BIS issues two new rules with far reaching effect

Trade and Customs Services

Introduction

In April, the Bureau of Industry and Security (BIS) published two new rules that, when they become effective on June 29, 2020, will increase requirements for exports to Russia, China and Venezuela,[1] while also eliminating a license exception that allows for the export of controlled items to certain countries, such as China.[2]

During this interim period, it is imperative that exporters assess how these new rules will impact their operations and develop a strategy to address these new requirements. Making adjustments to your export compliance program now will help facilitate business once these regulations are effective.

Overview of the rules

These two new rules target different aspects of the Export Administration Regulations (EAR) and support the 2017 National Security Strategy (NSS). The NSS established the following four pillars of the President's administration:[3]

— Protect the homeland,

— Promote American prosperity,

— Preserve peace through strength, and

— Advance American influence.

The NSS provides a detailed roadmap of the administration's priorities, including an assessment of the threats Russia, China, Venezuela and other foreign governments may pose. Additionally, the elimination of license exception Civil End-Users (CIV), which allows export of controlled items to civil end-uses and end-users in certain countries, addresses concerns raised in the December 2018 National Defense Strategy (NDS).[4]

Enhanced controls for military end-use and end-user exports to China, Russia and Venezuela

The first rule change achieves two goals regarding exports to China, Russia and Venezuela with a military end-use or user: (1) limit certain exports to these countries where there is a military end-user or end-use and (2) increase visibility when exports do occur. To do so, BIS both expanded existing regulations and created new ones. These new requirements target the following areas:

(1) ***Expands license requirements for exports, reexports and in-country transfers of certain items intended for military end-use or end-users in China, Russia or Venezuela.*** Previously, the EAR required an export license for the export of certain goods to military end-users or military end-uses in Venezuela and Russia, and for military end-uses in China. The license requirement has been expanded to military end-users in China as well.

(2) ***Broadened the definition of "military end-use" and "military end-user."*** In what may be the most significant development with the new rule, BIS expanded the definition of "military end-use" from the "use," "development," or "production" of military items to include any item that "supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, 'development' or 'production' of military items." BIS also expanded the definition of "military end-user" to include "any person or entity whose actions or functions are intended to support `military end uses'." It is not clear whether one instance of "support" – such as manufacturing a chip for a military end-use – would result in an entity being designated a "military end-user." BIS recently indicated that additional guidance is forthcoming.

(3) ***Expanded license requirements by adding additional items subject to military end-use and end-user license requirements.*** In doing so, some every-day items will now be subject to license requirements, including mass-market consumer items classified under ECCN 5A992 (for example, smartphones, laptop computers, wireless home products), certain commercial software classified under 5D992, as well as microprocessors and certain memory chips classified under ECCN 3A991. Specific additions to items subject to this rule are as follows:

[1] 85 Fed. Reg. 23459 (Apr. 28, 2020).

[2] 85 Fed. Reg. 23470 (Apr. 28, 2020).

[3] National Security Strategy of the United States of America, December 2017, *available at https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905-2.pdf*.

[4] Summary of the 2018 Defense Strategy of the United States of America, *available at https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf*.

Category	ECCNs added for military end-use/user controls
Category 2 – Materials Processing	2A290 2A291 2B999 2D290
Category 3 – Electronics Design Development and Production	3A991 3A992 3A999 3B991 3B992 3C992 3D991
Category 5 (Part 1) – Telecommunications	5B991
Category 5 (Part 2) – Information Security	5A992 5D992
Category 6 – Sensors and Lasers	6A991 6A996
Category 9 – Propulsion Systems	9B990

(4) A new ***presumption of denial*** for license applications involving the export of items subject to this rule to China, Russia or Venezuela for a military end-use or military end-user***.***

(5) ***Electronic Export Information (EEI) filings are now required for all shipments to China, Russia or Venezuela, regardless of their value, unless the shipment qualifies for the "GOV" license exception***. Exporters to these countries may no longer use the provisions that only require EEI filings when a non-licensable shipment exceeds $2,500. Further, the correct ECCNs must be included on the EEI for any item listed on the CCL including items controlled for Anti-Terrorism purposes.[5]

This change will likely require many exporters to reassess both exported products and their customers to understand which exports, if any, are subject to this new rule. Exporters should not be surprised if they determine that products that were previously exportable are now restricted for military end-users or end-use in China, Venezuela or Russia. Particularly for exports to China, exporters must now proactively assess if their customers are military end-users within the EAR's expansive definition prior to exporting items with an ECCN subject to this rule. From a business management perspective, exporters may need additional resources to meet EEI filing obligations so that goods can be lawfully exported in a timely manner.

Elimination of CIV license exception

The second change is the elimination of license exception CIV. This exception authorized the export, reexport and transfers of national security controlled items without a BIS export license to civil end-users for civil end-use on the Country Group D:1 list[6] provided certain criteria were met. Relatively few companies may have used license exception CIV, however, certain companies extensively relied on this exception to export products to D:1 countries – such as China – without having to obtain a formal BIS export license. The impact to those companies historically relying on license exception CIV for such exports is likely to be significant.

Additionally, license exception CIV authorized deemed exports of certain controlled technology – such as ECCN 3E002 microprocessor technology – without a BIS export license. Companies utilizing this license exception for such deemed exports will now be required to obtain a BIS deemed export license.

The Federal Register Notice explains that there has been increasing integration of civilian and defense technology for many reasons, including economic growth and efficiency. However, the alignment of civil and military technology means that U.S. exporters may unknowingly support foreign militaries whose goals are at odds with U.S. priorities. Further, the merging of civil and military technologies in many of the D:1 countries prevents U.S. exporters from confirming that their products are not intended for a military end-use or end-user. As such, BIS is removing the CIV license exception.[7]

[5] 85 Fed. Reg. 23459 (Apr. 28, 2020).

[6] Includes the following countries: Armenia, Azerbaijan, Belarus, Cambodia, China, Georgia, Iraq, Kazakhstan, Kyrgyzstan, Laos, Libya, Macau, Moldova, Mongolia, North Korea, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, Venezuela, Vietnam and Yemen.

[7] 85 Fed. Reg. 23470 (Apr. 28, 2020).

The impact on industry

These changes are receiving a considerable amount of attention as exporters assess if and how they will be impacted when the new regulations become effective at the end of June. Specifically, the enhanced requirements around Chinese, Venezuelan and Russian military end/users poses significant due diligence challenges.

To meet these obligations, companies exporting to the targeted countries will need to take additional compliance measures, including reassessing if their goods meet the expanded definition of military end-use and/or whether they are exporting to military end-users in China. Reaching a clear determination may be difficult for many exporters given the civil and military fusion in these countries, particularly China. Further, the requirement to file EEIs on all shipments to these countries will significantly increase the administrative burden for exporters. For those companies that are subject to these new regulations, business operations may be dramatically impacted in response to these new requirements.

Although the elimination of the CIV license exception impacts a smaller group of exporters, it is causing a great deal of concern in certain industries, like semi-conductor manufacturers. A major concern is the reliance on foreign national engineering talent who are employed at their facilities in the United States. In some cases, especially for certain microprocessor technology, companies were using license exception CIV to release controlled technology to these foreign national workers. The requirement to obtain a license for a deemed export has the potential to impact product development - especially if it is difficult to obtain quickly. As a result, these exporters are concerned that commercial activities will be adversely impacted if staff can't be fully engaged in production or if shipments don't meet customer deadlines.

Next steps

Impacted exporters have a relatively small window to develop a plan to manage compliance before these regulations are effective. A critical first step is reviewing product lines to confirm the accuracy of ECCNs, including documenting rationale. Simultaneously, conducting a deep-dive into customers located in China, Russia or Venezuela should be performed to assess their relationships with the military. Validating whether products are exported to a military end-user in China is particularly important given the new rule's enhanced controls. As part of the preparation, Global Trade Management (GTM) settings should be tested and, if necessary, augmented to ensure that the ECCN is included on EEI filings, as well as configured to file the EEI.

Getting ahead of these regulations will help exporters remain compliant and limit business disruption. This can be done through proactive decision-making coupled with a clear strategy for both continuing business and ensuring compliance.

Contacts

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