

## Regulatory Alert

April 29, 2020

## BIS Changes Military End-User Rules, Eliminates CIV, Proposes APR Changes

[Export Controls and Sanctions Group](#)

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The Bureau of Industry and Security (“BIS”) published three rules on April 28, 2020, making or proposing significant changes to the Export Administration Regulations (“EAR”). Two are final rules concerning changes to military end-use/end-user license requirements and the elimination of License Exception CIV that will take effect on June 29, 2020, subject to a limited savings clause for items that are exported, and in transit, as of the effective date. The third is a proposed rule regarding modifications to License Exception APR, with comments due by June 29, 2020.

### 1. Expansion of Military End-Use Rule - [85 Fed. Reg. 23459 \(Apr. 28, 2020\)](#)

The EAR already requires a license (under EAR § 744.17 or § 744.21) for export, reexport, or in-country transfer of low-sensitivity items that do not normally require a license for China, Russia, or Venezuela, if such items are for a military end-user or a military end-use.

- “Military end-users” 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 reconnaissance organizations, or any person or entity whose actions or functions are intended to support “military end uses.”
- “Military end-use” means incorporation of the item into military items (including those on the ITAR US Munitions List, EAR 600 series Export Control Classification Numbers (ECCNs), ECCNs ending in 018, or the Wassenaar Munitions List) or into any commodity that supports the development, production, use, or deployment of military items.

#### 1.1 Additional Items Subject to License Requirement

The military end-use/end-user license requirement applies only to ECCNs specified in EAR Part 744. This rule change adds license requirements for 17 new ECCNs and expands application for three ECCNs that were only partially subject to military end-use/end-user license requirements. Companies should check the full scope of the ECCNs covered to assess the impact.

For example, the rule change adds 5A992 and 5D992 items, which control mass market encryption items, such as personal computers, mobile devices, and desktop software. We anticipate this change will have a significant effect on companies who sell such items, as many such items are used by foreign military end-users for day-to-day tasks that do not relate to defense articles or specific military activities.

Before EAR § 744.21 was added to the EAR in 2007, many companies and trade associations responded to the proposed rule with cogent arguments against subjecting 5A992/5D992 items, which are frequently sold through e-commerce or multi-level distribution networks, and the Bush Administration removed them from the final rule.

This change was not issued as a proposed rule, but it may be worthwhile to comment to BIS in the sixty days until the rule becomes effective. The 2006 public comments address some of the issues with this rule, especially as applied to 5A992/5D992 items, and are still available at: <https://efoia.bis.doc.gov/index.php/documents/public-comments/722-proposed-rule-revisions-for-china/file>

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## **1.2 Addition of Military End-Users in China, Regardless of End-Use**

EAR § 744.21 already imposes a license requirement for export/reexport/in-country transfer to both “military end-users” and for “military end-uses” in Russia and Venezuela. For China, the existing rule applies only when the item is for “military end-use,” as defined above. The new rule adds controls for “military end-users” in China, as well, meaning that covered items will require a license for military end-users, regardless of how they intend to use the items.

## **1.3 New Export Documentation Requirements**

Currently, exports of Anti-Terrorism only items are exempt from Electronic Export Information filing requirements if valued under \$2,500, and do not require entry of the ECCN unless going to an embargoed country. The new rule eliminates these exemptions for exports to China, Russia, and Venezuela, regardless of whether an export license is required. Companies may have to modify procedures for documenting physical exports to these three countries.

## **2. Elimination of License Exception CIV – [85 Fed. Reg. 23470 \(Apr. 28, 2020\)](#)**

The second final rule will remove License Exception CIV, EAR § 740.5, which authorizes exports of certain National Security controlled goods, technology, and software for civil end-use to Country Group D:1, such as China, Russia, former communist countries, and other sensitive destinations like Venezuela and Libya. License Exception CIV also authorizes "deemed export" releases of certain National Security controlled technology and source code to Country Group D:1 foreign nationals, as well.

Companies in the high technology sector have relied on License Exception CIV for many years, and its removal will mean the need to obtain new export licenses, including to foreign affiliates in countries like China and Russia, or to add previously CIV-eligible technology or source code to deemed export licenses.

## **3. Proposed Elimination of License Exception APR – [85 Fed. Reg. 23496 \(Apr. 28, 2020\)](#)**

The third rule proposes to eliminate certain aspects of License Exception APR, EAR § 740.16. APR is used to alleviate double-licensing requirements caused by the EAR’s extraterritorial jurisdiction, by authorizing reexports of US-origin National Security items from allied third countries to more sensitive destinations, provided that a license has been issued by the third country. The United States asserts export control jurisdiction over reexports of US-origin items, foreign-manufactured items containing more than de minimis US-origin content, and certain foreign direct products of US-origin software, technology, and manufacturing plants.

The proposal will remove Country Group D:1 from the list of eligible destinations. This means reexporters of certain US-origin National Security-controlled items will need to apply for both a US license and a license in the country from which they are reexporting, when destined to Country Group D:1.

License Exception APR is a fairly esoteric authorization, and because there is no U.S. Government documentation that must be filed to use it, it is difficult to predict the full impact. This may be why BIS chose to issue this rule in proposed form, in order to solicit comments from non-US companies who use APR about the impact on them.

Anecdotally, licensing procedures in allied countries in Europe and elsewhere often process licenses faster than the United States does, and many non-US parties are unfamiliar with the US system, so this could impose a significant burden on affected reexporters.