

BIS Tightens Controls on Exports of National Security-Controlled Items

The U.S. Department of Commerce, Bureau of Industry and Security (BIS) on April 28, 2020, published two final rules and a proposed rule that substantially tighten the controls in the Export Administration Regulations (EAR). These rules affect exports of items controlled for national security reasons which are listed on the Commerce Control List with "reasons for control" NS1 or NS2 (NS items) to China, Russia, Venezuela, and certain other countries of heightened national security concern.

The [first final rule](#) eliminates License Exception CIV, which previously authorized certain exports of NS items to certain countries of heightened national security concern, including China, Russia, and Venezuela. The [second rule](#) increases the restrictions on exports intended for military end uses or military end users in China, Russia, and Venezuela. The [proposed rule](#) would modify License Exception APR to no longer apply to reexports of NS items to Country Group D:1.

The two final rules take effect June 29, 2020. Comments on the proposed rule are also due on June 29, 2020.

Elimination of License Exception CIV

License Exception CIV (Civil End Users) currently authorizes exports, reexports, and in-country transfers of NS items to non-military end users in [Country Group D:1](#) (other than North Korea),^[1] for non-military end uses. By eliminating License Exception CIV, BIS is removing one of the more significant avenues by which sellers of NS items are exempt from the requirement to obtain a specific license.

BIS is removing this license exception "due to the increasing integration of civilian and military technology development in these countries of concern," that makes it difficult for U.S. exporters to determine whether the item is destined for a military end use or military end user. BIS asserts that certain countries have employed strategies to "obscure" the possible military end use or military end users to take advantage of License Exception CIV.

Expansion of Controls for Military End Use or Military End Users in China, Russia, or Venezuela

Nevertheless, BIS's second new rule imposes additional restrictions precisely on items intended for a military end use or military end user.

Among other things, the current [Section 744.21](#) of the EAR requires companies to obtain a license to export, reexport, or transfer specific items listed in [Supplement No. 2 to Part 744](#) of the EAR, with "knowledge" that the item is intended for a military end use in China, Russia, or Venezuela, or is intended for a military end user in Russia or Venezuela. The new final rule significantly expands these military end use and end user controls on China, Russia, and Venezuela, as follows:

New Controls on "Military End Users" in China: The new rule extends to China the license requirement for items that the exporter knows are intended for a military end user in China. The EAR defines "military end user" broadly to include the national armed services (army, navy, marine, air force, or coast guard), national guard and national police, government intelligence or reconnaissance organizations, and any person or entity whose actions or functions are intended to support military end uses. Accordingly, this is a significant extension, especially in view of BIS's warning that "China's widespread civil-military integration" will require heightened diligence by sellers.

Expanded Definition of "Military End Use": The new rule also significantly broadens the definition of "military end use," thereby increasing the restrictions on all three countries. Currently, the EAR generally limits the definition of "military end use" to "use," "development," "production" or "incorporation into" military items on the U.S. Munitions List or Wassenaar Agreement Munitions List and military items classified under "600 series" ECCNs on the Commerce Control List. Given the narrow definition of "use" in the EAR, the definition scope of "military end use" was relatively limited. The new rule expands the scope of the definition to include any item that "supports or contributes to" the operation, installation, maintenance, repair, overhaul, refurbishing, development, or production, of military items.

Additional Items Subject to Controls: Finally, the new rule adds 15 new ECCNs^[2] to the list of items to which the military end use or military end user restrictions described above apply and adds additional items within four ECCNs^[3] currently listed in Supplement No. 2 to Part 744 of the EAR. The effect of this expansion will be to impose licensing requirements on a wide range of commercial electronics, mass-market encryption items, sensors, and commercial aircraft and water craft components, so long as these items are destined for a military end use or user in China, Russia or Venezuela.

In addition the new rule expands the Electronic Export Information filing requirements in the Automated Export System for exports to China, Russia, and Venezuela by eliminating the existing exception for shipments valued at less than \$2,500 (unless the shipment is eligible for License Exception GOV), and requiring that the exporter provide the applicable ECCN for all items, eliminating the prior exclusion for items controlled only for anti-terrorism (AT) reasons.

Proposed Modification of License Exception APR

License Exception APR (Additional Permissive Reexports) currently authorizes reexports of many items that otherwise would be subject to license requirements, including items controlled for national security reasons, from Country Group A:1 (which consists of close U.S. allies)^[4] or Hong Kong. The logic behind the license exception has been that these countries would apply their own export controls to more sensitive items.

BIS proposes to modify License Exception APR to eliminate the provision that currently permits reexport of NS items to all countries in Country Group D:1 other than North Korea. This change means that persons seeking to reexport NS items to such countries from Country Group A:1 or Hong Kong will now have to seek a specific license from BIS unless another license exception applies (in addition to complying with any licensing requirements of the country of reexport). This potentially doubles the regulatory burden on companies whose business regularly involves such reexports. Moreover, certain companies that operate solely in Country Group A:1 or Hong Kong may face U.S. export control compliance burdens for the first time.

BIS explains that it is proposing this change due to "evidence of differences in licensing review standards for national security-controlled items" that could result in another country approving "a license for the reexport of a U.S.-origin item that would have been denied if exported directly from the United States."

BIS requests comments on how the proposed change would affect persons who currently use or plan to use License Exception APR. Because the license exception has no documentation requirement and involves exports from third countries, BIS does not know the volume of reexports that would be affected or how the proposed change would affect the amount of time necessary to complete reexport transactions in the future. Comments must be submitted to the [federal rulemaking portal](#) under ID number BIS–2020–0010 no later than June 29, 2020.

Endnotes

[1] In addition to China, Russia, and Venezuela, the affected countries are Armenia, Azerbaijan, Belarus, Burma, Cambodia, Georgia, Iraq, Kazakhstan, Kyrgyzstan, Laos, Libya, Macau, Moldova, Mongolia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, Vietnam, Yemen.

[2] The new ECCNs are 2A290, 2A291, 2B999, 2D290, 3A991, 3B991, 3B992, 3C992, 3D991, 5B991, 5A992, 5D992, 6A991, 6A996, and 9B990.

[3] The expanded coverage is for additional items described in ECCNs 3A992, 3A999, 8A992, and 9A991.

[4] Specifically, the Group A:1 countries are: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Ireland, Italy, Japan, Korea (South), Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, and the United Kingdom.

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