

Trade Compliance Flash: U.S. Export Controls for China, Russia, and Venezuela Expanded With Respect to Military End Users and End Uses; License Exceptions Modified

International Alert

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The Department of Commerce, Bureau of Industry and Security (BIS) has [issued a final rule](#) expanding the "military end user" and "military end use" restrictions in the Export Administration Regulations (EAR) to target alleged diversion of U.S. exports to the militaries of China, Russia, and Venezuela. These changes are likely to impact the sales of many common dual-use civilian/military items, particularly with regard to China. As a result, many U.S. exporters may need to evaluate whether the new rules impact items that were only lightly controlled to these destinations in the past. The new restrictions will go into effect on June 29, 2020, with a savings clause that will allow for certain deliveries to continue beyond that date.

The new restrictions will apply only to certain covered dual-use civilian/military items—including several "900 series" items subject only to Antiterrorism (AT) controls that do not generally require a license for export to China, Russia, and Venezuela. Most notably, mass-market encryption software designated ECCN 5D992 is now covered, which may capture many commercial, off-the-shelf software products and operating systems. Sales of materials processing, electronics, telecommunications testing equipment, and vibration testing equipment in China, Russia, and Venezuela may also be impacted. However, the new restrictions do **not** impact EAR99-designated commodities, technology, and software, *i.e.*, U.S. items that are subject to the lowest level of export control.

The most significant new restrictions target sales of covered items to "military end users" in China—including the Chinese armed services, national guard, and national police, as well as intelligence or reconnaissance services—even for entirely civilian end uses. Such restrictions are new with respect to China but have been in place for Russia and Venezuela for many years. Similarly, the new restrictions expand the existing definition of "military end use" applicable to all three countries to cover any end use that "supports or contributes" to the operation, maintenance, repair, overhaul, refurbishment, use, development, or production of military items. BIS has also imposed additional Regional Security (RS) controls on 500 series and 600 series ".y items"—primarily parts of military items and spacecraft—thereby restricting their export to China, Russia, and Venezuela.

Finally, BIS has [issued a final rule](#) to eliminate the Civil End-Users (CIV) license exception and a [proposed rule](#) that would modify the Additional Permissive Reexports (APR) license exception, thereby restricting the exports, reexports, or transfers of items subject to National Security (NS) controls that would not have required specific authorization previously.

We summarize the new restrictions in greater detail and provide our key takeaways below.

Summary of New Restrictions

Effective June 29, 2020, the [new restrictions](#) expand export controls on military end users and military end use for China, Russia, and Venezuela. In a simultaneous [press release](#), BIS notes that the new restrictions seek to counteract these countries' alleged efforts to divert sensitive U.S. technology to their militaries "through civilian supply chains, or under civilian-use pretenses"—especially technology that could be used in the development of "weapons, military aircraft, and surveillance technology." For that reason, many of the changes focus on eliminating the channels that BIS believes foreign militaries may use to obtain such sensitive technologies or giving the U.S. government "greater visibility" over the technology and purported end users in these countries.

We provide details on the key changes below:

- **"Military End User" Restrictions Imposed on China** : The EAR's restrictions on exports, reexports, and transfers to "military end users" have now been expanded to include China, supplementing similar restrictions already in place for Russia and Venezuela. Specifically, all items subject to the EAR and listed in Supplement 2 to Part 744 of the EAR (summarized below) now require a license when the exporter, reexporter, or transferor knows or has reason to know the items are intended for a "military end user" in China, Russia, or Venezuela. Any related licensing applications are reviewed by BIS under a presumption of denial standard, meaning that a license is essentially unobtainable barring extraordinary circumstances. The term "military end user" explicitly covers "national armed services (army, navy, marine, air force, or coast guard), as well as the national guard and national police, government intelligence or reconnaissance organizations." With regards to China, the new definition presumably covers the Ministry of National Defense, the People's Liberation Army and all its branches (Ground Force, Navy, Air Force, Rocket Force, and the Strategic Support Force), the Ministry of Public Security (as the "national police" of China), the Ministry of State Security, but not necessarily private sector Chinese companies.

- For example, the export of a typical consumer GPS device designated under ECCN 7A994 to China's Ministry of Public Security may have been previously authorized but is now likely prohibited under the policy of denial because ECCN 7A994 is contained on the list in Supplement 2 to Part 744 and the Ministry of Public Security likely qualifies as a "military end user."

The term "military end user" also has a "catch-all" clause that covers "any person or entity whose actions or functions are intended to support 'military end uses' as defined in section (f) of this section," a reference to the new restrictions' expanded definition of "military end use." To date, BIS has not provided guidance on how it will interpret this catch-all language as it relates to the newly expanded definition of "military end use." As discussed in the takeaway section below, a broad—but in our view, incorrect—reading of this language could cover Chinese companies, laboratories, and universities that primarily work on civilian projects but also engage in some military work—an interpretation that would make large sectors of the Chinese economy essentially off-limits to U.S. exporters. Resolution of this ambiguity will be crucial for U.S. exporters seeking to comply with the new rules.

- **"Military End Use" Definition Broadened** : The EAR's existing military end use restriction—which currently applies to China, Russia, and Venezuela—is now more broadly defined. Specifically, all items subject to the EAR *and* listed in Supplement 2 to Part 744 of the EAR (summarized below) require a license when the exporter, reexporter, or transferor knows or has reason to know the items are intended for such a "military end use" in China, Russia, or Venezuela. Such license applications are reviewed by BIS under a presumption of denial standard, making a license essentially unobtainable barring extraordinary circumstances. Previously, the term "military end use" included incorporation into an item that would be designated under the U.S. Munitions List or as a "600 series" or Export Control Classification Number (ECCN) ending in "A018" if subject to jurisdiction (*i.e.*, a military item), as well as for use "for the 'use,' 'development,' or 'production' of military items...." The new definition adds language to cover "any item that *supports or contributes to ... the operation, installation, maintenance, repair, overhaul, refurbishing* , 'development,' or 'production' of military items..." (emphasis added).

- For example, the export of a product used only for "refurbishing" a military item that did not meet the other elements of "use" may have been previously authorized but would likely now be restricted if sold in China, Venezuela, or Russia.

- **List of Items Subject to Military End User and Military End Use Restriction Expanded** : The new rule expands Supplement No. 2 to Part 744 of the EAR, which lists the items to which the military end use and military end user restrictions apply. Notably, Supplement No. 2 to Part 744 of the EAR now includes several new "900 series" items subject only to AT controls, which would not have required a license previously for export or reexport to Russia, China, or Venezuela (in addition to several 900 series items already included in Supplement No. 2 to Part 744 of the EAR). Most notably, mass-market encryption software designated ECCN 5D992 is now covered, which captures many commercial, off-the-shelf software products and operating systems. Sales of materials processing, electronics, telecommunications testing equipment, and vibration testing equipment in China, Russia, and Venezuela may also be impacted. We summarize the ECCNs subject to the previous and expanded restrictions in [Appendix 1](#) to this trade flash.

- **Regional Stability Added as a Control** : Regional stability (RS) has been added as a new reason for export control to certain items

for export to China, Russia, or Venezuela, with some items subject to a presumption of denial for any license requests. Items now subject to RS controls for China, Russia, and Venezuela include the "600 series" .y items and "9x515.y" items—*i.e.*, parts, accessories, and components of controlled military items and spacecraft. License applications will be reviewed on a case-by-case basis.

- **Export Filing Requirements Increased:** The electronic export information (EEI) filing requirements for exports to China, Russia, and Venezuela have been expanded by eliminating certain exemptions in order to "promote transparency with respect to shipments to these destinations." Specifically, EEI filings are now mandatory for all shipments to China, Russia, and Venezuela of items that are designated under an ECCN, including "900 series" ECCNs subject only to Anti-Terrorism (AT) controls, which do not generally require a license to these destinations. In addition, EEI filings are now required regardless of the value of the shipment, whereas previously items valued under \$2,500 were exempted when no export license was required. However, it continues to be the case that no EEI is required for shipments of EAR99 items.
- **CIV License Exception Eliminated:** The export license exception "Civil End Users" (CIV) previously authorized the export or reexport of certain items subject to National Security (NS) Column 2 controls (*i.e.*, less stringent national security controls) to civil end users and civil end uses in certain D:1 countries (including China, Russia, and Venezuela). The license exception was available for certain electronic assemblies; certain resists for semiconductor fabrication; certain external interconnection equipment used for high-performance computers; certain optical equipment; certain lasers; and certain aerospace development, production, testing equipment with widespread civilian uses. BIS has now [revoked the CIV exception](#) with regard to China, Russia, and Venezuela and all other D:1 countries. The licensing policy for these items depends on the ECCN and the country of destination, but applications may be considered and granted in some circumstances.
 - For example, telecommunications test equipment controlled under ECCN 5B001 for NS previously could have been exported to a civil end user in Russia for civilian use without a license under CIV. Now, however, such an export would require a specific license from BIS.
- **Modification to Additional Permissive Reexports Proposed:** BIS also [proposed amendments](#) to the license exception Additional Permissive Reexports (APR) by eliminating the eligibility of certain NS-controlled items, so that the U.S. government may gain "better visibility" into exports that implicate NS concerns. Comments on the proposed rule must be submitted by or on May 28, 2020.

Key Takeaways

The new restrictions implicate several important compliance considerations for exporters in the United States, as well as reexporters, transferors, and end-users of items subject to the EAR outside the United States, especially those in China. We summarize our key takeaways below.

- **New restrictions may apply to certain "900 series" items shipped to China.** To determine the impact of the new rules on an exporter, the first step is to determine whether any exported, reexported, or transferred items are included in the expanded Supplement No. 2 to Part 744 of the EAR. Items that are not listed in the supplement—including EAR99 items subject to the lowest level of controls—are not impacted by the new restrictions. Items that are not subject to the EAR—including foreign-made items with less than 25 percent of controlled content—are also not impacted by the new restrictions. All such items may still be exported, reexported, or transferred to Chinese military end users or for Chinese military end uses, so long as no other restrictions apply. The items that are impacted by the new restrictions are "900 series" controlled for AT reasons only, which do not generally require a license for export to China. We summarize the full list of items, including those previously listed in Supplement No. 2 to Part 744 and those recently added, in Appendix 1, below.
- **Certain Chinese customers may come under additional scrutiny.** The new restrictions are motivated by BIS's concerns about "widespread civil-military integration" in China, which BIS views as increasing the risk that items exported for civilian purposes will be diverted to military end uses. As a matter of law, the restrictions address this perceived risk in two ways: (1) expanding the

definition of "military end use" to cover "support[ing] or contribut[ing]" to the development, production, or use of a military item and (2) introducing "military end user" restrictions in China, regardless of end use. As a matter of practice, BIS has identified Chinese universities, laboratories, and companies that supply or work closely with Chinese government or military as posing a greater threat of diversion. Certain U.S. government stakeholders are also increasingly suspicious of any sales to Chinese government entities, even those that are entirely civilian. Companies that export, reexport, or transfer any items listed in Supplement No. 2 to Part 744 of the EAR may want to consider additional due diligence or compliance checks for all such customers in China.

- **Ambiguity regarding entities "whose actions or functions are intended to support 'military end uses.'"** The changes to the definition of "military end use" may inadvertently create an ambiguity in the interpretation of the term "military end user," even though the new rule does not purport to change the definition of this term. Specifically, BIS has expanded the definition of "military end use" to cover "support[ing] or contribut[ing]" to the development, production, or use of military items may also subtly expand the definition of military end users. As noted above, there is a pre-existing catch-all clause in the definition of "military end user" that covers "any person or entity whose actions or functions are intended to support 'military end uses.'" Accordingly, when read in conjunction with the expanded definition of "military end use," the preexisting definition of "military end user" may now cover any "person or entity whose actions or functions are intended to support" the "support[ing] or contribut[ing]" to the "development, production, or use of military items." This broad definition could potentially cover *any* Chinese entity that collaborates with the Chinese military—including many Chinese universities, laboratories, and companies in the aerospace, transportation, shipbuilding, or information technology sectors—even if such collaboration is only a small part of the entity's activities. However, we believe such a broad reading would be incorrect and inconsistent with BIS's intent. Notably, in the Federal Register Notice announcing the new rule, BIS made clear that it did *not* intend to expand the definition of "military end user." Furthermore, a broad reading of the term "military end user" would in effect render the definition of "military end use" superfluous, which also does not appear to be BIS's intent. Additional formal or informal guidance from the agency may be necessary to understand the full impact of the interplay between the expanded "military end use" definition and the catch-all clause.
- **Elimination of the CIV license exception for items subject to NS Column 2 controls** . The elimination of the CIV license exception will trigger licensing requirements for the export or reexport of certain items to China, including certain electronic assemblies; certain resists for semiconductor fabrication; certain external interconnection equipment used for high-performance computers; certain optical equipment; certain lasers; and certain aerospace development, production, testing equipment with widespread civilian uses. Exports or reexports to other D:1 countries—including Russia, many former Soviet countries, Vietnam, and Venezuela—may now require a license, as well. The licensing policy for these items depends on the ECCN and the country of destination, but applications may be considered and granted in some circumstances. (Of course, no license will be required for exports or reexports of such items to destinations that are not subject to NS Column 2 controls, including most NATO allies, South Korea, and Japan.)
- **Business in Russia and Venezuela may be impacted as well** . Although the new restrictions primarily target China, Russian and Venezuelan business may also be impacted. For example, the expanded definition of "military end use" may sweep in many Russian universities, research laboratories, and private companies. Similarly, the imposition of new RS controls on .y parts, accessories, and components may impact the ability to service Venezuela's pre-Chavez era U.S. military hardware. Of course, such business is likely to be heavily restricted already—many Russian universities, research laboratories, and private companies are already subject to U.S. economic sanctions and/or included on the Entity List, and the Government of Venezuela is comprehensively blocked pursuant to current U.S. economic sanctions. Nevertheless, any company that exports items subject to the EAR and continues to do business in either of those two countries should consider evaluating its trade compliance risk in light of the new rules.
- **Consider winding down projects that will be impacted by the new restrictions by June 29, 2020** . The new restrictions on military end users and military end uses go into effect on June 29, 2020. There is a savings clause for items that are on dock for loading, on lighter, laden aboard an exporting carrier, or en route aboard a carrier to a port of export by that date, so long as the export, reexport, or transfer occurs before July 27, 2020. Given the prohibitive licensing policy for items impacted by the restrictions,

companies may consider accelerating or winding down impacted projects in an effort to make all shipments before the effective date. The alternative may be to seek a license from BIS, which would face long odds to overcome the presumption of denial.

Miller & Chevalier will be monitoring BIS's implementation of these new rules closely in the coming months. For any questions you may have about the new rules or their potential impact on your business, please [contact a member of the Miller & Chevalier team](#) to discuss further.

Appendix 1 – Items Covered by Expanded Controls

- **Previously covered ECCNs:** The ECCNs below were previously included on Supplement No. 2 to Part 744 of the EAR and are now subject to expanded Chinese "military end user" restrictions and the expanded definition of "military end use":
 - 1A290 (depleted uranium);
 - 1C990 (certain fibrous and filamentary materials used in composite structures);
 - 1C996 (certain fluids containing synthetic hydrocarbon oils);
 - 1D993 and 1D999 (certain software related to the development, production, and use of certain fibrous and filamentary materials and related processing equipment);
 - 1E994 (certain technology for the development, production, and use of certain fibrous and filamentary materials);
 - 2A991 (certain high-temperature ball bearings);
 - 2B991 (certain CNC machines);
 - 2B992 (certain machine tools for generating optical quality surfaces);
 - 2B996 (certain dimensional inspection or measuring systems or equipment);
 - 3A992.g (certain digital oscilloscopes and transient recorders);
 - 3A999.c (certain flash x-ray machines, and components of pulsed power systems designed thereof);
 - 3E991 (technology related to certain oscilloscopes);
 - 4A994 (certain high-performance computers);
 - 4D993 and 4D994 (certain related software);
 - 5A991.a, 5A991.b7, and 5A991.f (certain low-temp and high-temp telecommunications equipment; certain radio equipment; and certain phased array antennas);
 - 5D991 (certain software related to controlled telecommunications);
 - 5E991 (certain technology related to controlled telecommunications);
 - 6A995 (certain lasers);
 - 6C992 (certain optical sensing fibers);
 - 6A993 (certain cameras);

- 7A994 (certain navigation direction finding equipment, airborne communication equipment, inertial navigation systems, and avionics equipment);
 - 7B994 (certain equipment for the test, inspection, or "production" of navigation and avionics equipment);
 - 7D994 (certain related software);
 - 7E994 (certain related technology);
 - 8A992 (certain underwater systems or equipment);
 - 8D992 (certain related software);
 - 8E992 (certain related technology);
 - 9A991 (certain aircraft and gas turbine engines);
 - 9D991 (certain related software); and
 - 9E991 (certain related technology).
- **Newly covered ECCNs:** The ECCNs below will be added to Supplement No. 2 to Part 744 of the EAR and are now subject to Chinese, Russian, and Venezuelan "military end user" restrictions and the expanded definition of "military end use":
- 2A290 (certain nuclear plant generators and equipment, such as nuclear turbines and condensers);
 - 2A291 (certain equipment related to nuclear material handling and processing or nuclear reactors);
 - 2B999 (certain specific processing equipment such as laser welding machines, e-beam welders, and bellows manufacturing equipment);
 - 2D290 (certain software designed for nuclear plant equipment, equipment related to nuclear material handling and processing, or equipment related to nuclear reactors);
 - 3A991 (certain electronic devices such as space-qualified solar panels and certain field programmable logic devices);
 - 3A999 (certain specific processing equipment such as certain high voltage capacitors and certain mass spectrometers);
 - 3B991 (certain equipment for the manufacture of electronic parts such as equipment designed for the manufacture of electron tubes or semiconductor devices);
 - 3B992 (certain equipment for the inspection or testing of electronic components and materials such as equipment designed to test electron tubes or semiconductor devices);
 - 3C992 (positive resists designed for semiconductor lithography specially adjusted (optimized) for use at wavelengths between 370 and 193 nm);
 - 3D991 (certain software specially designed for certain electronic devices, electronic equipment, or manufacturing and test equipment such as certain microcircuits, oscilloscopes, and equipment used to manufacture semiconductors);
 - 5B991 (certain telecommunications test equipment);
 - 5A992 (mass market encryption commodities);
 - 5D992 (mass-market encryption software);

- 6A991 (certain marine or terrestrial acoustic equipment capable of detecting or locating underwater objects or features or positioning surface vessels or underwater vehicles);
 - 6A996 (certain magnetometers and superconductive electromagnetic sensors); and
 - 9B990 (certain vibration test equipment).
- **Expanded coverage ECCNs:** The entries for the below ECCNs in Supplement No. 2 to Part 744 of the EAR will be expanded and subject the entire ECCN to Chinese, Russian, and Venezuelan "military end user" restrictions and the expanded definition of "military end use":
- 3A992 (certain general purpose electronic equipment such as electronic test equipment and certain oscilloscopes);
 - 8A992 (certain vessels, marine systems or equipment and marine boilers); and
 - 9A991 (certain aircraft and gas turbine engines).

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