

BIS AMENDS NATIONAL SECURITY LICENSE REVIEW POLICY, PROVIDING WELCOME TRANSPARENCY

On October 29, 2020, the Bureau of Industry and Security ("**BIS**") issued a final rule amending the license review policy for items subject to the Export Administration Regulations ("**EAR**") that are controlled for National Security ("**NS**") reasons when destined to China, Venezuela, or Russia. See the final rule announcement [here](#). This final rule amends part 742 of the EAR so that NS license applications for EAR items being exported to these countries of concern will be evaluated based on whether the items will make a "material contribution to the weapons systems capability of those countries," which runs counter to U.S. national security interests. The final rule provides a "robust illustrative list of license application review factors" that helps guide exporters on the contents of their applications and assist BIS in its license determinations.

Under the amended § 742.4, BIS has a presumption of denial for applications to export, reexport, or transfer (in-country) items that have a NS reason for control when such activity will make a "material contribution" to the "development, production, maintenance, repair, or operation of weapons systems" of China, Venezuela, or Russia. Among the factors BIS will consider in reviewing license applications are:

1. The appropriateness of the export, reexport, or transfer for the stated end use;
2. The significance of the item for the weapons systems capabilities of the importing country;
3. Whether any party is a 'military end user' as defined in § 744.21(g) of the EAR;
4. The reliability of the parties to the transaction, including whether:

- a. An export or reexport license application has previously been denied;
 - b. Any parties are or have been engaged in unlawful procurement or diversion activities;
 - c. The parties are capable of securely handling and storing the items; and
 - d. End-use checks have been and may be conducted by BIS or another U.S. government agency on parties to the transaction;
5. The involvement of any party to the transaction in military activities, including activities involving the "development," "production," maintenance, repair, or operation of weapons systems, subsystems, and assemblies;
 6. Government strategies and policies that support the diversion of exports from their stated civil end use and redirection towards military end use; and
 7. The scope and effectiveness of the export control system in the importing country

Additionally, BIS' licensing decisions will also consider "an assessment of the impact of a proposed export of an item on the United States defense industrial base and the denial of an application for a license that would have a significant negative impact on such defense industrial base."

Other sections of part 742 will continue to apply to the review of license applications for the export, reexport, or in-country transfer of NS controlled items to the three such countries, such as:

- There is a presumption of approval when an export, reexport, or in-country transfer is for a civil end user for civil end uses; and
- There is a presumption of denial for license applications to export, reexport, or transfer items that would make a substantial contribution to the "development, production, maintenance, repair, or operation of weapons systems, subsystems, and assemblies" to certain countries, including China, Venezuela, or Russia.

This final rule provides welcome transparency for exporters regarding the license review process by listing review factors that will be used in licensing decisions. BIS expects that publicly providing the list of criteria should result in applications that contain information that captures the review factors. Exporters that could be affected by these amendments should re-evaluate their export licensing procedures and applications to ensure they align with these new developments, and consider whether on the basis of the application criteria (including perhaps most challenging "*The scope and effectiveness of the export control system in the importing country*") whether a expectations of licenses being granted need to be recalibrated.

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