

## Licenses for Exports to Russia related to Commercial Space Launches Must be Granted by September 1, 2021

June 15, 2021

### Key Points

- As part of the United States' response to Russia's use of chemical weapons against Russian opposition figure Aleksey Navalny, the U.S. State Department applied a policy of denial to licenses and other approvals for exports to Russia of defense articles and defense services under the International Traffic in Arms Regulations (ITAR). The policy of denial, which was effective on March 18, 2021, does not apply to, and an export license or other approval for ITAR items may be issued on a case-by-case basis for, government space cooperation and, temporarily, for commercial space launch activities. However, after September 1, 2021, the State Department will impose a policy of denial for all ITAR licenses and other approvals in support of commercial space launches.
- Similarly, also effective March 18, 2021, the U.S. Commerce Department adopted a presumption of denial in reviewing license applications for exports or reexports of national security-controlled ("NS-controlled") items to Russia under the Export Administration Regulations (EAR). However, Commerce is allowing case-by-case review for deemed export and deemed reexport licenses. As with the State Department, the policy of denial does not apply to, and an export license or other approval for NS-controlled items may be issued on a case-by-case basis for, government space cooperation and, temporarily, for commercial space launch activities. However, after September 1, 2021, the State Department will impose a policy of denial for all EAR licenses and other approvals in support of commercial space launches.
- Given Russia's significant role in the space industry, and given that the license review process can take months for the U.S. government to complete, companies in the commercial space industry should review their ITAR and EAR licensing needs immediately and submit necessary license applications as soon as possible to receive approvals under the above mentioned exceptions before they expire on September 1.

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## Background

On March 1, 2021, the U.S. Secretary of State determined pursuant to Section 306(a) of the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (“CBW Act”) that the government of Russia “has used chemical or biological weapons in violation of international law or lethal chemical or biological weapons against its own nationals.”<sup>1</sup> The determination was made in response to the attempted assassination of Russian opposition figure Aleksey Navalny in August 2020 and his subsequent imprisonment in January 2021.<sup>2</sup> Pursuant to this determination, the Department of State imposed sanctions against Russia to remain in place for at least one year and until further notice.<sup>3</sup>

As part of the CBW Act sanctions, the following changes came into effect on March 18, 2021:

- The Department of State Directorate of Defense Trade Controls (DDTC) amended the ITAR to adopt a policy of denial for licenses and other approvals for exports of defense articles and defense services to Russia.
- The Bureau of Industry and Security of the Department of Commerce (BIS) adopted a license review policy of presumption of denial for NS-controlled items subject to the EAR destined for Russia, and suspended certain license exceptions.

## ITAR Amendments

On March 18, 2021, the DDTC published a final rule that imposed restrictions on exports of defense articles and defense services to Russia.<sup>4</sup> Specifically, the final rule:

- Applies a policy of denial to licenses and other approvals for exports of defense articles and defense services destined for or originating in Russia, by adding Russia to the list of countries subject to U.S. arms embargoes in ITAR § 126.1(d)(2).
- Provides Russia-specific exceptions to the policy of denial for:
  - Prior to September 1, 2021, “commercial space launches.”
  - “Government space cooperation.”<sup>5</sup>

Licenses or other approvals for exports of defense articles and defense services falling within the above exceptions may be issued on a case-by-case basis consistent with U.S. foreign policy and national security considerations.

In addition, the final rule provides for a Russia-specific exemption for certain exports by or for the U.S. government (e.g., pursuant to an international agreement) when such export is in support of “government space cooperation.”<sup>6</sup> The ITAR also provides limited exemptions generally applicable to all countries subject to the policy of denial (e.g., for personal protective gear and certain items for official use by the U.S. government).<sup>7</sup>

As a result of these amendments, all **new and pending** applications for a license or authorization to export defense articles, including technical data, or defense services to Russia is subject to a policy of denial, unless one of the limited exceptions or exemptions described above applies.<sup>8</sup> The DDTC has clarified that to qualify for case-by-case review, approvals for “commercial space launches” must be **issued** – not just submitted – by September 1, 2021.<sup>9</sup> In addition, the policy of denial applies to licenses and approvals for not only exports but also for transfer, reexport and retransfer of

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defense articles or defense services to Russia or “to any person acting on its behalf,” which include transfers of non-U.S. satellites that contain ITAR-controlled components.<sup>10</sup> The policy of denial also applies to license applications in furtherance of previous approved agreements and their amendments,<sup>11</sup> as well as to brokering activities involving Russia.<sup>12</sup>

An existing license or other approval for export to Russia remains valid, unless revoked by the DDTC.<sup>13</sup> The policy of denial under § 126.1(l) applies only to **exports** to Russia. License applications related to **temporary imports** from Russia will continue to be adjudicated on a case-by-case basis.<sup>14</sup>

## Policy Changes Under the EAR

On March 18, 2021, BIS announced that it would adopt a presumption of denial in reviewing license applications for exports or reexports of NS-controlled items to Russia. However, the pre-existing licensing policy continues to apply to certain categories of exports and reexports pursuant to a partial waiver of the CBW Act sanctions on national security grounds. The items covered by the waiver are:<sup>15</sup>

- Items eligible for license exceptions TMP (Temporary Imports, Exports, and Reexports); GOV (Governments, International Organizations, and International Inspections under the Chemical Weapons Convention); BAG (Baggage); AVS (Aircraft and Vessels); or ENC (Encryption Commodities and Software).
- Items necessary for the safety of flight of civil fixed-wing passenger aviation.
- Deemed exports and reexports to Russian nationals.
- Items to wholly-owned U.S. subsidiaries and other foreign subsidiaries of U.S. companies that are located in Russia.
- Items in support of commercial space launch activities, until September 1, 2021. After this date, a presumption of denial will apply to these items.
- Items in support of government space cooperation.

BIS further suspended license exceptions Service and Replacement of Parts and Equipment (RPL), Technology and Software Unrestricted (TSU), and Additional Permissive Reexports (APR) for use with NS-controlled items destined to Russia.

Lastly, because of the ITAR amendments discussed above, Russia has been automatically included in a more restrictive country group (Country Group D:5) under the EAR.<sup>16</sup> Placement of a country in Country Group D:5 generally limits the availability of license exceptions under the EAR for exports and reexports of certain items.<sup>17</sup>

## Implications for the Commercial Space Industry

### 1. Tight timeframe for submitting applications for commercial space launches

As noted above, the new policies of denial for Russia exports under the ITAR or the EAR contain an exception for commercial space launches prior to September 1, 2021. Companies wishing to make use of this exemption, including suppliers of ITAR components in non-U.S. satellites destined for Russia, should submit their license applications as soon as possible, and likely prior to July 1, 2021, as the DDTC will only

apply the case-by-case review to licenses approved granted by September 1, 2021, and it remains unclear whether BIS will follow suit.

The DDTC's current guidance states:

*You should plan to submit any license applications far enough in advance to enable DDTC to complete its case-by-case review of the application prior to September 1, 2021. Average license processing timelines generally range from 35-45 days and exports involving countries listed in ITAR § 126.1 often require additional time to review.*<sup>18</sup>

Companies should also factor in additional processing time caused by a likely marked increase in similar license applications.

## **2. Exports to Baikonur Cosmodrome may be affected**

Exporters to Baikonur Cosmodrome should be aware of the risk of export or reexport to Russia. Although the Baikonur Cosmodrome is located on Kazakhstan soil, the spaceport is leased by the Kazakh government to Russia until 2050 and managed jointly by the Roscosmos State Corporation (a Russian state corporation) and the Russian Aerospace Forces. In this regard, the ITAR prohibits unauthorized export, transfer, reexport and retransfer of defense articles or defense services to Russia or "to any person acting on its behalf," and the new policy of denial applies to the application of licenses in such cases as well.<sup>19</sup> The relevant DDTC guidance notes that applicants "should consider whether it is possible to conduct exports to Baikonur without exporting any defense articles, including technical data, to Russian persons."<sup>20</sup>

Additionally, unlike BIS's policies for deemed exports and deemed reexports to Russian nationals, the ITAR amendments do not contain a general (i.e. non-space specific) carve-out for deemed exports and reexports. This likely means that any deemed export or deemed reexports to Russian nationals related to commercial space launches will only be subject to case-by-case review until September 1, 2021.

## **3. U.S. government space programs unlikely to be affected**

Both the EAR and the ITAR contain carve-outs for U.S. government space programs. Provided that they fall under the condition of the carve-outs, exports in support of U.S. government space programs (such as the International Space Station (ISS)) are unlikely to be affected by these amendments.

## **Conclusion**

Russia plays a significant role in the space industry, and the commercial space launches exception for license applications under both the ITAR and EAR is only available until September 1, 2021, less than three months away. As the exemption applies, at least at the DDTC, to licenses granted by that date, and the license review process can take months for the U.S. government to complete, it is critical that U.S. exporters in the commercial space industry and their non-U.S. subsidiaries and partners review their Russia-related ITAR and EAR licensing needs, including the evaluation of the current use of EAR license exceptions RPL, TSU and APR for Russia, and to submit necessary license applications as soon as possible, and likely prior to July 1, 2021.

<sup>1</sup> See “Determinations Regarding Use of Chemical Weapons by Russia Under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991.” [86 FR 14804](#) (March 18, 2021).

<sup>2</sup> See “U.S. Sanctions and Other Measures Imposed on Russia in Response to Russia’s Use of Chemical Weapons.” [State Department Fact Sheet](#) (March 2, 2021).

<sup>3</sup> See footnote 1. The CBW Act sanctions targeting Russia also includes the termination of foreign assistance, arms sales, and arms sales financing, as well as the denial of U.S. government credit or other financial assistance.

<sup>4</sup> See “International Traffic in Arms Regulations: Addition of Russia.” [86 FR 14802](#) (March 18, 2021).

<sup>5</sup> See ITAR § 126.1(l).

<sup>6</sup> See ITAR § 126.4(a)(2) and (b)(2).

<sup>7</sup> See ITAR §§ 123.17, 126.4(a)(1) or (3) and (b)(1), and 126.6.

<sup>8</sup> See “ITAR / USML Updates FAQs – Russia.” [DDTC website](#).

<sup>9</sup> See “ITAR / USML Updates FAQs – Russia.” [DDTC website](#).

<sup>10</sup> See ITAR § 126.1(e)(1).

<sup>11</sup> See “Summary of Changes to International Traffic in Arms Regulations § 126.1 – Russia.” [DDTC Factsheet](#) (April 12, 2021).

<sup>12</sup> See ITAR § 129.7(d) and “ITAR / USML Updates FAQs – Russia.” [DDTC website](#).

<sup>13</sup> See “ITAR / USML Updates FAQs – Russia.” [DDTC website](#).

<sup>14</sup> See “ITAR / USML Updates FAQs – Russia.” [DDTC website](#).

<sup>15</sup> See “Russia: Implementation of Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (CBW Act) Sanctions.” [86 FR 14689](#) (March 18, 2021).

<sup>16</sup> See Note 1 to Country Group D:5 in Supplement No. 1 to part 740 of the EAR, which provides that Country Group D:5 includes all countries subject to a U.S. arms embargo under ITAR § 126.1.

<sup>17</sup> See EAR § 740.

<sup>18</sup> See “ITAR / USML Updates FAQs – Russia.” [DDTC website](#). BIS has not issued guidance relevant to this issue at the time of this alert.

<sup>19</sup> See ITAR § 126.1(e)(1).

<sup>20</sup> See “ITAR / USML Updates FAQs – Russia.” [DDTC website](#).

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