

BIS TIGHTENS EXPORT CONTROL RULES WITH AN EYE ON CHINA

On April 28, 2020, the Bureau of Industry and Security ("**BIS**") of U.S. Department of Commerce published two major amendments and one proposed amendment to the Export Administration Regulations ("**EAR**") that would significantly tighten export controls to China and certain other countries. Specifically, the new rules expand military end use and end user restrictions, remove a commonly used license exception for civil end-uses of certain controlled items, and propose to severely limit the scope of a license exception for re-exports.

Expansion of Restrictions on Military End-Use and End-User

Under a Final Rule that will become effective June 29, 2020 – an accelerated timeline that short circuits the usual process for soliciting public input on new export control regulations – BIS has expanded the scope of Military End Use and End User controls (the "**MEU Rule**"). Section 744.21 of the EAR currently imposes a license requirement for exports, reexports, and transfers (in-country) of certain specified items subject to the EAR if they are intended for use in Russia, China, and Venezuela, or military end users in Russia and Venezuela. Under the current regulations, "military End Use" is defined narrowly, to include incorporation of an item into military products or technologies or for the "use," "development," or "production" of military products or technologies, along with the "deployment" (defined as "placing in battle formation or appropriate strategic position") of civil aircraft and gas turbine engines for military purposes. The new MEU Rule expands the scope of that definition to also include any item that supports **or** contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, "development," **or** "production," of military products [emphasis added]. This language change expands the scope of Military End Use in § 744.21(f) in significant ways, so that any one of the listed activities is sufficient to trigger the licensing requirement. For example, while a company's supply of a civil aircraft engine to a Chinese military entity for installation on a military aircraft arguably would not have qualified as military end use, the same activities now would be subject to the military end use restrictions.

As expected with respect to End User controls, the MEU Rule expands the license requirements to include China alongside existing requirements for Military End Users in Russia and Venezuela. As stated in the Supplementary Information to the MEU Rule, BIS expects that this change will require "increased diligence with respect to the evaluation of end users in China, **particularly in view of China's widespread civil-military integration.**"[emphasis added]. This refers to U.S. Government concerns that China is pursuing a strategy of "military-civil fusion" - whereby attempts to acquire and divert foreign technologies for its military capabilities are not limited to state entities, but also extend to private entities that engage in any joint R&D (willingly or otherwise) with the Chinese government. Under the MEU Rule, a Military End User is not only traditional state agencies with national security responsibility, but also "any person or entity whose actions or functions are intended to support `military end uses.'" It is therefore unclear whether Military End User extends to cover commercial enterprises such as AVIC and COMAC associated with or owned by the Chinese military, or even research institutions and academic institutions that receive R&D funding from China.

Alongside the changes to the Military End Use and End User definitions, the MEU Rule broadens the scope of the items subject to license requirements. Specifically, the MEU Rule adds several Export Control Classification Numbers ("**ECCNs**") in the categories of materials processing, electronics, telecommunications, information security, sensors and lasers, and propulsion. The MEU Rule also adopts a license review policy of presumption of denial for exports for Military End Use and End Users.

Finally, the MEU Rule modifies a filing requirement for U.S. exporters. While U.S. exporters previously did not need to file an Electronic Export Information ("**E EI**") for items destined to China, Russia, or Venezuela if they are valued under \$2,500 and do not require a license, they now need to make an EEI filing for items destined to China, Russia, or Venezuela regardless of the value of the shipment, unless the shipment is eligible for License Exception GOV – even if no license is required to ship an item to those destinations.

Elimination of License Exception Civil End Users (CIV)

Under a second Final Rule, also effective June 29, 2020, BIS will remove the License Exception Civil End Users ("**CIV**") from the EAR. Currently, if the CIV license exception criteria described in § 740.5 of the EAR are met, an exporter is authorized to export, reexport, and transfer certain national security-controlled items on the Commerce Control List ("**CCL**") to most civil end users for civil end uses in Country Group D:1, which includes China and certain other countries considered by the U.S. Government to pose high export control risks, without first requiring review by the U.S. Government or acquiring a license. License Exception CIV thus exempts certain export and re-export transactions from BIS licensing requirements based on the assumption that certain items do not pose any national security risks if they are intended for civil end-use. Starting on June 30, exporters previously relying on the license exception will require a license for exporting, reexporting, and transferring national security-controlled items on the CCL to Country Group D:1 destinations, which are countries of national security concern to the U.S. Government.

BIS noted removal of License Exception CIV advances U.S. national security policy objectives and that their decision was based on the following factors:

- *An evaluation of export data from current CIV end-users,*
- *publicly available strategies of D:1 countries currently implementing civil-military integration strategies to obscure U.S. exporters from easily determining if a national-security controlled item will not be or is not intended to be exported, reexported or transferred (in-country) to military users or military end users, and*
- *U.S. Government enforcement actions identifying diversion of U.S.-origin items to military end uses and military end users by purported civil end users in these countries.*

Proposed Amendment License Exception Additional Permissive Reexports (APR)

Under a Proposed Rule, License Exception APR will be significantly limited for certain controlled items. License Exception APR currently authorizes the re-export of certain national-security controlled items via a country in Group A:1 (a group of countries that are parties to the Wassenaar Arrangement) or Hong Kong. Under the Proposed Rule, China and other Country Group D:1 countries would no longer be eligible destinations under License Exception APR.

BIS notes in the Federal Register notice promulgating the Proposed Rule that the reason for the proposed change is that "[b]ased on discussions with partner governments and U.S. companies, BIS has evidence of differences in licensing review standards for national-security controlled items destined to Country Group D:1, so that countries in Country Group A:1 or Hong Kong may approve a license for the reexport of a U.S.-origin item that would have been denied if exported directly from the United States."

If the Proposed Rule on License Exception APR becomes effective in its current form, certain items controlled for national security reasons that currently can be re-exported through Europe or Hong Kong to China and certain other countries without a license will require a BIS license, which may take significant time to obtain and may be rejected on national security grounds.

BIS is soliciting public comments on the Proposed Rule until **June 29, 2020**. In particular, BIS is interested in understanding how the Proposed Rule would affect the current use or planned use of License Exception APR, the volume of transactions affected by the Proposed Rule, how the Proposed Rule would affect the amount of time necessary to complete such transactions in the future, and how the Proposed Rule would otherwise affect current business.

Conclusion

The two amendments and one proposed amendment to the EAR reflect the U.S. Government's continuing effort to tighten export controls with respect to China and certain other countries. These revisions would impose significant compliance burdens on U.S. exporters and global business with ties to China and other countries affected. These companies are well advised to update their current compliance procedures and assess business activities in light of these new export restrictions.

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