

E-ALERT | International Trade Controls

September 22, 2014

U.S. COMMERCE DEPARTMENT ANNOUNCES RESTRICTIONS ON ITEMS INTENDED FOR MILITARY END USES AND MILITARY END USERS IN RUSSIA

On September 17, 2014, in response to continued unrest in Ukraine, the U.S. Commerce Department's Bureau of Industry and Security ("BIS") published a [final rule](#) in the Federal Register further restricting exports, reexports, and in-country transfers of certain items subject to the Export Administration Regulations ("EAR") destined for a "military end use" or "military end user" in Russia.

In addition, BIS added ten defense and energy sector companies to the Entity List based on a determination that they are acting contrary to the national security or foreign policy interests of the United States. BIS previously announced these Entity List additions on September 12, 2014, as described in our [September 13, 2014 E-Alert](#).

RESTRICTIONS ON EXPORTS INTENDED FOR MILITARY END USES OR MILITARY END USERS

Restrictions on Exports, Reexports, and Transfers of EAR Part 744 Supplement No. 2 Items

BIS amended EAR § 744.21 to require a license for the export, reexport, or transfer (in-country) of any item that is (a) subject to the EAR and (b) specifically listed in Supplement No. 2 to EAR Part 744 if the exporter, reexporter, or transferor has knowledge¹ or reason to know that the item is intended, entirely or in part, for a military end use or military end user in Russia. A license also may be required if BIS informs the exporter, reexporter, or transferor that an item is or may be intended, entirely or in part, for a military end use or military end user in Russia.

The term "military end use" is defined in EAR § 744.21(f) to mean:

- Incorporation into a military item described on the U.S. Munitions List ("USML") (22 C.F.R. § 121.1) or the [Wassenaar Arrangement Munitions List](#);
- Incorporation into items classified under Export Control Classification Numbers ("ECCNs") ending in "A018" or under "600 series" ECCNs; or
- For the use,² development,³ or production⁴ of military items described on the USML or the Wassenaar Arrangement Munitions List, or items classified under ECCNs ending in "A018" or under "600 series" ECCNs.

¹ Knowledge is defined in EAR § 772.1 as including "not only positive knowledge that the circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person's willful avoidance of facts."

² The term "use" is defined in EAR § 772.1 to mean "[o]peration, installation (including on-site installation), maintenance (checking), repair, overhaul and refurbishing."

³ The term "development" is defined in EAR § 772.1 and refers to all stages prior to serial production, including: "design, design research, design analyses, design concepts, assembly and testing of prototypes,

The term “military end user” is newly defined in EAR § 744.21(g) as the national armed services (the army, navy, marine, air force, or coast guard), the national guard and national police, government intelligence or reconnaissance organizations, or any person or entity whose actions or functions are intended to support a “military end use,” as defined above.

The items subject to a license requirement that are listed in Supplement No. 2 to Part 744 include, but are not limited to, certain fibrous and filamentary materials controlled under ECCN 1C990; numerically-controlled machine tools controlled under ECCN 2B991 and non-numerically controlled machine tools controlled under ECCN 2B992; digital oscilloscopes and transient recorders controlled under ECCN 3A292.d; computers with specified adjusted peak performances controlled under ECCN 4A994; telecommunications equipment designed to operate at specified temperatures and controlled under ECCN 5A991; lasers controlled under ECCN 6A995; navigation direction finding equipment, airborne communication equipment, and aircraft inertial navigation systems controlled under ECCN 7A994; underwater systems and equipment controlled under ECCN 8A992; aircraft and gas turbine engines controlled under ECCN 9A991; and related technology and materials controlled under a variety of ECCNs.

Importantly, the prohibitions with respect to the Supplement No. 2 items are broader for Russia than for China. The restrictions on exports, reexports, and transfers of such items to China apply only to items exported, reexported, or transferred for an intended *military end use* in China. The prohibitions with respect to Russia apply not only when there will be a *military end use* of the item, but also when the export, reexport, or transfer is to any *military end user* in Russia, regardless of whether there is a military end use.

BIS may inform companies, either individually via a specific notice or publicly through a notice or amendment to the EAR that is published in the Federal Register, that a license is required for a specific export, reexport, or transfer (in-country) because there is an unacceptable risk of use in or diversion to a military end use or military end user in Russia.

This prohibition does not apply to exports, reexports, or transfers (in-country) of items subject to the EAR if the activity is authorized under the provisions of License Exception GOV.

Restrictions on Exports, Reexports, and Transfers of Other Sensitive Items

The new BIS rule also prohibits the export, reexport, or transfer to Russia without a license of *any* item controlled under an ECCN in the “515” series of Category 9 or the “600 series” of any Category, including items described in a “.y” paragraph of a 9x515 or “600 series” ECCN. This prohibition applies regardless of whether the exporter, reexporter, or transferor knows that the end use or end user is associated with the Russian military, though in reviewing the license application BIS will consider whether the item would make a material contribution to Russia’s military capabilities (see discussion below). Again, this prohibition does not apply to exports, reexports, or transfers (in-country) of items subject to the EAR if the activity is authorized under the provisions of License Exception GOV.

pilot production schemes, design data, [the] process of transforming design data into a product, configuration design, integration design, [and] layouts.”

⁴ The term “production” is defined in EAR § 722.1 to mean “all production stages,” including product engineering, manufacturing, integration, assembly (mounting), inspection, testing, and quality assurance.

License Review Standards

BIS will review on a case-by-case basis applications for licenses to export, reexport, or transfer to Russia the items covered by this new rule, to determine whether the export, reexport, or transfer would “make a material contribution to the military capabilities of ... Russia, and would result in advancing the country’s military activities contrary to the national security interests of the United States.” This review policy also applies to any item that requires a license for export, reexport, or transfer to Russia *for any other reason*. If an export, reexport, or transfer of any item subject to the EAR would make a material contribution to Russia’s military capabilities, BIS will deny the license application.

ADDITION OF TEN PERSONS TO THE ENTITY LIST

In the same Federal Register notice, BIS also added ten parties – five Russian defense companies and five Russian energy companies – to the Entity List based on a determination that “there is reasonable cause to believe” that they “have been involved, are involved, or pose a significant risk of being or becoming involved in, activities that are contrary to the national security or foreign policy interests of the United States.”

As discussed in our [September 13, 2014 E-Alert](#), a license from BIS will be required for any person (whether or not a U.S. person) to export, reexport, or transfer abroad any item subject to the EAR to these five defense companies: Almaz Antey Air Defense Concern Main System Design Bureau JSC; Dolgoprudny Research Production Enterprise, OAO; Kalinin Machine Plant, JSC; Mytishchinski Mashinostroitelny Zavod, OAO; and Tikhomirov Scientific Research Institute of Instrument Design, JSC (aka JSC NIIP). Applications for such licenses will be subject to a presumption of denial.

The five entities that operate in Russia’s energy sector and were added to the Entity List – Gazprom, OAO; Gazprom Neft; Lukoil, OAO; Rosneft; and Surgutneftegas – are subject to a more narrow licensing requirement that applies only to exports, reexports, or transfers (in-country) of items subject to the EAR when the exporter, reexporter, or transferor knows that the items will be used directly or indirectly in exploration for, or production of, oil or gas in Russian deepwater (greater than 500 feet) or Arctic offshore locations or shale formations in Russia, or is unable to determine whether the items will be used in such projects. Once again, license applications for such transactions will be subject to a presumption of denial if destined for projects that have the potential to produce oil.

These measures supplement other restrictions on these parties imposed by BIS and the U.S. Treasury Department, Office of Foreign Assets Control discussed more fully in our E-Alerts of [September 13](#) and [August 12, 2014](#).

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These new licensing requirements represent the latest, although perhaps not the last, restrictions imposed in response to the crisis in Ukraine. We are following closely the above-mentioned export control developments and related economic sanctions measures imposed by the U.S. and EU authorities and we will provide further updates as appropriate. We are particularly well-positioned to advise companies and individuals on compliance with the U.S. and EU sanctions related to the Ukraine crisis, as well as on the broader impact of the crisis on foreign investment in both Ukraine and Russia and other legal and commercial interests in the region.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our international trade controls practice group:

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