BIS Expands Export Restrictions on Chinese, Russian, and Venezuelan Military End Users and End Uses

On April 28, 2020, the U.S. Commerce Department’s Bureau of Industry and Security (BIS) published two final rules to expand export controls on items destined for military applications in China, Russia, and Venezuela. One final rule amends the Export Administration Regulations (EAR) to impose additional restrictions on exports to Chinese, Russian, and Venezuelan military end users or for military end uses, in recognition of the fact that these countries increasingly use commercial items for military uses. It imposes license requirements on a broader set of items and expands the definition of “military end use,” creating additional due diligence obligations for U.S. exporters. The second rule removes license exception CIV and requires a license for national security-controlled items subject to the EAR to countries of national security concern. Both final rules are effective on June 29, 2020.

Expanded Export Controls on Military End Users and End Uses

The rule amends Section 744.21 of the EAR in a number of ways to limit China, Russia, and Venezuela from using U.S.-origin commercial items for military applications. All of these license requirements will have a presumption of denial.

First, the rule expands the licensing requirement for “military end users” to apply to China, in addition to the previous application to Russia and Venezuela. In 2007, BIS first imposed a licensing requirement for items designated for “military end use” in China. Then in 2014, BIS placed export restrictions on items for “military end use” and a “military end user” in Venezuela and Russia. With this new rule, BIS imposes the same licensing requirements for exports to China, noting that “[t]his expansion will require increased diligence with respect to the evaluation of end users in China.”

Second, the rule also expands the definition of “military end use” to include any item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, “development,” or “production,” of military items. Previously, only items for the “use,” “development,” or “production” of military items were restricted. BIS has also clarified that for the revised definition of “military end use,” any one of the six elements of the term “use” will be sufficient.

Third, BIS added a number of ECCNs to the list of items that require an export license under Supplement No. 2 to Part 744. These items fall in the categories of materials processing, electronics, telecommunications, information security, sensors and lasers, and propulsion. The rule also increases...
the range of items under ECCNs 3A992, 8A992, and 9A991. This change significantly expands the scope of items for which U.S. exporters will have to evaluate potential export license requirements for shipments to China, Russia, and Venezuela.

Additional changes from the rule include the following:

- The rule adds the “regional stability” (RS) reason for control for items in a .y paragraph of ECCN 9x515 or a “600 series” ECCN, except for exports or reexports to Russia for use in, with, or for the International Space Station (ISS).

- Exports to China, Russia, and Venezuela must meet additional Electronic Export Information (EEI) filing requirements. While currently EEI filings are only required for items on the Commerce Control List in shipments greater than $2500, the new rule requires a filing for all such shipments to these countries, regardless of value. Additionally, companies are required to report the correct ECCN on all required EEI filings, regardless of whether there is a reason for control for shipments to those countries.

Removal of License Exception CIV

The second published rule removes license exception CIV, which allowed for exports, reexports, or in-country transfers to civilian end users for civil end uses in Country Group D:1. BIS notes that the integration of civil and defense technology in many countries “makes it more difficult for industry to know or determine whether the end use and end users of items … will not be or are not intended for military uses or military end users.”

Conclusion

The Department of Commerce stated in a press release that these new rules are intended to “prevent efforts by entities in China, Russia, and Venezuela to acquire U.S. technology that could be used in development of weapons, military aircraft, or surveillance technology through civilian supply chains, or under civilian-use pretenses, for military end uses and military end-users.”

Due to these changes, U.S. and non-U.S. companies exporting items subject to the EAR to China, Russia, or Venezuela should determine whether their dual-use goods are listed in Supplement No. 2 to Part 744. If they are, exporters should carefully assess whether any such items are intended, entirely or in part, for a military end use or a military end user in that country. This exercise may require significant additional due diligence on customers and end users, including for many items that previously were not generally subject to any export license requirements. Since BIS is unlikely to grant an export license for such items, we suggest ensuring that compliance policies, sales agreements, and other commercial arrangements are reviewed and updated to include the necessary compliance procedures and commercial terms to account for these export restrictions.

* * *
Authors:

Michael T. Gershberg
Avani Uppalapati

This alert is not intended to provide legal advice, and no legal or business decision should be based on its content. If you have any questions about the contents of this alert, please call your regular Fried Frank contact or the attorneys listed below:

Contacts:

Washington, D.C.

Michael T. Gershberg +1.202.639.7085 michael.gershberg@friedfrank.com

London

Dr. Tobias Caspary +44.20.7972.9618 tobias.caspary@friedfrank.com

Fried Frank’s International Trade and Investment Group regularly represents clients in international mergers and acquisitions, joint ventures, principal investments, and sensitive corporate investigations, particularly in relation to matters that implicate the U.S. government's regulation of international business activities, such as the Committee on Foreign Investment in the United States (CFIUS), economic sanctions, export controls, and anti-corruption and anti-bribery.

For decades, our international trade and investment practitioners have been consistently recognized for their legal and policy-based contributions. Today, our practice is unique among its kind: it draws upon the Firm’s long tradition of senior U.S. government and diplomatic service, combines policy insight with deep technical expertise and business judgment, is fully integrated with Fried Frank’s preeminent Corporate and Litigation Practices, and is international in its outlook, experience, network reach and reputation.