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ALERT

Commerce Department Further Restricts U.S. Exports to China, Russia, and Venezuela; Aims to Combat China's Military-Civil Fusion Strategy

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As part of the U.S. National Security Strategy, and in what looks to be an effort to combat the "military-civil fusion" strategy in China, the Commerce Department's Bureau of Industry and Security (BIS) published two final rules and one proposed rule designed to tighten export restrictions on China, Russia, Venezuela, and other countries of national security concern. Given current U.S. sanctions on the Venezuela government and targeted restrictions on the Russian defense and intelligence sectors, companies doing business with China likely will experience the brunt of the impact of the new prohibitions.

First, currently, Section 744.21 of BIS's Export Administration Regulations (EAR) requires companies to obtain an export license for a relatively small universe of U.S. hardware, software, and technology, where the exporter knows such items are intended for a "military end use" in China or for a "military end use" or "military end user" in Russia or Venezuela. BIS issued a final rule, which will go into effect on June 29, 2020, significantly expanding these military end use and end user controls on China, Russia, and Venezuela, as follows:

- As noted above, currently, the licensing requirement for military end users only applies to Russia and Venezuela. The new rule expands that requirement to also apply to military end users in China, which include the national armed services (army, navy, marine, air force, or coast guard), as well as the national guard and national police, government intelligence or

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reconnaissance organizations, and any person or entity whose actions or functions are intended to support military end uses. BIS warned that this "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."

- Additionally, the new rule broadens the definition of "military end uses" beyond items for the use, development, or production of military items (as those terms are defined in the EAR) to include any U.S. commodity, software, or technology that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, development, or production of military items.
- Perhaps most importantly for U.S. companies, the rule expands the list of items for which a license is required for a military end use or end user in China, Russia, and Venezuela to include the following new Export Control Classification Numbers (ECCNs): 2A290, 2A291, 2B999, 2D290, 3A991, 3A992, 3A999, 3B991, 3B992, 3C992, 3D991, 5B991, 5A992, 5D992, 6A991, 6A996, and 9B990. Additionally, the rule expands the current licensing requirements for items controlled under ECCNs 3A992, 8A992, and 9A991. Practically, this means that even low-level electronics, mass market encryption hardware and software (such as laptops and smartphones), and parts and components for commercial aircraft will require an export license if destined for a military end use or end user in China, Russia, or Venezuela. As currently drafted, the rule also creates an interesting and likely unintended scenario where, for example, certain higher-level encryption items can be exported to a military end user in China or for a military end use in China under EAR License Exception ENC, but a mass market item could not, an issue that BIS previously encountered and addressed when it initially implemented the military-related controls in 2007.
- The new rule also adds the regional stability (RS) reason for control for low-level, paragraph .y military and satellite items being exported to China, Russia, and Venezuela; licensing requirements for these items already are in place for the three countries, but this change clarifies U.S. policy.
- Finally, BIS altered the Electronic Export Information (EEI) filing requirements for exports to China, Russia, and Venezuela to gain additional visibility into U.S. shipments to these countries. Namely, EEI filings will be required for all items on the EAR's Commerce Control List that are destined for these countries, regardless of value, unless the shipment is eligible for License Exception GOV (*e.g.*, the normal $2,500 low value exception to filing EEI no longer applies). Further, an exporter or its agent will be required to enter the correct ECCN on any required EEI filing for exports to China, Russia, or Venezuela, regardless of the reason for control.

The second rule BIS published, which also will be effective on June 29, 2020, eliminates License Exception CIV from the EAR. This exception currently authorizes exports, reexports, and transfers (in-country) of certain national security-controlled U.S. items, without prior review by BIS, to most civil end users in EAR Country Group D:1, including China, for civil end uses. BIS explained that it is "removing License Exception CIV due to the increasing integration of civilian and military technology development in these countries of concern."

Finally, BIS issued a proposed rule, with comments due by June 29, 2020, aiming to modify License Exception APR to remove provisions that currently authorize non-U.S. companies to reexport certain national security-controlled U.S. items to Country Group D:1. Similar to its policy rationale for removal of License Exception CIV, BIS explained that the modification is "due to variations in how the United States and its partners, including partners located in Country Group A:1, perceive the threat caused by the increasing integration of civilian and military technology development in countries of concern."

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 the new EAR rules, please do not hesitate to contact one of the attorneys listed on this alert.