

## U.S. Government Imposes Expansive, Novel and Plurilateral Export Controls Against Russia and Belarus

March 8, 2022

### Key Points

- As part of **highly coordinated** U.S. government and **allied and partner country** responses to **Russia's further invasion of Ukraine**, and **Belarus' enabling of it**, BIS imposed on February 24, 2022, and March 2, 2022, significant, novel and complex controls on the export and reexport to, and transfer within, **Russia** and **Belarus** of a wide-range of previously uncontrolled U.S.- and foreign-made items.
- With limited exceptions, the export from the United States, and the reexport from abroad, of any commodity, software or technology subject to the EAR described on the EAR's Commerce Control List, whether U.S.- or foreign-made, will require a license if destined to Russia or Belarus, which will generally be denied.
- The following foreign-produced items are now, or will be on March 26, 2022, subject to the EAR and require a license (which will generally be denied) if destined to Russia or Belarus from a country that has not committed to imposing substantially similar controls:
  - Foreign-made items of a type described on the Commerce Control List with more than 25 percent U.S.-origin content controlled for Anti-Terrorism reasons.
  - Foreign-produced items described on the Commerce Control List (i.e., that are not EAR99 items) produced with U.S. technology, software or equipment described on the Commerce Control List.
  - With limited exceptions, foreign-produced items of any type (i.e., including EAR99 items) produced from technology, software or equipment described on the Commerce Control List and subject to the EAR, if one of the newly identified Russian or Belarusian Military End Users on the Entity List is involved in the transaction, directly or indirectly.
- The export, reexport or transfer of any type of item, including EAR99 items, subject to the EAR (such as by being U.S.-origin) will require a license, which will be denied if there is knowledge that it will be for a military end use or military end user, listed or unlisted, in Russia or Belarus. This is an expansion of the traditional military end

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use and end user rules, which are limited in scope to a subset of items controlled on the Commerce Control List for Anti-Terrorism-only reasons.

- BIS's March 2 rule significantly narrowed the scope of provisions in its February 24 rule pertaining to the availability of Licenses Exceptions AVS (aviation) and ENC (encryption items) to authorize shipments to Russia or Belarus without a license.
- The new rules do not impose new controls on the deemed export or deemed reexport of newly controlled source code or technology to Russians or Belarusians outside of Russia or Belarus.
- Comprehensive new controls are imposed against the so-called DNR and LNR regions of Ukraine.
- BIS **also added new controls** to target Russia's **oil refining sector**.
- BIS added to the regular Entity List **91 additional entities** in Russia and other countries that support Russian military activities.

## **Broad Policy Comment—The Rules Reflect a Paradigm Shift in Export Controls**

In response to Russia's further invasion of Ukraine, and Belarus' enabling of it, the Commerce Department's Bureau of Industry and Security (BIS) has amended the Export Administration Regulations (EAR) to impose significant Russia- and Belarus-specific controls on exports, reexports and transfers of many different types of U.S.- and foreign-produced commodities, software and technology, which are collectively referred to as "items." U.S. and non-U.S. companies with, and that choose to continue, any direct or indirect involvement with Russia or Belarus will need to spend a significant amount of time studying the rules and updating internal policies and procedures to ensure compliance.

In sum, there is little that can be exported or reexported that involves Russia or Belarus, or Russian or Belarusian entities, directly or indirectly, without requiring an analysis of complex and novel U.S. and allied and partner country export controls. To ensure compliance, one will need to determine, at a minimum, (i) which items of interest are identified on the EAR's **Commerce Control List** as controlled for "Anti-Terrorism" reasons; and (ii) which foreign-made items are produced using technology, software or equipment that is subject to the EAR.

A simplistic, imprecise, but nonetheless helpful way of thinking about the new controls is the following:

- If the item at issue is of a type described on the Commerce Control List, whether U.S.- or foreign-produced, then it generally cannot be shipped from anywhere to anyone in Russia or Belarus for any reason without a license or other authorization.
- If the item at issue is of a type not described on the Commerce Control List (i.e., an EAR99 item), whether U.S.- or foreign-produced, then it generally can be shipped to Russia or Belarus, so long as it would not be for a military end use, a military end user or involving an entity on the Entity List.

The purpose of the new controls is "to protect U.S. national security and foreign policy interests by restricting Russia's access to items that it needs to project power and fulfill its strategic ambitions." The rule does this by leveraging the "global dominance of U.S.-origin software, technology, and equipment (including tooling)" to largely block

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the export and reexport of U.S.- and foreign-produced items that are essential inputs for sectors important to the Russia and Belarusian economies, primarily their defense, aerospace and maritime sectors. The related purpose of the parallel controls against Belarus is to restrict its access to items “it needs to support its military capabilities and preventing such items from being diverted through Belarus to Russia.”

The rules reflect an extraordinary amount of export control cooperation and coordination among close allies and partner countries that has not been seen since the end of the Cold War. In particular:

- The allies and partner countries have agreed to a common licensing policy of denial for exports of controlled items to Russia and Belarus. Until these rules, the standard had been one of “national discretion,” which allows each country to make its own licensing decisions without a need to coordinate with other countries.
- The allies and partner countries have each agreed to impose their own unilateral controls on items that only the United States has historically controlled, namely Anti-Terrorism-controlled items. Until these rules, allies and partner countries have been reluctant to, **or did not have the legal authority to**, impose controls on items that were not identified in one of the four primary multilateral export control regimes.
- The rules’ extraterritorial controls on foreign-produced items do not apply if the items are produced in countries that commit to imposing substantially similar controls to those of the United States. This creates an incentive for other countries to cooperate, reduces the negative impacts of unilateral controls on U.S. industry and reduces the incentive to design out U.S.-origin content or items produced with U.S. technology or tools.

Indeed, the rules create a whole new paradigm, structure and purpose for coordinated export controls. That is, traditional multilateral export controls since the end of the Cold War have been focused on regulating weapons of mass destruction, conventional weapons, and the bespoke and dual-use commodities, software and technologies necessary for their development, production or use. In contrast, these rules have a much broader purpose, which is the plurilateral<sup>1</sup> control over exports to specific end users and the types of items important to a country’s **strategic economic** and military objectives. In particular, the **White House** stated that these “actions will ensure that the military as well as the aerospace, maritime and high-technology sectors do not obtain U.S. technology goods and technology that can be used to support Russian technical maintenance and innovation.” Export controls are being used as, and to enhance, economic sanctions tools.

## Topics Covered in this Alert

This alert describes:

- New controls on U.S.-origin items and other items subject to the EAR
- New policies of denial for items that require a license
- The limited licensing carve-out for mass market items
- The three new ways in which a foreign-produced item is subject to the EAR
- The expanded scope of the Russia- and Belarus-specific military end use and military end user rules
- The limited availability of license exceptions

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- Deemed export rule issues
- New controls pertaining to the occupied Donetsk and Luhansk regions
- The new entities added to the Entity List
- New controls on oil- and gas-related exports
- The rules' savings clauses.

This alert concludes with comments on some steps a company could take to help ensure compliance with the new rules, to the extent it chooses to continue to do business involving Russia or Belarus.

This alert is not a substitute for legal advice on specific transactions, particularly given the rules' novelty, complexity and likely evolution. This alert also does not describe export controls and sanctions in place before the new rules, the quickly expanding U.S. and non-U.S. sanctions, or non-U.S. export controls.

### **New Controls on U.S.-Origin Items and Other Items Subject to the EAR—the “Russia and Belarus Sanctions”**

With one limited exception pertaining to mass market items, the new rules impose controls on exports and reexports to, and transfers in, Russia and Belarus on all the remaining types of commodities, software and technologies in Commerce Control List [Categories 3, 4, 5, 6, 7, 8 and 9](#) that did not previously require a license to export or reexport to, or transfer within, Russia or Belarus.

These are U.S.-origin items, and foreign-made items shipped from the United States, controlled unilaterally for Anti-Terrorism reasons only. They include basic microelectronics ([Category 3](#)), computers ([Category 4](#)), telecommunications items ([Category 5, part 1](#)), encryption items ([Category 5, part 2](#)), sensors and lasers ([Category 6](#)), navigation equipment and avionics ([Category 7](#)), marine equipment ([Category 8](#)) and civil aircraft components ([Category 9](#)). The new controls also apply to software and technology for such items. These items are identified on the Commerce Control List with Export Control Classification Numbers (ECCNs) that have a “9” in their middle. For example, ECCN 3A991 describes basic semiconductors. 5A991 describes basic telecommunications items. 8A992 describes vessels and related engines and components. 9A991 describes civil aircraft, civil aircraft engines and civil aircraft components. BIS wrote that although such items “generally are controlled at a lower level under the EAR, they are still necessary for the functioning of aircraft, vessels, and electronic items.” Allies and partner countries have committed to using their unilateral domestic export control and sanctions authorities to impose controls over similar items exported from their countries for the same purpose.

BIS did not explain why it did not apply the same controls to the otherwise uncontrolled items in Categories 0, 1 and 2. One possible answer is that BIS and its counterparts in allied countries did not want to impose, for humanitarian reasons, controls on the protective personal equipment, vaccines, medical products and food-testing items that are controlled for Anti-Terrorism reasons only in Commerce Control List Category 1. With respect to the other and very few items controlled for only Anti-Terrorism reasons in Categories 0, 1 and 2, they are basically limited to ring magnets, low-grade ball bearings, pipes, tubes, pumps, portable electric generators, machine tools and control units, processing equipment, common composite materials, hydraulic fluids and fertilizer. BIS and the allies probably decided that such items do not fit within the

broader policy objectives of imposing new controls on items necessary for the functioning of aircraft, vessels and electronic items in Russia or Belarus.

The March 2 rule also imposes controls on the export and reexport to, and transfer within, Belarus of items on the Commerce Control List controlled for nuclear non-proliferation (NP) reasons. This and related country group changes are regulatory housekeeping to account for Belarus being a member of the Nuclear Suppliers Group, and the broader objective of imposing controls and denial policies on all items described in a multilateral regime's control list.

These new controls will not apply to the export, reexport or transfer of EAR99 items, unless a proscribed person or end user (such as a company on the Entity List or a military end user) or a prohibited end use (such as one related to weapons of mass destruction or military end use) is involved. EAR99 items are those that are not described on the Commerce Control List. The apparent purpose of not imposing controls on EAR99 items generally is to limit the impact of the new rules on consumer items that civilians purchase and use. That is, a rough surrogate for items commonly purchased at retail outlets for civilian applications are the items not identified on an export control list.

### **New Policies of Denial for Items that Require a License under Old or New Export Controls**

For items that have previously required a license for exports or reexports to, or transfers within, Russia or Belarus, and for all items that have new license requirements involving Russia or Belarus, the license policy is now one of denial, with limited exceptions. A "policy of denial" is slightly more restrictive than a policy of "presumptive denial," which can be overcome in rare circumstances if there is a reason consistent with U.S. policy. It is also much more restrictive than a "case-by-case" policy, which depends upon the facts of each application. The choice of a "policy of denial" standard rather than the more traditional "presumption of denial" standard was presumably made in part to align with the EU and other countries' articulation of their licensing policies—and to reinforce the unique seriousness of the issues pertaining to Russia's further invasion of Ukraine and Belarus' enabling of it.

The exceptions to the denial policy pertain to exports, reexports and transfers of items:

- related to safety of flight, maritime safety, or civil nuclear safety;
- to meet humanitarian needs;
- in support of government space cooperation;
- for companies headquartered in [Country Groups A:5 or A:6](#) to support civil telecommunications infrastructure, or
- involving government-to-government activities.

The policy for such applications will be one of "case-by-case" review. For example, if the proposed transaction would benefit the Russian or Belarus governments or defense sectors, or would present a risk of diversion to Russia from Belarus, then the license will be denied. If not, then it might be approved depending upon the licensing agencies assessment of the national security issues involved. Licenses will also be denied if a military end user is involved. To repeat, these are not exceptions from the

requirement to get a license, only from the policy that the license would be automatically denied.

The same case-by-case license policy applies if the item is destined for a civil end use to a company in Russia or Belarus that is not a military end user and is not on the Entity List or other proscribed list and that is:

- a subsidiary of a U.S. company, a U.S. joint venture or a company headquartered in Country Groups A:5<sup>2</sup> or A:6<sup>3</sup>; or
- a joint venture of a U.S. company or companies headquartered in Country Groups A:5 or A:6.

Licenses for transactions involving Russian- or Belarusian-headquartered companies will be denied.

The A:5 and the A:6 group countries are those to which License Exception STA (Strategic Trade Authorization) may be used for various types of items. Although License Exception STA is not available for any transactions involving Russia or Belarus, BIS has repurposed the pre-existing lists of countries that are partner countries for various reasons to scope down the case-by-case licensing policy for exports to affiliates.

BIS has the authority to consider requests for **emergency processing** of applications, such as if for safety- or human-rights-related reasons. For other types of applications, such as those involving civil end users that are one of the types of subsidiaries of, or joint ventures with, companies in STA countries or the United States, license applications are not likely going to be processed quickly. These are novel licensing policies. BIS and the other reviewing agencies will likely need several months to gather the necessary facts and policy views to decide whether to approve or deny any particular application. For this reason, and because the broader policy of denial would apply to most items, exporters should not plan for many licenses to be approved. Although the new foreign direct product rules are based on the Huawei-specific foreign direct product rule created in **August 2020**, the Huawei-specific controls allowed for approvals on a case-by-case basis if the items involved would not be for use in 5G or other applications of concern. The licensing policies for the new Russia- and Belarus-related controls are more restrictive and without carve-outs for items merely because they are not sensitive.

### **The Limited Carve-Out from the License Requirement for Mass Market Commodities and Software**

The one carve-out from the new licensing requirements is for mass market commodities and software that are classified under ECCNs 5A992 or 5D992 that:

- have been “classified in accordance with § 740.17,” which refers to the EAR’s License Exception ENC (encryption); and
- are for civil end users that are one of the types of subsidiaries of, or joint ventures with, companies in STA countries or the United States.

Such mass market items are business and consumer electronics, such as phones, computers, printers and routers, and similar software available to the public at retail. To have been “classified in accordance with § 740.17,” someone would have needed to follow the steps described in License Exception ENC (section 740.17) to properly



classify the items as “mass market” encryption items under 5A992 and 5D992. This would involve (i) obtaining a formal classification determination from BIS (a “CCATS”) for mass market items that implement non-standard cryptography, (ii) self-classifying and submitting an annual self-classification report to BIS for mass market encryption components and executable software, or (iii) self-classifying and internally documenting the classification for mass market items such as phones or computers.

There are no licensing carve-outs of any sort for technology described on the Commerce Control List. This is also the case for the limited license exceptions described below. That is, they only apply to commodities and software, not technology.

### **The Rules Create Three New Ways in Which a Foreign-Produced Item is Subject to the EAR**

An [earlier Akin Gump alert](#) described the seven ways in which a commodity, software or technology is subject to the export control jurisdiction of the EAR. As forecast in that alert, BIS has created three new ways in which a foreign-produced commodity, software or technology is subject to the EAR. One way is an expansion of the scope of the EAR’s legacy de minimis rule with respect to Russia and Belarus. The other two are new foreign direct product (FDP) rules—the “Russia/Belarus FDP rule” and the “Russia/Belarus-Military End User (Russia/Belarus-MEU) FDP rule.”

A novel aspect of these new extraterritorial jurisdictional rules is that they do not apply to foreign-produced items that are exported from the allied and partner countries that have committed to implement substantially similar export controls as part of their domestic sanctions against Russia and Belarus. For now, these countries are the EU member states, the other Five Eyes countries (Canada, Australia, the United Kingdom and New Zealand), Japan and South Korea. The [list of such countries](#) is likely to grow as additional allies and partner countries agree to impose similar controls in their systems. Because many of these countries do not have the general authority to impose controls over items that are not identified on one of the four primary multilateral regime export control lists, there will need to be new domestic laws passed to give their export control and sanctions agencies such authority.

#### **A. The De Minimis Rule Applies to More Foreign-Produced Items Destined to Russia or Belarus**

Under the EAR’s [de minimis rule](#), a controlled, foreign-produced item is subject to the EAR if it has more than a specific percentage of “controlled” U.S.-origin content that would require a license to export to the destination country if shipped separately. BIS did not amend the de minimis rule. Rather, the new rules make more types of U.S.-origin content controlled for export to Russia and Belarus. These are primarily items controlled for Anti-Terrorism reasons only. One, however, does not include such newly controlled U.S.-origin content in a de minimis calculation if the foreign-produced item is to be shipped from a country that has agreed to impose substantially similar controls and is recognized by BIS.

Making de minimis determinations for shipments from other countries will likely be difficult for many companies that historically have not needed to determine whether their products are, or contain, Anti-Terrorism-controlled items subject to the EAR. The issue will be particularly difficult with respect to foreign-origin technology that contains any percentage of controlled U.S.-origin technology. To rely on a determination that foreign-origin controlled technology is not subject to the EAR because it contains a de

de minimis amount of controlled U.S. technology, one must first submit the analysis to BIS to conduct a one-time review of the calculation methodology and wait at least 30 days before exporting.

In addition, the rule formally designates in the EAR's country groups what had been U.S. government policy since March 2021, which is that Russia is a country subject to an arms embargo, i.e., in Country Group D:5. (Belarus was already in Country Group D:5.) This designation confirms that the zero percent de minimis rule is applicable to foreign-produced items that contain any amount of 9x515 (i.e., satellite-related items) or "600 series" (i.e., military) content subject to the EAR. In other words, if a foreign-produced item contains any amount of satellite- or military-related content that is subject to the EAR, the foreign-produced item is subject to the EAR and may not be shipped to Russia or Belarus from anywhere without a license, which would be denied.

The rule does not change the long-standing EAR provision that one does not consider controls imposed under the Entity List provisions when calculating controlled content for de minimis purposes. Also, EAR99 content is not controlled content for purposes of the de minimis rules.

## B. Russia/Belarus FDP Rule

Under the new Russia/Belarus FDP rule, a foreign-produced item of a type described on the Commerce Control List (i.e., not an EAR99 item) is subject to the EAR if:

1. it is either:
  - a. the direct product of U.S.-origin technology or software subject to the EAR and in Commerce Control List Categories 3 through 9; or
  - b. produced by equipment, whether U.S.- or foreign-origin, that is the direct product of U.S.-origin technology described in Commerce Control List Categories 3 through 9; **and**
2. there is "knowledge" that the foreign-produced item is either:
  - a. incorporated into, or used in, the production or development of any commodity produced, purchased or ordered by any of the Russian or Belarusian Military End Users identified on the Entity List with a footnote 3 designation; or
  - b. when a footnote 3 Russian or Belarusian military end user is a party to the transaction.

The footnote 3 entities include 45 Russian entities that had previously been identified on the EAR's Military End User (MEU) List. Footnote 3 also includes two Belarusian entities.

The Russia/Belarus-MEU FDP rule is broader than the EAR's traditional military end user rules because it applies to foreign-produced items that are otherwise uncontrolled if produced with technology, software or equipment subject to the EAR.

As with the Russia/Belarus FDP rule, a license is required to send from outside the United States such items "to any destination," except for shipments from allied or partner countries that have committed to imposing similar controls. Unlike the Russia/Belarus FDP Rule, however, the Russia/Belarus-MEU FDP rule applies even when the foreign-produced item is an EAR99 item, except food or medicine.



The Russia/Belarus MEU FDP rule is similar to the Huawei-specific Entity List FDP rule because it subjects foreign-produced items without any U.S.-origin content that are otherwise uncontrolled and outside the United States to the jurisdiction of the EAR because of the types of technology, software or equipment used to produce them. The new rule is, however, much broader than the Huawei-specific FDP rule because a foreign-produced item can become subject to the EAR based on software, technology or equipment used to produce it from any Commerce Control List Category, not just Categories 3 (semiconductors), 4 (computers) or 5 (telecommunications).

As with the Huawei-specific rule, but unlike most Entity List controls, the scope of the “party to the transaction” provision in the new foreign direct product rules is not limited to situations when the entity is a purchaser, intermediate consignee, ultimate consignee or end user. In other words, the rule could be triggered when a Russia/Belarus-MEU FDP item is shipped to a party other than the listed military end user but when the listed military end user is somehow a party to that transaction.

The direct product prong of the Russia/Belarus-MEU FDP rule is slightly, but materially, different than the Russia/Belarus FDP rule. For the Russia/Belarus FDP rule to apply, the technology or software must be “U.S.-origin.” The Russia/Belarus-MEU FDP rule counterpart is broader in that it refers to technology or software “subject to the EAR,” which includes foreign-origin technology or software subject to the EAR’s jurisdiction.

### **Expanded Scope of the Existing Military End Use and End User Rules**

Until the new rules, the scope of the items covered by the EAR’s military end use and military end user rules was limited to the specific Anti-Terrorism-controlled items identified in the [updated Supplement Number 2 to Part 744](#). BIS has expanded the scope of the items covered by the [Russia-specific](#) military end use and military end user rules to include all items subject to the EAR, including EAR99 items. BIS has also added Belarus to the military end use and military end user controls with the same scope of items as Russia, i.e., to include EAR99 items.

Although the EAR [lists some military end users](#), the new rules’ requirements are not limited to listed entities. Thus, it effectively creates additional compliance and diligence responsibilities because its licensing obligations apply when an exporter, reexporter or transferor of an item subject to the EAR has “knowledge” that the item is for a “[military end use](#)” or a “[military end user](#).” The EAR defines these terms broadly. A “military end user,” for example, can be a purely private company selling commercial items that nonetheless is [providing limited support](#) for the repair of military items. Thus, for example, one cannot send without a license a toothbrush from the United States to an unlisted private company in Russia or Belarus if there is knowledge that the company, even as a small part of its business, provides occasional support for the repair of military items.

To align the EAR’s controls against Belarus with those against Russia, BIS has also applied the EAR’s [military-intelligence end user and end use controls](#) to Belarus. This now means that if anyone has knowledge that an item subject to the EAR, even an EAR99 item, is intended, entirely or in part, for a military-intelligence end use, or military-intelligence end user in Belarus, Burma, Cambodia, China, Russia, Venezuela, Iran, Syria, North Korea or Cuba, then a license is required. The amendment also means that if any U.S. person provides any [form of support](#), even without the

involvement of items subject to the EAR, to such end uses or end users, then a license is required, which will be denied.

### Limited Availability of License Exceptions

With respect to Russia/Belarus-MEU FDP items, license exceptions are not available, except in rare cases identified in specific Entity List entries pertaining to U.S. government activities or those involving mass market commodities or software. The following are the limited number of license exceptions that are, however, available for items now subject to the EAR under the new controls on exports from the United States and items otherwise traditionally subject to the EAR, the expanded scope of the de minimis rule with respect to Russia and Belarus, and the Russia/Belarus FDP rule.

- **License Exception TMP**, if for temporary exports, reexports or transfers of items for use by the news media.
- **License Exception GOV**, if for certain government- or international organization-related exports, reexports or transfers.
- **License Exception TSU**, if for software updates so long as the end user is one of the subsidiaries of, or joint ventures with, companies in one of the STA countries or the United States.
- **License Exception BAG**, which authorizes exports of personal baggage, excluding firearms and ammunition.
- **License Exception AVS**, if for temporary sojourns of civil passenger aircraft subject to the EAR in and out of Russia and Belarus under certain conditions. The March 2 rule limited the scope of the exception to exclude any aircraft registered in, owned or controlled by, or under charter or lease by Russia or a national of Russia. BIS limited the scope of the exception to align with orders blocking Russian aircraft and airlines from entering and using domestic U.S. airspace.
- The February 24 rule allowed for **License Exception ENC** to be used to export to parties in Russia other than for government end users or Russian state-owned enterprises. The March 2 rule removed this element and added in the requirement that the export be only to civil end users that are one of the five types of subsidiaries of, or joint ventures with, companies in STA countries or the United States. BIS presumably did not want to impair the ability of such affiliates to get the software needed for cybersecurity efforts, while also not allowing for a general release of other types of commodities (such as some types of semiconductors and telecommunications items) generally available for export under the exception to be used in the sectors of concern. In any event, the availability of this exception is essentially meaningless because its scope is now the same as the revised scope of the carve-out from licensing obligations for mass market items if for the same types of affiliates. Whether BIS will expand the availability of the exception for U.S. company employees, contractors for U.S. companies or branch offices of U.S. companies in Russia or Belarus is unknown.
- **License Exception CCD** authorizes specific types of consumer communications devices and software subject to the EAR to be exported or reexported to, or transferred in, Russia or Belarus so long as they are either for independent non-governmental organizations or civilians who are not government officials. Editors of state-run media organizations are considered government officials. The types of authorized items under License Exception CCD are those that are controlled for

Anti-Terrorism reasons only and that are consumer computers, consumer disk drives, solid state storage equipment, monitors, printers, modems, network access controllers, communications channel controllers, mobile phones, SIM cards, memory devices, consumer information security equipment, peripherals, digital cameras, televisions, radios, recording devices and consumer software (other than encryption source code) for use with such devices. License Exception CCD is not a general carve-out for all types of items that are consumer devices. It applies only to the devices specifically identified in the exception that fall within the scope of the specific ECCNs noted in the exception. In addition, BIS noted in the March 2 rule that the exception may not be used for “non-consumer servers.” Consumer servers for home or personal use, however, are authorized under the exception “to make it harder for the Russian government to control the message getting to the Russian people.”

## **Deemed Exports**

The new licensing policies do not apply to deemed exports or deemed reexports. That is, the new rules do not impose licensing obligations on the release of source code or technology subject to the new licensing policies if released to Russians or Belarusians in the United States or countries outside of Russia or Belarus. This is a break from the usual licensing policy under which the deemed export and deemed reexport rules always apply to releases to nationals of a country to which the technology or source code would need a license if exported. The difference is reasonable given that the objective of the new controls is to cut off the flow of the items that key sectors of the Russian and Belarusian economies need to function, not to address concerns about sensitive technology being released to Russian or Belarusian individuals outside of Russia or Belarus.

There are, however, deemed export and deemed reexport requirements involving foreign nationals located in, or from, the Crimea region of Ukraine—and now also the so-called Donetsk People’s Republic (DNR) and Luhansk People’s Republic (LNR) regions of Ukraine. BIS uses the “nationality of the foreign national (as determined by accepted methods, such as looking to the passport or other nationality document(s) recognized by the United States Government)” to determine nationality. The U.S. government recognizes passport and nationality documents issued by Russia and Ukraine. It does not recognize Crimea, DNR or LNR as countries for deemed export or deemed reexport purposes. This means that the nationals from the newly sanctioned regions will be treated as Ukrainian or Russian nationals, for deemed export or reexport considerations, based on the country corresponding with the individual’s issued passport or other nationality documents.

## **Comprehensive Embargoes on the DNR, LNR and Crimea Regions of Ukraine**

The rule imposes comprehensive export controls against DNR and LNR for all items subject to the EAR with few exceptions, such as for food, medicine and certain Internet-based software for personal communications. These new controls generally track the sanctions imposed against the occupied regions and the existing comprehensive embargoes imposed against the Crimea regions of Ukraine in 2014. Unlike the Office of Foreign Assets Control (OFAC) sanctions, however, the EAR does not have a wind-down period for prohibited activities in the DNR and LNR. Also, the OFAC General Licenses do not match one-to-one with the EAR license exceptions,

which means that companies must analyze both sets of rules carefully to determine whether a transaction is authorized.

## **New Entities Added to the Entity List**

### **A. New Footnote 3 Entities**

As a result of a series of moves from the Military End User List, revisions and new additions, the following 51 entities are now footnote 3 entities that are subject to the Russia/Belarus-MEU FDP rule:

- Admiralty Shipyard JSC
- Aleksandrov Scientific Research Technological Institute NITI
- Argut OOO
- Communication Center of the Ministry of Defence
- Federal Research Center Boreskov Institute of Catalysis
- Federal State Budgetary Enterprise of the Administration of the President of Russia
- Federal State Budgetary Enterprise Special Flight Unit Rossiya of the Administration of the President of Russia
- Federal State Unitary Enterprise Dukhov Automatics Research Institute (VNIIA)
- Foreign Intelligence Service (SVR)
- Forensic Center of Nizhniy Novgorod Region Main Directorate of the Ministry of Interior Affairs
- Irkut Corporation
- Irkut Research and Production Corporation Public Joint Stock Company
- Joint Stock Company Scientific Research Institute of Computing Machinery
- JSC Central Research Institute of Machine Building (JSC TsNIIMash)
- JSC Kazan Helicopter Plant Repair Service
- JSC Rocket and Space Centre – Progress
- Kamensk-Uralsky Metallurgical Works J.S. Co.
- Kazan Helicopter Plant PJSC
- Komsomolsk-na-Amur Aviation Production Organization (KNAAPO)
- Ministry of Defence of the Russian Federation
- Moscow Institute of Physics and Technology
- NPO High Precision Systems JSC
- NPO Splyav JSC
- Oboronprom OJSC
- PJSC Beriev Aircraft Company
- PJSC Irkut Corporation
- PJSC Kazan Helicopters

- POLYUS Research Institute of M.F. Stelmakh Joint Stock Company
- Promtech-Dubna, JSC
- Public Joint Stock Company United Aircraft Corporation
- Radiotechnical and Information Systems (RTI) Concern
- Rapart Services LLC
- Rosoboronexport OJSC (ROE)
- Rostec (Russian Technologies State Corporation)
- Rostekh – Azimuth
- Russian Aircraft Corporation MiG
- Russian Helicopters JSC
- Sukhoi Aviation JSC
- Sukhoi Civil Aircraft
- Tactical Missiles Corporation JSC
- Tupolev JSC
- UEC-Saturn
- United Aircraft Corporation
- United Engine Corporation
- United Instrument Manufacturing Corporation
- International Center for Quantum Optics and Quantum Technologies LLC
- SP Kvant
- Federal Security Service (FSB)
- Main Intelligence Directorate
- JSC Integral (Belarus)
- The Ministry of Defence of the Republic of Belarus.

The Entity List entries for the Russian and Belarusian Ministries of Defence also cover the Russian and Belarusian armed forces and all operating units wherever located, the national armed services, the national guard, national police, and government intelligence and reconnaissance organizations.

#### B. Additions to the Regular Entity List

On March 3, BIS added 91 entities to the regular Entity List. These entities were determined to be involved in, contribute to, or otherwise support the Russian security services, military and defense sectors, and military or defense research and development efforts. The entities are in multiple countries, specifically Belize, Estonia, Kazakhstan, Latvia, Malta, Russia, Singapore, Slovakia, Spain and the United Kingdom.

#### **Expansion of Controls on Oil and Gas-Related Exports to Russia**

Also on March 3, BIS **expanded existing controls** applicable to the Russian oil and gas sector to align with EU controls on items necessary to meet certain standards. The new controls specifically target Russia's oil refinery sector to limit revenue Russia could use to support its military capabilities. The new license requirement does not depend on the knowledge of the exporter, but rather applies to all exports, reexports and transfers of a long list of items identified in a supplement. These items relate to oil and gas refining and are identified by Harmonized Tariff Schedule (HTS)-6 codes and by the Bureau of Census's Schedule B numbers.

### **Savings Clause**

Items subject to the new restrictions under the Russia/Belarus FDP rule and the Russia/Belarus-MEU FDP rule may proceed to their destination without a license if they were en route aboard a carrier to a port of export, reexport or transfer on March 26, 2022, pursuant to actual orders. BIS did not explain why the rules have a month-long delayed effective date for the new foreign direct product rules to become effective. Presumably, the delays were inserted to give the allies and partners planning on implementing their own new unilateral controls and sanctions enough time to change their domestic laws to control such items. Also, determining which foreign-produced items are subject to the new rules will require unusually complicated fact-gathering and legal analyses that have never been conducted before.

The effective date of all other controls is the date when the rule was filed with the Federal Register for public inspection. The Russia-specific controls became effective on February 24, unless modified by the March 2 rule. The Belarus-specific controls became effective on March 2.

### **Conclusion – Steps a Company Could Take to Ensure Compliance**

To help ensure compliance with the new export controls, companies will need to, at a minimum, do the following:

- Examine all planned or possible exports and reexports to, and transfers within, Russia or Belarus, or involving Russian or Belarusian entities, directly or indirectly. Screen such exports against the new lists of entities.
- For U.S.-origin items and items that would be shipped from the United States, companies will need to confirm the export control classification status of the items, particularly whether they are controlled for Anti-Terrorism-only reasons. (Companies that have not had to deal with embargoed destinations have generally not needed to distinguish whether their products are EAR99 items or controlled for Anti-Terrorism-only reasons because the result would not generally change any EAR compliance obligations.)
- For foreign-produced items not shipped from allied or partner countries, companies will need to conduct the complex analysis to determine whether the new scope of the de minimis rule, the new Russia/Belarus FDP rule or the Russia/Belarus-MEU FDP rule apply.
- Companies should implement or expand military end use and military end user screening due diligence processes for Russia and Belarus to cover EAR99 items—which also apply to entities that are not formally identified or listed as military end users.



- Companies will need to conduct similar efforts to determine whether the new export control rules created by allied and partner governments impose new controls on exports from such countries.
- Track developments daily. As allies and partners impose new controls, BIS is likely to match many of the changes so that the plurilateral controls are aligned. Also, the controls will likely expand and evolve as situations on the ground change in Ukraine, Russia and Belarus. Finally, given the novelty of the rules, BIS is likely going to amend them over time. It will likely also publish answers to FAQs to help ensure that the rules effectively accomplish the U.S. government's objectives pertaining to Russia and Belarus.
- With so many more ways that items can become subject to the EAR, it is important to remember the scope of the EAR violation provision in [Section 764.2\(e\)](#). It prohibits anyone from ordering, buying, removing, concealing, storing, using, selling, loaning, disposing of, transferring, transporting, financing, forwarding or otherwise servicing, in whole or in part, or conducting negotiations to facilitate such activities with respect to any item that has been, is being, or is about to be exported, reexported, or transferred that is subject to the EAR with knowledge that a violation of the EAR has occurred, is about to occur, or is intended to occur in connection with the item. This prohibition, and others, can subject someone to liability under the EAR even if they are not directly involved in the export of an item subject to the EAR to Russia or Belarus.
- Finally, remember that the U.S. government has many different tools available to it for investigating and enforcing violations of these and all other export control rules. In particular, BIS and other U.S. government officials have made clear that BIS will add to the Entity List any foreign companies that BIS believes have continued exporting U.S.- or foreign-origin items covered by the new rules without the required licenses from the United States or allied or partner countries. Indeed, unlike past unilateral U.S. controls, the enforcement of the new rules will be magnified by the coordinated action of, and information sharing among, the United States and its partner countries.

<sup>1</sup> A "multilateral" control is one based on agreements of one of the four primary multilateral export control regimes, such as the Wassenaar Arrangement. A "plurilateral" control is one agreed to by an ad hoc group of countries using their domestic authorities to impose coordinated unilateral controls outside the scope of the items controlled by one of the four multilateral regimes.

<sup>2</sup> The A:5 Group countries are Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Turkey and the United Kingdom.

<sup>3</sup> The A:6 Group countries are Albania, Cyprus, Malta, Mexico, Singapore, South Africa and Taiwan.

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