

# Summer Vacation's Over: Commerce Imposes New Russia and Belarus Export Controls

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Well, the Bureau of Industry and Security (BIS) waited until the summer was over, but timing may be the best part of the new export controls on Russia and Belarus (the "Rule"). Understanding the new Rule and how the old regulations have been amended is a bear. We do our best to simplify the new Rule and identify potential pain points.

The new export controls can be found [here](#).

## Expansion of Russian and Belarusian Industry Sector Sanctions

1. A [new list](#) of EAR99 items requires a license to Russia and Belarus: These items are in a new [Supplement 6 to Part 746](#) and include:
  - a. Listed chemicals (by CAS #) in concentrations of 90% weight or greater;
  - b. More listed chemicals (by CAS #) in concentrations of 95% weight or greater;
  - c. Fentanyl and derivatives;
  - d. Chemical precursors to Central Nervous System Acting Chemicals;
  - e. Biologics including butyrylcholinesterase (BCHE), cell culture materials, assay kits and reagents for nucleotide or peptide isolation, extraction, or purification, nucleotides, oligonucleotides and reagents, and amino acids, peptides, proteins and resins and reagents for peptide synthesis;
  - f. Equipment, including reaction vessels, vacuum pumps, laboratory equipment, whole

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chlor-alkali electrolysis cells, compressors specially designed to compress chlorine, Class II biosafety cabinets and glove boxes, floor-mounted fume hoods, full face mask air-purifying and air-supplying respirators, clean air rooms and HEPA filters, microwave reactors, well plates, fermenters, centrifuges, filtration equipment, nucleic acid synthesizers and assemblers, polymerase chain reaction instruments, robotic liquid handling instruments, chromatography and spectrometry components, parts and accessories, nucleic acid sequencers, aerosol inhalation testing equipment, flow cytometry equipment, probe sonicators, cell disruptors and tissue homogenizers and “continuous flow reactors” and their “modular components;”

- g. Quantum computing equipment;
- h. Advanced manufacturing equipment, including additive manufacturing equipment, powder-fed systems, microscopes, and decapsulation equipment for semiconductor devices;
- i. Software and technology “specially designed” or modified for the “development,” “production,” or “use” of the items in g-hg., above.

BIS has provided CAS numbers for the chemicals but has not provided Harmonized Tariff System (HTS) codes or Schedule B numbers. The Rule states that these items “may be useful for Russia’s [chemical and biological weapons] production and development capabilities and therefore may be used in support of its military aggression.” Additionally, quantum computing and advance manufacturing items may be used to “enable advanced manufacturing capabilities across a number of industries, including Russia’s defense-industrial base.”

- 2. 57 new entries in HTS Chapters 84, 85, 86, and 90 have been added to [Supplement 4](#) and now require a license to Russia and Belarus: If you continue to export items in these chapters to Russia or Belarus, then you should review the list of additions. They include heat pumps, self-propelled lifting or handling trucks, machinery, apparatus and equipment, for preparing or making printing blocks, plates, cylinders or other printing components, offset printing machinery, sawing or cutting-off machines for removing metal, generating sets with compression-ignition combustion piston engines, primary cells and primary batteries, electric storage heating radiators, magnetron microwave tubes, diodes, semiconductor devices, mounted piezoelectric crystals, parts for diodes, transistors and similar semiconductor devices, processors and controllers, electronic integrated circuits, memories electronics, amplifiers electronics, electronics, parts for electronics and microassemblies, rail locomotives powered by electricity, cameras of various types including underwater, instant print and 35 mm, and photographic flashlight/lamp apparatus and instruments and apparatus for measuring or checking the flow or level of liquids.

The Rule notes that this revision will help better align these controls with the controls of US allies on these items.

- 3. Expansion of [Supplement 4](#) beyond Schedule B and HTS numbers and descriptions to components, parts, accessories, and attachments: A potentially vast expansion of the Supplement 4 licensing requirement, this revision impacts exporters that make custom components, parts, accessories, and attachments for any equipment in Supplement 4. As

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such, in addition to checking the HTS codes/Schedule B numbers in Supplements 4, 5, and 6, you now need to figure out if your item goes into, and is “modified or designed” for an item in Supplement 4. The only exclusion is for any “part” or minor “component” that is a fastener (e.g., screw, bolt, nut, nut plate, stud, insert, clip, rivet, pin), washer, spacer, insulator, grommet, bushing, spring, wire, or solder (think specially designed (b)(2) release). While the Rule does not include a definition of modified or designed, the EAR defines “designed or modified” in the Missile Technology Control Regime context as “equipment, parts, components, or ‘software’ that, as a result of development, or modification, have specified properties that make them fit for a particular application.”

4. Expansion of industry sector export licensing requirements to Belarus: BIS has expanded all industry sector license requirements to require a license for export of [Supplement 4](#) items to Belarus. Recognizing that Belarus has only a limited oil and gas exploration industry, and given concerns that the items subject to the industry sector sanctions could be diverted from Belarus to Russia, the Rule expands the scope of [Supplement 2](#) oil and gas license requirements to shale formations in Belarus. However, the Rule does not add Belarus after the reference to Russian deepwater or Arctic offshore locations, as this reference is specific to Russia.

## **The Entity List and Expansion of Military End User and Military-Intelligence End User Controls**

The Rule broadens the scope of the Russian/Belarusian “military end user” and “military-intelligence end user” controls: it expands the “is informed” license requirements for additional entities that “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.” BIS also expands the “military end user” and “military-intelligence end user” restrictions to identify “military end users” and “military-intelligence end users” located anywhere in the world. Finally, the Rule revises the Entity List to designate six existing Entity List entities as Russian “military end users.”

1. Expansion of the [“Is Informed” provision](#): The new Rule adds [paragraph \(c\)\(3\) to § 744.11](#), which allows BIS to provide oral notice (followed up within two days with a written notice) of parties not on the Entity List that require an export license based on specific and articulable facts that the entity has been involved, is involved, or poses 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. Once a notice is provided, BIS may seek to add the entity to the Entity List.

This “significant risk of becoming involved” in unspecified activities contrary to unspecified US interests is perhaps the lowest standard yet for blacklisting non-US companies. Given the extremely short explanation currently provided by BIS for Entity List designations, will the requirement of “specific and articulable” result in BIS providing an opportunity to potential Entity List designees to dispute such facts prior to listing?

2. Expansion of [“military end user” \(MEU\) controls](#): BIS has revised [§ 744.21](#), the MEU restrictions, to include specific MEUs outside their designated home countries of Russia, Belarus, Burma, Cambodia, China, or Venezuela. Any Russian or Belarusian MEU that BIS determines to be located outside their home country will be added to the [Entity List](#) with a

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footnote three designation. Other military end users will be identified under the [MEU List](#). The Rule also revises the Entity List [by designating six entities](#) under ten existing entries as Russian MEUs, rendering them subject to the Russia/Belarus-Military End User Foreign Direct Product Rule (FDPR). BIS determined that these entities had contracted to supply Russian entities on the Entity List or that had been sanctioned since Russia's further invasion of Ukraine.

3. Expansion of the military-intelligence end user (MIEU) controls: BIS has revised the "military-intelligence end user" restrictions in [§ 744.22](#) to mirror the changes in the MEU rule. BIS can now identify MIEUs outside of Belarus and Russia or located in [Country Group E:1 or E:2](#) by identifying such entities in paragraph [§ 744.22\(f\)\(2\)](#).

## Revision to the Foreign Direct Product Rule (FDPR)

We [previously analyzed](#) the Russian invasion's impact on the FDPR, and the Rule further expands the scope of the Russia/Belarus FDPR.

1. Non-US-origin Supplement No. 6 items: Non-US-origin [Supplement No. 6 items](#) that are the direct product of U.S.-origin software or technology or the direct product of a plant or major component of a plant that is itself the direct product of technology or software subject to the EAR that have an Export Control Classification Number (ECCN) on the Commerce Control List are subject to the license requirement for export, reexport, and transfer (in-country) to or within Russia and Belarus. (Note: Exports or reexports from the US allies identified in [Supplement No. 3](#) are exempt from the FDPR for the Supplement No. 6 items). Previously, items classified as EAR99 would have fallen outside the scope of the FDPR entirely except with respect to Russian/Belarusian MEUs (entities with a footnote three designation on the Entity List). However, you now must check Supplement No. 6 to rule out application of the FDPR definitively.

## Revisions to License Exceptions CCD and TMP

1. License Exception CCD: The Rule expands the application of [License Exception Consumer Communications Devices](#) (CCD) to apply to the [Russian and Belarusian Industry Sector Sanctions](#) and to the "[Luxury Goods](#)" restrictions. The Rule also updates the text of CCD to describe more accurately the items covered by exception. For example, it revises CCD's listing of consumer computers to add tablets and peripherals, including microphones, speakers, and headphones, designated as EAR99 or classified as ECCNs 5A992.c or 4A994.b.

The Rule also makes further revisions to the items eligible for CCD to reflect current consumer communications device use. For instance, it removes input/output control units (other than industrial controllers designed for chemical processing) designated as EAR99 because BIS determined these items are not typically used by consumers for communications purposes. The Rule also flags that certain headphones are controlled under 600 Series ECCNs and are not eligible for CCD. Indeed, it specifically states that the commodities and software eligible for CCD are "strictly limited to the descriptions and classifications that are specified" under the list of items that license exception, which is an "exhaustive listing."

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Given the above, reviewing License Exception CCD to confirm that it does cover the products you wish to export is essential!

2. License Exception TMP: The Rule clarifies that the news media authorization in [License Exception Temporary Imports, Exports, Reexports, and Transfers \(in-country\)](#) (TMP) applies to Russia and Belarus.

## Revisions to the “Luxury Goods” Dollar Limits

As [previously discussed](#), BIS has implemented restrictions on the export, reexport, and transfer (in-country) of certain “luxury goods.” The Rule has made the following changes:

1. Addition and changes to dollar value exclusion thresholds to “Luxury Goods”: To more closely align with the export controls implemented on Russia and Belarus by US allies, the Rule adds [additional dollar value exclusion thresholds](#) for certain “luxury goods” and changes others. The Rule also notes that BIS has determined that certain “luxury goods” entries continue not to warrant a dollar value exclusion, and that those entries remain unchanged by the Rule. BIS lowered the previous dollar value threshold for clothing and shoes from \$1,000 to \$300 per unit wholesale price, thereby increasing the number of clothing and shoe items requiring a license to Russia and Belarus. BIS added a \$300 per unit wholesale price in the US dollar value exclusion for most other items, thereby reducing the items requiring a license. In some cases, such as for automobiles, BIS added a higher dollar value exclusion. Bottom line: If you were relying on dollar value exclusions, recheck the Luxury Goods list!
2. License review policy for humanitarian needs: This addition is intended to apply to certain “luxury goods” that may be used in medical devices or where a case-by-case analysis is warranted. For example, BIS notes that contact lens solution, which is captured as a cosmetic in [Supplement No. 5](#), is necessary to maintain the eye health of those who wear contact lenses or are medically unable to wear corrective glasses. BIS notes that this policy allows it and other reviewing agencies flexibility in license review, while also considering US national security and foreign policy concerns.

## Clarifications to Existing Controls on Russia and Belarus (50% Clarification, 50% Say What?!)

1. Branches and sales offices of companies headquartered in the US and [Country Group A:5 and A:6 countries](#): In the Rule, BIS clarifies that items classified as ECCNs 5A992 or 5D992 that were excluded from license requirements when exported to a range of subsidiaries, joint ventures, and other legally separate entities of the US and Country Groups A:5 and A:6 also applies to branches and sales offices. The same clarification is added to [License Exception TSU](#) for software updates and [License Exception ENC](#) to “clarify that branches or sales offices as well as subsidiaries of companies headquartered in the US and Country Groups A:5 or A:6 countries are eligible for those license exceptions.”
2. Deemed export/reexport rule: The Rule notes that deemed export license requirements in place prior to the Sanctions Against Russia and Belarus Rule still apply to items that would require a license to be exported or reexported, regardless of the exclusion under the Russia

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and Belarus sanctions that applies to the new license requirements. Put another way, if your technology required a deemed export/reexport license to a Russian citizen prior to February 2022, it still does.

3. Certain transfers (in-country) excluded: The Rule states that the movement of an item within Russia or Belarus to return it to the United States or a Country Group A:5 or A:6 country is permitted. However, to fall within this [exclusion](#), the owner must retain title to and control of the item while it is in Russia or Belarus. Note that if a license would otherwise be required for a reexport to a Country Group A:5 or A:6 country, a separate EAR authorization would be required to authorize the reexport. While apparently intended to be helpful, this exclusion raises additional questions about reexports, and, potentially, the definition of transfer (in-country).

The EAR defines a [reexport](#) as an “actual shipment or transmission of an item subject to the EAR from one foreign country to another foreign country, including the sending or taking of an item to or from such countries in any manner.” First, in the new Rule, reexport is limited to “return” to the United States or a country in Country Group A:5 or A:6. Second, since when did we need a BIS license to “reexport” (aka import?) EAR-controlled items from Russia to the United States? Or, for example, an item controlled for antiterrorism (“AT”) reasons only (e.g., ECCN 4A994) to an A:5 or A:6 country? Does the exclusion now mean that a reexport of AT-controlled item from Russia to Morocco requires a reexport license because Morocco is not an A:5 or A:6 country?

Further, the Rule states that the exclusion applies to “transfers” within Russia or Belarus. Critically, it does not use the defined term “transfer (in-country),” but it is unclear what other type of transfer would require a license other than a transfer (in-country). However, a [transfer \(in-country\)](#) is “a change in end use or end user of an item within the same foreign country.” Here, the Rule states that the exclusion applies only if “the owner retains title to and control of the item at all times,” namely not a change in end use or end user. Does BIS intend to redefine transfer (in country) to mean the “movement” of an item in country (as BIS wrote in the [Federal Register Notice](#)), which is not necessarily a change in end user or end use, particularly if the same party maintains title and control of the item?

Ultimately, this exclusion may mean that companies trying to shut down operations in Russia need a BIS license to send their items to any country other than the United States or A:5 and A:6 countries, countries to which Russia may well decide to deny export licenses. In other words, it is quite possible that items subject to the EAR will be abandoned and stay in Russia.

4. Other changes: The Rule makes several other changes to the EAR that are primarily for consistency and clarification.
  - a. Transfers (in-country), which appear to be the black mold in the EAR basement – it’s everywhere!
    1. BIS clarifies EAR recordkeeping requirements ([§ 762.1\(a\)\(2\)](#) and [§ 762.6\(a\)\(2\)](#)) apply to transfers (in-country). Previously, those sections did not include the phrase “transfers (in-country),” but “in line with BIS’s longstanding interpretation and previous amendments to the EAR to clarify this point,” even though “transfers (in-country)” are not included in some parts of the EAR,



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BIS's intent is to also cover those transactions.

2. BIS also clears up some questions regarding the applicability of transfers (in-country) in the [General Prohibitions](#). BIS explains that the “general prohibitions describe obligations under the EAR generally and are not intended to be an exhaustive description of the EAR’s license requirements or other restrictions.” However, to help exporters, BIS made changes to the General Prohibitions to further clarify their application, including adding the phrase “transfers (in-country)” in several instances.
  - b. The Rule also revises [General Prohibition](#) 10 to include references to all restrictions related to Russia and Belarus (and, of course, add “transfers (in-country)”).
  - c. Finally, BIS removes Belarus and Russia from [Country Group A](#) to avoid confusion. (Footnotes to A:1, A:2, and A:4 remain, which clarify that while Russia is a participant in certain international export control regimes, it is excluded from those country groups.)

## Savings Clause that Saves Little

The Rule includes a so-called [Savings Clause](#), stating that shipments of items that have been removed from license exception eligibility or that were previously not subject to a license requirement may proceed to their destination under previous eligibility criteria if they “were *en route* aboard a carrier to a port of export, reexport, or transfer (in-country), on September 15, 2022, pursuant to actual orders for export, reexport, or transfer (in-country) to or within a foreign destination.” The export, reexport, or transfer (in-country) must be completed no later than November 14, 2022.

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National Law Review, Volumess XII, Number 269

Source URL: <https://natlawreview.com/article/summer-vacation-s-over-commerce-imposes-new-russia-and-belarus-export-controls>