

Expansion of Military End-Use Controls Creates Potential Pitfalls for Exporters

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On November 7, 2014, the U.S. Commerce Department's Bureau of Industry and Security (BIS) announced a final rule implementing controls on exports, re-exports and transfers of a variety of goods, software and technologies for a "military end use" in Venezuela. The final rule was issued in response to what BIS described as "the Venezuelan military's violent repression of the Venezuelan people." It joins similar military end-use controls already in place on exports, re-exports and transfers to the People's Republic of China and Russia.

Under the new rule, as under the existing controls on China and Russia, a "military end use" is very broadly defined to include not only direct uses such as parts, components or subsystems of weapons and other defense articles, but also indirect use in the design, development and production of such weapons and defense articles. In turn, the definitions of use, design, development and production can encompass preliminary design research, product engineering, systems integration, testing, manufacturing, quality assurance and day-to-day operation, repair, and maintenance of existing items and systems. In addition, for certain items, a "military end use" may include assistance with the item's operational deployment.

The breadth of the military end-use rules on China, Russia and now Venezuela pose a number of pitfalls. Among other things, the military end-use controls add to the already significant obligation on exporters and others in the transaction chain to clearly understand and carefully document the intended end use of each item they sell. For example, companies that do not implement effective presale due diligence and screening procedures may incur potential liability if information about a transaction provides a reason to know that the end use of the item is, in fact, a military end use. This could include a delivery address that is the same as or similar to a known military end user in the country of destination or the involvement of a company or organization associated with the Chinese, Russian or Venezuelan military.

Violations of the military end-use rules and other aspects of BIS's Export Administration Regulations can lead to criminal penalties of \$1 million per violation and up to 20 years' imprisonment and civil penalties of the greater of \$250,000 or twice the amount of the transaction involved in the violation. In assessing penalties, BIS commonly charges each export or other transaction as a separate violation, resulting in civil penalties in the millions of dollars. BIS also may subject violators to multiyear export bans. The potential civil and criminal penalties for violations of the military end-use rules and other aspects of U.S. export controls underscore the need to invest in and implement effective compliance programs, training, record-keeping and auditing procedures. Purchasers of and investors in companies that do business with countries subject to U.S. export controls should also conduct their own careful due diligence, given the potential for successor liability for past violations.