

BIS Announces the Elimination of License Exception CIV, Expanded Licensing Requirements on Exports to Chinese, Russian, and Venezuelan Military End Users and End Uses, and a Proposed Rule to Narrow License Exception APR

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Key Points

- On April 28, 2020, the Bureau of Industry and Security of the U.S. Department of Commerce announced changes to the Export Administration Regulations (EAR) through three notices published on the *Federal Register*. The changes may have far reaching implications involving countries subject to national security controls under category D:1, including China and Russia. The new rules are intended to safeguard U.S. national security interests by imposing additional restrictions involving countries that have a “military-civil fusion” doctrine, and present heightened risk of diversion of civil items for military applications.
- The first of three notices is a final rule, **effective on June 29, 2020**, that expands export control restrictions under EAR Section 744.21 involving certain military end uses and end users in China, Russia, and Venezuela. The expanded scope of Section 744.21 will perhaps have the most far reaching impact on industry—particularly among the semiconductor, telecommunications, consumer electronics, and aerospace industries. The new rule expands the restrictions in three significant ways. First, the new rule expands the scope of items subject to this rule to include many AT-only Export Control Classification Numbers (ECCNs). Second, the rule expands the definition of “military end use” to include “any item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, ‘development,’ or ‘production,’ of military items.” Third, the rule expands the restrictions to not only cover exports of items in Supplement No. 2 to Part 744 for military end uses in China, but also to military end users in China. The expanded definition of military end use, coupled with new restrictions on military end users in China, will create complex compliance challenges for companies, including for companies that traditionally have not needed to worry significantly about export controls. The term “military end user” is not limited to what most people think is a traditional military end user, such as an army or navy. For purposes of the new export license requirements, the term “military end user”

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applies to any person or entity whose actions or functions are intended to support “military end uses” under the new expanded definition of that phrase. Thus, even if an export is for purely civil end uses, a license will be required if it is destined to such a “military end user.”

- The second of three notices is a final rule, **effective on June 29, 2020**, that eliminates License Exception Civil End Users (CIV) for eligible D:1 countries. License Exception CIV allows the export of certain items controlled for national security (NS) reasons only to civil end users in D:1 countries. These exports will now be subject to a case-by-case license review, and given China’s adoption of the military-civil fusion doctrine, it is unclear what additional information license applicants will need to provide to rebut the U.S. government’s concern that any NS-controlled items exported or reexported to Chinese firms may be potentially diverted to military end users.
- The last of the three notices is a proposed rule that would remove currently eligible D:1 countries from license exception Additional Permissive Reexports (APR). Comments on the proposed rule are due by **June 29, 2020**. The change, if adopted, would mean that reexporters seeking to ship U.S. items from specific third countries to a D:1 country such as China would require a U.S. reexport license, even when the third country has granted a valid export authorization for the shipment. BIS will review requests for such reexport authorizations on a case-by-case basis.

Introduction

On April 27, 2020, the Bureau of Industry and Security (BIS) of the U.S. Department of Commerce published three rules that will significantly expand export control restrictions on China and other countries subject to national security-related controls and designated in Country Group D:1 under the Export Administration Regulations (EAR). These new rules implement changes to the EAR in furtherance of the Trump Administration’s 2017 National Security Strategy and 2018 National Defense Strategy which expressed concern over the integration of military and civil activities in countries such as China and Russia. This integration has been referred to by U.S. officials as the “military-civil fusion” doctrine and characterized by them as largely erasing the line between civilian and military activity, potentially resulting in the diversion of U.S. equipment and technology into military programs. Remarks by high level U.S. officials underscore the view there is a presumption within the U.S. Government of widespread military-civil integration and that such integration is a direct and leading policy objective of the PRC Government.¹

The new restrictions aim to safeguard U.S. national security interests by expanding licensing requirements on hardware, software, and technology (collectively, “items”) subject to the EAR in order to prevent their use in advancing the military and national security objectives of D:1 countries. These restrictions will likely have far reaching implications for exports, reexports, and in-country transfers of items subject to that EAR, particularly given uncertainties surrounding whether such items may be for military end uses and end users. In countries such as China that openly adopt the military-civil fusion doctrine, the question becomes whether there is a presumption that exports and reexports of dual-use items subject to the EAR are intended for military end use or end users; and if so, what type of due diligence and certifications can companies obtain to overcome this presumption.

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Amendments to Section 744.21 Restrictions on Military End Users and Military End Uses for China, Russia, and Venezuela

Background

Currently, [Section 744.21](#) of the EAR prohibits the export, reexport, or transfer of certain items subject to the EAR to China, Russia, or Venezuela without a license if a party has “knowledge,”² or is informed by BIS, that the item in question will be exported, reexported, or transferred for a “military end use” in China or for a “military end user” or “military end use” in Russia or Venezuela. The ECCNs of the items subject to these restrictions are listed in [Supplement No. 2 to Part 744](#).

Section 744.21 currently defines the term “military end use” to mean the incorporation into a military item; the “use,” “development,” or “production” of military items; or the deployment of items classified under ECCN 9A991 in Supplement No. 2 to Part 744. The term “military end user” is currently 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.”

Notably, Section 744.21 restrictions currently apply to both military end users and end uses in Russia and Venezuela. However, current restrictions on China only apply to military end uses. The omission of restrictions on Chinese military end users was a deliberate decision by the Bush Administration when Section 744.21 controls were first introduced in 2007 given the challenges in determining whether a Chinese company could be deemed to be engaging in actions or functions intended to support “military end uses.”³

Amendments to Section 744.21 and Potential Impact

On June 29, 2020, the following changes to Section 744.21 will go into effect:

- **Expansion of Military End Use Definition.** BIS will expand the definition of “military end use” at Section 744.21(f) to include any item “that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, ‘development,’ or ‘production,’ of military items.” 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.⁴
- **Expansion of China Restriction to Military End Users.** The 744.21 restrictions for China will be broadened to include “military end users,” in addition to “military end uses.” BIS states that “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.”⁵ As noted above, the definition of “military end user” includes “any person or entity whose actions or functions are intended to support ‘military end uses.’” Importantly, it is notable that BIS states in the preamble to its proposed rule that it “will require increased diligence with respect to the evaluation of end users in China, particularly in view of China’s widespread military-civil integration.”⁶
- **Expansion of items Subject to Military End Use and End User Restrictions.** BIS will amend Supplement No. 2 to Part 744 to include 17 new ECCNs in categories of materials processing, electronics, telecommunications, information security, sensors and lasers, and propulsion.⁷ BIS is also expanding the range of

items covered by these restrictions across three ECCNs currently identified in Supplement No. 2 to part 744, specifically 3A992, 8A992, and 9A991. As a result of these changes, the ECCNs subject to military end use and end user restrictions under Section 744.21 will span virtually all sectors of the semiconductor industry as well as aircraft parts and components. These changes also have the potential to radically disrupt supply and manufacturing chains for consumer goods, due to the new license requirements for low-level encryption items under 5A992 and 5D992.

- **Additional Reason for Control and Review Policy; Relocation of License Requirement.** The rule will clarify the 744.21 licensing requirements for items included in “.y” paragraphs of 9x515 and 600 series ECCNs by assigning those licensing requirements Regional Stability (RS) as the reason for control and including them in the “Licensing Requirements” section of those ECCNs. The rule will also make conforming changes to Part 742 to describe the RS reasons for control and the applicable review policy with respect to China, Russia, and Venezuela military end users and military end uses.
- **Electronic Export Information Requirements.** The rule will expand Electronic Export Information (EEI) filing requirements in the Automated Export System (AES) for exports to China, Russia, and Venezuela which are available to BIS for review. The expanded requirements will mandate EEI filings—with accurate ECCN information—for almost all tangible shipments of items described on the CCL to China, Russia, and Venezuela regardless of value.

Taken together, these changes to Section 744.21, particularly the expanded definition of military end use, coupled with new restrictions on military end users in China will create complex compliance challenges for companies. The questions for companies are: what type of due diligence is required to determine whether a customer is a military end user? Does any activity with a military item render the customer a military end user, even if the customer’s activities with the military are wholly unrelated to the item subject to the EAR? Companies will need to navigate these complex compliance challenges and adapt their due diligence processes and certifications accordingly.

Elimination of License Exception CIV (Civil End Users)

Background

License Exception CIV is an exception to the license requirements of the EAR which authorizes the unlicensed export and reexport of items controlled only for National Security (NS) reasons as long as such items are destined to civil end users or for civil end uses in a country that falls under **Country Group D:1** (except North Korea) and are identified as CIV-eligible in the Commerce Control List (CCL). Countries eligible for this license exception include the following D:1 countries: Armenia, Azerbaijan, Belarus, Cambodia, China, Georgia, Iraq, Kazakhstan, Kyrgyzstan, Laos, Libya, Macau, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, Venezuela, Vietnam, and Yemen.

The scope of License Exception CIV covers items that fall under eight of the nine categories of the CCL, including those with the following ECCNs: electronics (e.g., 3A001), telecommunications systems and equipment (e.g., 5A001), radar systems (e.g., 6A008), and test, inspection, and production equipment for gas turbines (e.g., 9B001), among others. The exception also authorizes the release to Chinese and

other foreign nationals of a small number of technologies and software related to these items.

Elimination of License Exception CIV and Potential Impact

Effective June 29, 2020, BIS will eliminate License Exception CIV, resulting in a need for a BIS-issued specific license for exports, reexports, and in-country transfers of items that were previously covered by this exception.⁸ As a matter of policy, NS controls in the EAR apply to items that the U.S. government has determined could make a significant contribution to the military potential of any other country that would prove detrimental to the national security of the United States. For this reason, the EAR licensing policy for NS controls is that of a “presumption of denial” for applications involving items that could make a direct and significant contribution to the military capabilities of D:1 countries like China or Russia.

This presumption of denial, combined with the U.S. State Department’s views on “military-civil fusion” in China, could mean that the U.S. government would be unwilling to grant specific licenses for exports and reexports of NS-controlled items to China, absent exceptional circumstances. Accordingly, companies that rely on this license exception to engage in exports, reexports, and in-country transfers of NS-controlled items involving D:1 countries will need to identify alternative license exceptions or begin gathering the necessary information for specific license applications to BIS. Companies should also be prepared to provide evidence in these license applications that such items will not be diverted to military end users or for military end uses, particularly with respect to China.

Proposed Rule on License Exception APR (Additional Permissive Reexports)

Background

License Exception APR was developed, in part, to address a tension between the extraterritorial nature of the U.S. export controls and the export regimes of member states of the Wassenaar Arrangement—an intergovernmental forum that facilitates export control standards setting and information sharing among member states, with a focus on conventional arms and dual-use goods and technologies. The United States is the only member of the Wassenaar Arrangement that applies extraterritorial jurisdiction to controlled items once those items are in another country. Specifically, the EAR controls “reexports,” which is defined in relevant part as shipments of items subject to the EAR (e.g., U.S.-origin items) from one non-U.S. country to another non-U.S. country. Thus, a shipment of an item subject to the EAR from a Wassenaar Arrangement member to a third country could potentially require two authorizations: a reexport authorization from the United States and an export authorization from the non-U.S. country of export.

Paragraph (a)(3)(ii) of License Exception APR authorizes reexports of certain items subject to the EAR from Hong Kong and Wassenaar Arrangement participating states to D:1 group countries (except for North Korea), provided that the reexport is authorized by the non-U.S. country of export. This provision applies to items that are controlled for NS reasons but not for items controlled for reasons relating to Non-Proliferation (NP), Chemical and Biological Weapons (CW), Missile Technology (MT), Significant items (SI), or Crime Controls and Detection (CC) reasons. This authorization in paragraph (a)(3)(ii) of License Exception APR is also not available for

items described in several ECCNs, namely: 0A919,⁹ 3A001.b.2 and b.3,¹⁰ 6A002,¹¹ 6A003,¹² and 0x5zz.¹³

Proposed Narrowing of APR

BIS has proposed to remove paragraph (a)(3)(ii) from License Exception APR on the basis that licensing standards in Wassenaar Arrangement member states and Hong Kong for exports to D:1 countries differed from the United States, resulting in permitted reexports that would have been denied if exported directly from the United States.¹⁴ This may be indicative of the Trump Administration's increasing willingness to pursue unilateral national security policies, even in the absence of support from traditional global partners. BIS is seeking comments on the proposed rule, with a deadline of June 29, 2020.

Impact of Changes for Industry

These rules raise a number of questions for industry. For example, in view of the statement in the new 744.21 rule regarding increased diligence on end users in China, and statements that suggest a presumption on the part of U.S. government officials regarding military-civil fusion in that country, what type of due diligence and certifications will be sufficient? If a Chinese company has dealings with the Chinese military, completely unrelated to the U.S. item at issue, is that company still considered a military end user for purposes of the restrictions in Section 744.21? What constitutes "support" or "contribution" and how far does it extend beyond activities directly related to an item exported by a U.S. company? Companies will have to navigate these challenges in the coming weeks and prepare license applications or advisory opinion requests, and/or seek additional clarification from BIS.

The scope of the affected AT-only ECCNs means that these questions will need to be asked in transactions for items that are not usually subject to significant export license considerations. Whether a company deals with commercial semiconductors, civil aircraft components, or consumer electronics and telecommunications equipment, screening programs will have to be reevaluated and enhanced for transactions involving China, whether as part of your supply chain or for sales to vendors and end-users. This applies to website and catalog orders as well, including downloadable apps and software programs that include encryption, which are largely controlled under ECCN 5D992, which will fall within the scope of the new 744.21 restrictions.

It is also important to consider the extraterritorial effects of these restrictions, particularly given that U.S. export controls can apply to reexports of items subject to the EAR located outside of the U.S. and destined for D:1 countries. Non-U.S. companies that may have items covered by these restrictions should ensure they have mechanisms in place to determine whether they engage in the reexports of items subject to the EAR, including by conducting requisite jurisdictional analyses under the EAR *de minimis* and foreign direct product rules.

1 See, e.g., Remarks by Dr. Christopher Ashley Ford, Assistant Secretary, Bureau of International Security and Nonproliferation, *Huawei and its Siblings, the Chinese Tech Giants: National Security and Foreign Policy Implications* (Sept. 11, 2019) available at <https://www.state.gov/huawei-and-its-siblings-the-chinese-tech-giants-national-security-and-foreign-policy-implications/>.

2 Under the EAR, "knowledge" of a circumstance (the term may be a variant, such as "know", "reason to know", or "reason to believe") includes not only positive knowledge that the circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person's willful avoidance of facts. 15 C.F.R. § 772.1.

3 See Expansion of Export, Reexport, and Transfer (in-Country) Controls for Military End Use or Military End Users in the People's Republic of China, Russia, or Venezuela, 85 Fed. Reg. 23459, 23460 (April 28, 2020).

4 See *Id.* (“Further, this rule broadens the definition of ‘military end use’ by identifying each element of the definition of ‘use’ so that any one of the six elements, standing alone, is sufficient.”)

5 See *Id.*

6 See *Id.*

7 These ECCNs include 2A290, 2A291, 2B999, 2D290, 3A991, 3A992, 3A999, 3B991, 3B992, 3C992, 3D991, 5B991, 5A992, 5D992, 6A991, 6A996, and 9B990. *Id.*

8 See Elimination of License Exception Civil End Users (CIV), 85 Fed. Reg. 23470 (April 28, 2020).

9 “Military commodities” located and produced outside the United States.

10 MMIC amplifiers and discrete microwave transistors meeting certain parameters.

11 Optical sensors and equipment, and related components.

12 Cameras, systems or equipment, and related components.

13 Certain firearms, ammunition, and related items.

14 See Modification of License Exception Additional Permissive Reexports (APR), 85 Fed. Reg. 23496 (April 28, 2020). The agency has asserted that “[e]ven Wassenaar participating states in Country Group A:1 may have export authorization policies that do not align with the national security or foreign policy interests of the U.S. government.” *Id.*

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