

Commerce Department Expands Controls on Military-Intelligence End Uses and End Users, Proliferation of WMDs

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In a rule that takes effect on March 16, 2021, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) has determined to impose additional export licensing requirements in connection with military-intelligence end uses and end users under the Export Administration Regulations (EAR). The rule, implementing the Export Control Reform Act of 2018 (ECRA), covers not only exports of U.S. commodities, software, and technology, but also activities of U.S. persons (both within and outside of the United States) in support of military-intelligence end uses and end users. It also expands existing licensing requirements for activities related to weapons proliferation and provides BIS with authority to further limit a restricted party's potential access to EAR-controlled items.

Comprehensive License Requirements for Certain Military-Intelligence End Uses/End Users

In June 2020, BIS expanded its export controls and licensing requirements for exports of certain items (including mass market encryption hardware and software and parts/components for commercial aircraft) to "military end users" or for "military end uses" in China, Russia, and Venezuela. BIS recently added Burma (Myanmar) to this restricted group of countries in response to the military coup that overthrew the democratically-elected government.

BIS's new rule adds a targeted restriction on exports, reexports, or transfers (in-country) for military-intelligence end uses and end users in China, Russia, Venezuela, and Country Groups E:1 and E:2 (currently, Cuba, Iran, North Korea, and Syria). Military-intelligence

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Practice Areas

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end users are defined as intelligence or reconnaissance organizations of the armed services or national guard, including China's Intelligence Bureau of the Joint Staff Department. Other intelligence and reconnaissance organizations remain subject to the standard military end use/end user rule.

While BIS's military end use/end user rule has created compliance challenges for U.S. industry, those licensing requirements are limited to a specific group of U.S. items. The new military-intelligence rule, on the other hand, is comprehensive: it requires licenses to export all items subject to the EAR, including EAR99 items that are not covered by the existing military end use/end user restrictions, to a specific subset of intelligence and reconnaissance organizations. Practically, given that comprehensive sanctions have been imposed on most of the countries subject to this rule, along with restrictions and sanctions on Russia's defense and intelligence sectors, the impact of the new export prohibitions primarily will be concentrated in China.

New Restrictions on Activities of U.S. Persons

For the most part, the EAR restricts exports, reexports, and transfers of U.S. items, rather than activities of U.S. persons. However, consistent with the authority provided in ECRA to regulate activities of U.S. persons in connection with foreign military intelligence services, the EAR now prohibits U.S. persons from supporting a military-intelligence end use or end user in China, Russia, Venezuela, or an E:1/E:2 country. "Support" is defined broadly to capture not only shipments and transfers of wholly foreign-origin items (items not subject to the EAR), but also the activities of any U.S. person (including individuals and entities) that facilitate these shipments and transfers and the performance of any contract, service, or employment that the person knows may assist or benefit a military-intelligence end user or end use. This expansive prohibition potentially captures activities of consultants and other service providers, including foreign branches of U.S. companies and any persons in the United States, in support of intelligence and reconnaissance organizations, which ordinarily would not be covered by the EAR.

BIS also amended the existing controls on U.S. persons involved in activities related to weapons proliferation to parallel those that now apply to military-intelligence end users and end uses. Notably, the threshold required to trigger these controls is broader in scope, shifting from knowledge that such activities "will directly assist" weapons proliferation to those that "will support" the proliferation of weapons of mass destruction (WMDs).

BIS also clarified that no license is required if a covered activity is subject to a license requirement or general prohibition administered by another federal department or agency, including the U.S. Departments of Energy, State, or the Treasury. For example, if a U.S. person applies for authorization from the State Department to provide defense services in support of an activity that normally would trigger the WMD or military-intelligence end use/end user controls, that U.S. person would not also need to apply for a license from BIS.

Other Changes

The EAR formerly imposed licensing requirements on all exports of U.S. items (as well as reexports and transfers), where the exporter knew the item would be used in the design, development, production, or use of certain rocket systems or unmanned aerial vehicles; or in the design, development, production, stockpiling, or

use of chemical or biological weapons. The term “use” in the EAR generally requires all six of the following elements: operation, installation (including on-site installation), maintenance (checking), repair, overhaul, *and* refurbishing.

Although the existing prohibitions did not use double quotation marks around the term use, which would have denoted that it was a defined term requiring the six elements referenced above, BIS nonetheless altered the regulatory language so that such restrictions now explicitly cover items to be used in the design, development, production, operation, installation, maintenance, repair, overhaul, **or** refurbishing (*i.e.*, in *any* of the individual elements of “use”) of certain rocket systems and unmanned vehicles. This same scope of activities, along with “stockpiling,” also now applies to the chemical and biological weapons restrictions. This eliminates a possible loophole and, at the very least, provides much-needed clarity in the regulations.

Additionally, the chemical and biological weapons-related export restrictions now extend to exports for the design, development, production, operation, installation, maintenance, repair, overhaul, or refurbishing of a whole plant for certain chemical weapons precursors in a country that is not a member of the Australia Group, which is the multilateral export control regime focused on minimizing the risk of assisting chemical and biological weapons proliferation.

Finally, the new rule seeks to address circumvention of the Department of Commerce’s Entity List by giving BIS the authority to inform persons that a license is required for specified transactions, or transactions with specific parties, based on an “unacceptable risk” that controlled items will ultimately be used by, or diverted to, a listed entity. Consistent with longstanding BIS practice, Entity List prohibitions do not *per se* extend to separate legal parents, subsidiaries, or other affiliates of a listed entity if those separate entities are not specifically identified on BIS’s Entity List. This new authority suggests that BIS may begin applying *de facto* restrictions against certain affiliated parties of Entity List companies, as well as other entities that may pose an “unacceptable risk” of diversion. These changes are in reaction to the U.S. government’s heightened awareness that foreign entities continue to use gaps in U.S. export control laws to increase their capabilities.

Given the foregoing expansion to the EAR, businesses should take steps to minimize their exposure to the new rule, including identifying any transactions with entities that meet the definition of “military-intelligence end user” or which may be supporting a “military-intelligence end user,” identifying any transactions with entities that have significant commercial relationships with Entity List companies, and examining alternatives to existing commercial relationships to the extent that those relationships may be impacted by the new rule.

Wiley continues to closely monitor the U.S. government’s efforts to address the growing political, economic, and military competition from China, Russia, and other countries and the impact of such efforts on U.S. and non-U.S. companies. Should you have any questions on this rule or other EAR restrictions, please do not hesitate to contact one of the attorneys listed on this alert.

Nicole Hager, a Law Clerk at Wiley Rein LLP, contributed to this alert.