

# Bureau of Industry and Security Further Restricts Exports to Countries of Concern, Including China

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On April 28, 2020, the Bureau of Industry and Security, U.S. Department of Commerce (BIS) published two final rules — both of which will take effect on June 29, 2020 — and one proposed rule — for which comments are due by June 29, 2020 — that have the potential to severely curtail export activities with respect to China, among others. These increasingly hawkish steps are intended to counteract the significant integration of civilian and military technology development in countries of concern, most notably China (where the so-called “civil-military fusion” strategy has accelerated), and may presage additional controls aimed primarily at China. According to a [statement](#) issued by the U.S. secretary of commerce, these rules aim to thwart the acquisition of U.S. technology through civilian supply chains or under civilian-use pretenses that could be used to develop weapons, military aircraft or surveillance technology for military use.

### Major Expansion of Military End Use and End User Controls

The [first final rule](#) dramatically modifies the export, reexport and in-country transfer controls set forth in the Export Administration Regulations (EAR) for military end uses and military end users in China, Russia and Venezuela. Specifically, the final rule:

- extends licensing requirements to “military end users” in China;
- expands the definition of “military end use,” thereby requiring licensing for a wider universe of transactions;
- broadens the list of items for which the licensing requirements apply;
- applies regional stability controls for certain items destined for China, Russia or Venezuela; and
- adds Electronic Export Information (EEI) filing requirements in the Automated Export System (AES) for exports to China, Russia and Venezuela.

**Restrictions Are Expanded To Include Chinese Military End Users.** In 2007, BIS imposed export, reexport and in-country transfer licensing requirements for certain items intended for military end uses in China. In 2014, BIS expanded these licensing requirements to both Russia and Venezuela, but captured military end users in addition to military end uses in these jurisdictions. BIS now has aligned the China-specific restrictions with those for Russia and Venezuela, though some ambiguity remains regarding which entities BIS considers to be military end users.

Specifically, the term “military end user” is defined as the “national armed services (*i.e.*, the army, navy, marine, air force, or coast guard), as well as the national guard and national police, government intelligence or reconnaissance organizations, **or any person or entity whose actions or functions are intended to support ‘military end uses’**” (emphasis supplied). Historically, BIS has not clarified this catchall language, though practitioners have taken the view that an entity that is partially engaged in activities that support a military end use prudently should be treated as a military end user even if the item being exported to that entity is unrelated to such activities. Furthermore, it is unclear whether an entity engaged solely in commercial activities, but which is owned and/or controlled in whole or in part by a military end user, would itself be considered a military end user.

In connection with this rulemaking, BIS only has commented that the “expansion will require increased diligence with respect to the evaluation of end users in China, particularly in view of China’s widespread civil-military integration.” Absent any further

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guidance from BIS, exporters will likely want to enhance due diligence and incorporate robust representations and warranties into contractual language.

**The Scope of Military End Use Is Broader.** For each of China, Russia and Venezuela, BIS also has widened the aperture of activities that constitute military end uses, further expanding the range of restricted uses. Previously, the term “military end use” primarily was defined to mean: incorporation into a military item described on the U.S. Munitions List (USML); incorporation into a military item described on the Wassenaar Arrangement Munitions List; incorporation into items classified under the Export Control Classification Numbers (ECCNs) on the Commerce Control List (CCL) pertaining to the Wassenaar Arrangement Munitions List or under those ECCNs capturing military items that were migrated to the CCL from the USML as a consequence of the Export Control Reform Initiative (so-called “600-Series” items); or for the “use,” “development” or “production” of such military items.

The BIS rule targets the “use” prong of this definition, which currently is defined as “operation, installation (including on-site installation), maintenance (checking), repair, overhaul and refurbishing.” The new military end use definition replaces the conjunctive “and” with the disjunctive “or” and now reads: “[I]ncorporation into the military items described above or any item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, ‘development,’ or ‘production’” of the military items described above. As a consequence, a broader array of activities will be drawn into this licensing regime.

**Licensing Requirements Will Apply to Additional Items, Including Those Related to Electronics, Telecommunications and Information Security.** Currently, the military end use and end user restrictions apply to certain ECCNs within the following categories of the CCL: (i) materials, chemicals, microorganisms and toxins; (ii) materials processing; (iii) electronics design, development and production; (iv) computers; (v) telecommunications; (vi) sensors and lasers; (vii) navigation and avionics; (viii) marine; and (ix) propulsion systems, space vehicles and related equipment.

The April 28, 2020, rule broadens the scope of the items subject to license requirements by supplementing the list of items subject to military end use and end user license requirements. Specifically, this rule adds ECCNs for materials processing, electronics, telecommunications, information security, sensors

and lasers, and propulsion to Supplement No. 2 to Part 744 of the EAR.<sup>1</sup> Among these items are certain integrated circuits, certain telecommunications testing equipment, and “mass market” encryption hardware and software. Additionally, this rule expands the range of items under ECCNs describing general purpose electronic equipment; certain vessels and associated parts and components; and certain aircraft, aircraft engines, and associated parts and components included in Supplement No. 2.<sup>2</sup>

The licensing policy for any such exports is presumptive denial, which means BIS is unlikely to grant the required licenses for those items.

**Regional Stability Controls Take Focus.** The rule relocates the existing license requirements for spacecraft-related and military items to China, Russia or Venezuela to each applicable ECCN and imposes “Regional Stability” controls on such items. License applications for such items are subject to a case-by-case review to determine whether the transaction is “contrary to the national security or foreign policy interests of the United States, including the foreign policy interest of promoting the observance of human rights throughout the world.” Such applications also will be reviewed consistent with the U.S. arms embargo policies set forth in the International Traffic in Arms Regulations if the items are destined for a country within Country Group D:5, which includes China. However, the licensing policy for spacecraft-related items destined for China will be presumptive denial.

**EI Filing Requirements Eliminate Several Exemptions.** Finally, with limited exceptions, for exports to China, Russia and Venezuela, the rule requires the submission of EEI through the AES for any items described on the CCL (*i.e.*, non-EAR99 items), regardless of the value of the shipment, and requires identification of the applicable ECCN regardless of the reason for control. As a result, shipments valued at less than \$2,500, which previously were exempted from EEI filing requirements, must be notified to the U.S. government through AES, and even ECCNs subject only to antiterrorism controls, which previously were not required to be identified, must be reported in connection with any required EEI submission. This change vastly increases the visibility of the U.S. government into export transactions — thus requiring significant attention by would-be exporters.

<sup>1</sup> More specifically, ECCNs 2A290, 2A291, 2B999, 2D290, 3A991, 3A992, 3A999, 3B991, 3B992, 3C992, 3D991, 5B991, 5A992, 5D992, 6A991, 6A996 and 9B990.

<sup>2</sup> Specifically, ECCNs 3A992, 8A992 and 9A991.

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## Removal of License Exception Civil End Users (CIV) May Dramatically Narrow Certain Exports

BIS also published a [second final rule](#) removing License Exception CIV, which authorizes the unlicensed export of a number of items controlled for national security reasons “provided the items are destined to civil end-users for civil end-uses in Country Group D:1,” which is a country group that includes China, Russia and Venezuela, among others. Items that may currently be exported under this license exception include specific types of bearings, semiconductors, semiconductor production equipment, materials for semiconductor production, computers, telecommunication equipment, acoustic systems, optical equipment and materials, radar equipment, marine systems, and civil aircraft engine production equipment.

The general policy for applications to export or reexport national security-controlled items to Country Group D:1 is approval, provided that BIS determines, on a case-by-case basis, that the items are for civilian use or would otherwise not make a significant contribution to the military potential of the country of destination that would prove detrimental to the national security of the United States. However, license applications to export, reexport or transfer items that would make a direct and significant contribution to the military capabilities of China or Russia presumptively will be denied.

## Proposed Modifications to License Exception Additional Permissive Reexports (APR)

Finally, since variations in how the United States and its allies perceive the threat caused by the increasing integration of civilian and military technology development in countries of concern has resulted in the export of national security-controlled items that are subject to the EAR from allied countries to destinations, such as China, for which a license would have been required had the export originated in the United States, BIS has [proposed](#) to modify License Exception APR. License Exception APR currently permits unlicensed reexports from Country Group A:1 (the countries participating in the multilateral Wassenaar

Arrangement, with the exception of Russia, Ukraine and Malta) and Hong Kong to Country Group D:1, which includes China, Russia and Venezuela, among others. The BIS proposal would require a license for such activities, but BIS has not yet specified the prevailing licensing policy under consideration.

In addition to the recent broad-reaching rules and proposal, BIS might employ other strategies to constrain technology exports to China. For example, BIS has yet to identify the specific “emerging technologies” that will be subjected to more stringent export controls with respect to China in accordance with the Export Control Reform Act of 2018 and has yet to publish an Advance Notice of Proposed Rulemaking regarding “foundational technologies” that would have the same effect. Furthermore, BIS has been considering fundamental changes to the de minimis and foreign direct product rules that would ensnare a greater number of items manufactured or developed outside the United States within the scope of the EAR, including a change that would inhibit the ability of non-U.S. foundries that use U.S.-origin semiconductor manufacturing equipment to supply chips to Huawei.

## Key Takeaways

- Taken together, the above-described rules, as well as those that are being proposed or otherwise contemplated, will radically reset the bilateral trade relationship between the United States and China and make engaging in certain technology transfers increasingly difficult, including in connection with joint venture and similar collaborative arrangements.
- Businesses in the aerospace and defense, electronics, information security, semiconductor, and telecommunications sectors, among others, will need to scrutinize their existing export control policies and procedures to ensure compliance, and some businesses may see significant disruptions to lines of business that relied on previous licensing in these areas.
- Future rulemaking is likely to further constrain the ability of U.S. exporters to engage in unlicensed exporting to China and to severely curtail currently permitted transactions with Huawei.