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BIS Issues Rules Further Restricting Exports to China, Russia and Venezuela

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On April 28, 2020, the U.S. Department of Commerce, Bureau of Industry and Security ("BIS") published two rules and one proposed rule (collectively, the "Rules") targeting China, Russia and Venezuela, amending the Export Administration Regulations ("EAR") to expand licensing requirements and eliminate certain license exceptions regarding export of items in support of military end uses and end users. In a heightened enforcement environment, the Rules will necessitate that companies understand the nature of their counterparties and the purpose of transactions with them.

The View From Washington

The Rules help effectuate the Trump administration's December 2017 National Security Strategy, which stated that the U.S. would "respond to the growing political, economic, and military" challenges being posed by China and Russia, as well as to their support of Venezuela. The Rules continue the trend of the Trump administration's use of trade policy to address concerns regarding China, Russia and Venezuela, and they complement the export restrictions related to Russia that BIS imposed in February 2020. In particular, the Rules reflect the Administration's concern about "civil-military integration," especially in China, as well as about China's influence over Hong Kong. Once the Rules come into effect, their impacts likely will fall most heavily on transactions with China that were previously authorized.

The Rules

The Rules expand the definition of military end uses and add new restrictions on military end users, remove license exceptions for civil end users for civil end uses and propose to remove authorizations for certain reexports. As a result of new export licensing requirements coupled with a policy of denial, many transactions with China, Russia and Venezuela that were previously authorized for practical purposes could now be banned.

Military End Uses and Military End Users

In the first final rule, BIS expanded licensing requirements related to exports of items in support of "military end uses" and "military end users" in China, Russia and Venezuela and added new filing requirements related to virtually all physical exports to those countries. Under the rule previously in effect, the EAR required a license for exports of certain items intended for military end use in China, Russia and Venezuela and for military end users in Russia and Venezuela. The new rule, which is effective June 29, 2020: (1) expands the definition of "military end use"; (2) adds a new restriction on exports of certain items to "military end users" in China; and (3) expands the list of items that are subject to these restrictions.

Military End Use: First, the rule significantly expands the definition of "military end use" beyond the former rule, which confined it to capture certain items for the "use," "development" and "production" of "military items."

- The new rule extends to certain items that support or contribute to the operation, installation, maintenance, repair, overhaul, refurbishing, "development" or "production" of military items, any one of which alone is sufficient to confer "military end use" status. The rule covers the less direct "supporting or contributing to" and replaces the term "use" with all of its defined constituent parts in the disjunctive. Thus, items that only indirectly support the development, production, operation, etc., of military items could now be considered as intended for "military end use."
- Also, exporters need only to have reason to know that the product could be intended "entirely or in part" for the above-listed uses or by persons or entities whose actions or functions are intended to support such uses (i.e., the definition of "military end user"). Without additional clarification of the scope of activities that may fall within these definitions, even a small indication that the recipient has some business with the Chinese, Russian or Venezuelan military (as the case may be) may be enough of an indicator that a license is required for the transaction.
- Furthermore, the rule significantly expands the list of Export Control Classification Numbers ("ECCNs") subject to the military end use license requirement, and it includes non-sensitive and widely available items such as basic electronics and consumer communications devices. Of particular note, items classified as 5A992 and 5D992, which cover "mass market" encryption items such as consumer

communications devices, will now be included in the list of ECCNs subject to potential license requirements.

Military End Users: Moreover, significantly, the rule expands license requirements to cover Chinese military end users, in addition to military end uses. "Military end user" is defined to include the army, navy, marines, air force, coast guard, national guard, national police and government intelligence or reconnaissance organizations. Given the potential overlap between civilian and military entities in China as noted by BIS, this expansion could create license requirements for exports to a much broader group of Chinese end users, making it important to conduct rigorous due diligence when exporting covered items to China.

Electronic Export Information: Finally, the rule revises the Electronic Export Information ("EEI") filing requirements to require filing for exports to China, Russia and Venezuela of items listed on the Commerce Control List ("CCL"), regardless of the value of the shipment, and also requires identification of ECCNs in the filings regardless of the reason for control. These modifications to the filing process have the effect of requiring a filing for virtually all physical exports of CCL-listed items to these countries, subject to narrow exceptions. Exporters will need to determine the appropriate export classification for all products exported to these countries, whereas previously, exporters did not need to include the ECCN in many of the EEI filings.

Civil End Users for Civil End Uses

The second final rule eliminates License Exception Civil End Users ("CIV"). CIV, which had been in place for decades, authorized the export, reexport and transfer (in-country) of items on the CCL that are controlled for national security reasons to civil end users for civil end uses in countries listed in Country Group D:1 (which includes China, Russia and Venezuela, among others). Without License Exception CIV, many sales to the private sector in countries in Group D:1 will now require a license. Similar to the first rule described above, this rule will have a particular impact on exports to China. The elimination of this exception reflects BIS's stated concern with the integration between military and civilian entities in China.

Reexports

The proposed rule would modify License Exception Additional Permissive Reexports ("APR") to restrict reexports of certain items to Country Group D:1. With this rule, BIS proposes to amend License Exception APR by removing the authorization for reexports of items on the CCL that are controlled for national security purposes from countries listed in Country Group A:1 (which includes all 42 countries participating in the Wassenaar Arrangement) and Hong Kong to countries listed in Group D:1, and requiring a license from BIS even though the items are already outside of the U.S. BIS noted concern that partner countries, including those listed in Group A:1, maintain standards of review that lead to approval of licenses that the U.S. would not grant.

Though not explicit in the proposed amendment, it would appear to reflect BIS's particular concern about transfers from Hong Kong to China. Unlike the other rules discussed above, this is not a final rule, and BIS requests comment on how the modification would affect those currently using or planning to use APR.

Key Takeaways

- Exporters increasingly will need to apply for licenses to export to China, Russia and Venezuela and, for those that are for a military end use or end user, they likely may be denied.
- Exporters should be cautious in their review of potential counterparties in China, Russia and Venezuela and seek to ensure that they have procedures in place to verify both end users and end uses. This will be particularly important for exports to China, which is newly subject to some of these restrictions.
- Exporters should be mindful that BIS appears to be using tools like the EEI to gather data on U.S. business in China, and may need to conduct additional export control classification analyses to meet the requirements.
- Exporters should prepare for greater hurdles to doing business in China, Russia and Venezuela and implement compliance measures to navigate these elevated risks.

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