



International Trade & Regulatory ADVISORY ■

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New Export Control Restrictions on China, Russia, and Venezuela Take Effect

On Monday, June 29, 2020, new export control restrictions issued by the Department of Commerce, Bureau of Industry and Security (BIS) took effect, further limiting exports of certain items to China, Russia, and Venezuela.

The rule, which was [issued](#) on April 28, 2020, broadens Part 744.21 of the Export Administration Regulations (EAR) that imposes certain heightened military end-use and end-user controls involving the export, reexport, and transfer (in-country) of certain items that are destined for China, Russia, and Venezuela.

The new export control restrictions took effect one week after the U.S. Department of Defense (DOD) – in an unrelated action – [published](#) a list of “Communist Chinese military companies operating in the United States” specifically designating 20 companies that are deemed “qualifying entities.” The list, which was prepared in accordance with Section 1237 of the National Defense Authorization Act for Fiscal Year 1999 (NDAA 1999) could have downstream compliance impacts for U.S. companies engaged in business with these listed entities.

What Restrictions Does Part 744.21 Impose?

Part 744 of the EAR outlines certain end-use and end-user-based controls. Part 744.21 has historically imposed a license requirement on the export, reexport, or transfer (in-country) of certain items listed in Supplement No. 2 to Part 744 if the item was destined for China, Russia, or Venezuela and the exporter had knowledge that the item was destined for a military end use or to a military end user in Russia or Venezuela (but not China). These end-use and end-user controls were in addition to the normal license requirements based on the reason for control of the item in question.

To Recap: What Did the April 28 Rule Change?

- 1. Expansion of military “end use” definition.** Any item identified in Supplement No. 2 to Part 744 for use, development, or production that *supports or contributes to* the operation, installation, maintenance, repair, overhaul, refurbishing, development, or production of military items will be subject to this new rule. The new changes continue to restrict activities supporting direct use (parts, components, subsystems of weapons, and other defense articles) and indirect use (weapon design and development, testing, repair, and maintenance).

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2. **Prohibits transfers to military “end users.”** The definition of military end user remains unchanged. Previously, the restrictions *only* applied to military end users in Russia and Venezuela; however, now it applies to military end users in China. Companies engaging in exports, reexports, or transfers (in-country) within China of items covered by this rule will be expected to conduct increased diligence of military end-users in China.
3. **Addition of new Export Control Classification Numbers (ECCNs) to Supplement No. 2 to Part 744 to also include the following ECCNs:** 2A290, 2A291, 2B999, 2D290, 3A991, 3A992, 3A999, 3B991, 3B992, 3C992, 3D991, 5B991, 5A992, 5D992, 6A991, 6A996, and 9B990. Moreover, the rule expands the scope of the restrictions to cover *all items* classified under ECCNs 3A992, 8A992, and 9A991. Previously, only certain items in those ECCNs were subject to the rule.
4. **New “reason for control.”** The new rule creates a new regional stability reason for control for any item described in the “.y” paragraph of ECCNs 9x515 or 600 series ECCNs. A license is required for the export or reexport to China, Russia, or Venezuela of any item described in a .y paragraph of those ECCNs. Previously, “.y” items were exempted from the reasons for control that required a license to be shipped to these destinations. The limited exception to this is for exports or reexports to Russia for use in, with, or for the International Space Station.

Additional AES Filing Requirements and Recent Changes

The new restrictions also require that Electronic Export Information (EEI) be filed *for all exports of items on the Commerce Control List* to China, Russia, or Venezuela, *regardless of value*, unless the shipment is eligible for license exception GOV. Exporters making EEI filings for exports to China, Russia, or Venezuela must include the correct ECCN for all items being exported, even if no license is required for the export, including those shipments that would normally be exempt from filing requirements falling under the \$2,500 valuation threshold.

This new Automated Export System filing requirement was scheduled to take effect on June 29, 2020 for all items destined for China, Russia, and Venezuela. While the requirement does take effect for items subject to Supplement No. 2 to Part 744 on June 29, BIS issued guidance last week that EEI filing for all exports controlled by ECCNs *not listed* in Supplement No. 2 to Part 744 will not be required until September 27, 2020.

Does Your Corporate Compliance Program Account for These Changes?

On Friday, June 26 – one business day before the new rule was scheduled to take effect – BIS issued 32 [Frequently Asked Questions](#) to address changes to Section 744.21. The new FAQs assist corporate compliance programs in assessing whether procedural or business process changes are required to adhere to the new export control requirements. While the FAQs do not address specific transactional challenges exporters might encounter as a result of increased due diligence, BIS is clear that “knowledge” surrounding the circumstances of a transaction is more essential than ever. As stated in the [April 28 Federal Register notice](#), “[t]his 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.”

Notable FAQs that may be helpful for industry are Questions 3, 7, and 9, which make clear that the specific end user at issue is what matters when reviewing a proposed transaction. Due diligence must be conducted in an appropriate manner to identify the specific entity involved. This guidance is important to keep in mind when dealing with subsidiaries of large state-owned enterprises or other complex organizations that consist of dozens of independent subsidiaries and affiliates, even as first-level public sources like websites may give the appearance of a single organization. Questions 11 and 12 are also helpful when evaluating sales made through distributors or other third parties and the license requirements that arise when the original exporter has knowledge that the distributor or third party intends to reexport or transfer an item for a military end use.

DOD List of Communist Chinese Military Companies

In a separate, unrelated action, last week the DOD issued a list of 20 Chinese companies, including Huawei, Hikvision, and several state-owned entities including Aviation Industry Corporation of China, China Railway Construction Corporation, and China State Shipbuilding Corporation, that are all deemed to qualify as “military companies operating in the United States.” The list addresses a reporting requirement that has been in place for over 20 years pursuant to Section 1237 of NDAA 1999, which authorizes, *but does not mandate*, the use of the International Emergency Economic Powers Act to impose sanctions on “persons operating directly or indirectly in the United States or any of its territories and possessions that are Communist Chinese military companies.” While the DOD cover letter, which is dated June 24, 2020, acknowledges that the DOD produced an initial list of companies that meet the Section 1237 criteria based on direction from the 106th Congress, which met in 1999, it is not clear if earlier versions of the list have ever been publicly released.

While the timing of this recent DOD publication is very curious, it is not clear what the Administration will do about imposing sanctions or enacting other export control restrictions (i.e., designation on the BIS Entity List), or if they will simply take no action against the 20 Chinese companies, some of which are already named on the BIS Entity List. Regardless of what track the Administration takes, the list amounts to a red flag for industry requiring increased due diligence as required by the expanded Part 744.21 rule for any company engaged in covered exports, reexports, or transfers to any of the 20 listed Chinese companies.

Final Takeaways for Industry

These new export control restrictions should not come as a surprise to industry given the Administration’s recent deployment of other control measures targeting China, including [restrictions on information and communications technology supply chains](#), [expansion of CFIUS controls aimed at direct investment in the U.S.](#), and [additional export control restrictions targeting foreign-produced direct products of U.S.-origin technology destined to Huawei](#).

Companies must remain diligent to ensure they are up to date on how this new rule impacts their sales activities. They may have to update end-use or end-user certifications on file, in addition to ensuring that items sold throughout the Asia-Pacific region, and into Russia and Venezuela, are documented and that the company understands the flow of goods between parties and intermediaries and how those goods are ultimately used by the end user.

While the new Part 744.21 rule is now in effect, it is not too late to take action and ensure that corporate compliance programs are updated accordingly to address this risk and that employees are trained on the new export control requirements.

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