant change because it may be more difficult for exporters or reexporters to distinguish between military and non-military recipients in China, given that the definition of “military end user” is very broad. The term “military end user” is defined to mean “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.’” There is also significant integration between the Chinese government, Chinese military, and many non-government organizations in China. Therefore, exporters and reexporters could soon be in violation of the EAR for exporting relatively simple technology from the U.S. if the recipient in China is related to the broadly defined category of “military end users.”

The resulting increased due diligence burdens on exporters, reexporters, and those that intend to transfer goods, software and technology subject to the EAR within a foreign country to confirm there is not a military end user in China at the other end of an export appears to be by design. BIS notes in the rule that “[t]his 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.”

Items Subject to the New License Requirements

The final rule also significantly expands the list of items subject to the military end use and end user license requirements in Supplement No. 2 to Part 744 to many items in the categories of materials processing, electronics, telecommunications, information security, sensors and lasers, and propulsion to the supplement, including many commercially available electronics items and software that are otherwise controlled at a level restricted only for a handful of countries, such as Iran, Cuba, Sudan, and Syria. As a result, a larger category of exports to China that exporters and reexporters know or have reason to know are for military end use and/or a military end user are now subject to the same restrictions that are imposed on embargoed destinations.

For example, the rule now restricts exports of relatively common electronic components and a vast array of commercial items that use encryption, including many standard consumer mobile devices, modems, and routers, and many “apps” used on these devices. These items are extremely prevalent in the global supply chain and otherwise subject to very low controls.

Expanded Definition of ‘Military End Use’

The EAR’s current definition of “military end use” is defined, among others, in terms of “use,” “development,” or “production” of certain military items. The final rule will expand the definition beyond “use,” “development,” or “production” to include any item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, development, or production, of military items described on the U.S. Munitions List or items classified under Export Control Classification Numbers ending in “A018” or under “600 series” ECCNs.

License Review Policy of Presumption of Denial

The final rule adopts “presumption of denial” as a license review policy for items subject to the China, Russia, and Venezuela Military End Use/End User.

Regional Stability Control

The final rule also clarifies existing controls on certain items related to spacecraft or military systems that have been determined to be of extremely low sensitivity (these items are described in a “.y” paragraph of a 9x515 or “600 series” ECCN). This change does not affect the scope of the license requirements but makes the requirements more apparent under the EAR. Therefore, all such “.y items” destined to China, Russia, or Venezuela remain subject to the license requirements (except for exports or reexports to Russia for use in, with, or for the International Space Station (ISS), including launch to the ISS).

License applications for these items destined to China, Venezuela, or Russia will be reviewed on a case-by-case basis. When destined to China, items classified under any 9x515 (spacecraft) .y control will be subject to a policy of denial.

Removal of Certain Export Filing Exemptions

Finally, the rule adds Electronic Export Information filing requirements in the Automated Export System for exports to China, Russia, and Venezuela. Under the current provisions, exporters are exempt from both filing EEI for many shipments valued under \$2,500 (unless an export license is required) and from entering the ECCN in the EEI when the reason for control is only anti-terrorism. The new rule would remove such exemptions and require EEI filings for items destined to China, Russia, or Venezuela regardless of the value of the shipment, unless the shipment is eligible for License Exception GOV and the inclusion of the relevant ECCNs regardless of reason for control.

Elimination of License Exception Civil End-User

In addition, BIS [announced](#) that it is eliminating License Exception CIV. Currently, License Exception CIV authorizes exports and reexports of certain items that are controlled for national security reasons to civil end users for civil end uses in certain countries (including China and the others noted above). The final rule would remove License Exception CIV and require licenses for exports of national security controlled items to all such countries. BIS noted that it is removing License Exception CIV because of concerns over “the increasing integration of civilian and military technology development in these countries of concern.”

Modification of License Exception Additional Permissive Reexports

Lastly, BIS issued a [proposed rule](#) to modify License Exception APR. Currently, License Exception APR allows reexports from certain countries, such as many NATO and other close allies of the U.S. (including Hong Kong) of certain national security controlled items to the same group of countries noted above, including China, provided that the reexporter complies with the conditions of export authorization from the government of the reexporting country.

BIS is proposing to remove several countries (including China) as a category of eligible destination for national security-controlled items under this license exception. In so doing, BIS noted that “there may be variations of national security or foreign policy concerns between other countries and the United States” and that even “[Wassenaar participating states](#) ... may have export authorization policies that do not align with the national security or foreign policy interests of the U.S. government.”

Unlike the other two final rules discussed above, the rule on Modification of License Exception APR is a proposed rule. BIS is requesting comments on how the proposed rule would affect those who are currently using or planning to use the License Exception APR, including the rule's effect on the volume of transactions and the amount of time to complete the transactions. Interested parties may submit their comments until June 29, 2020.

Conclusion

Taken together, these rules would likely have a significant impact on companies exporting, reexporting, or transferring items subject to the EAR to China. As noted in the beginning, companies potentially affected by these changes, including those that currently utilize License Exceptions CIV and APR, should evaluate their current and anticipated exports, reexports, and transfers of items that may be subject to the EAR and their due diligence procedures to ensure that they do not run afoul of the newly added restrictions.

With assistance from John Barker, Nick Townsend, and Trevor Schmitt, Arnold & Porter.