

U.S. Department of Commerce Proposes Expanded Export Controls Targeting Military, Intelligence, and Law Enforcement End Users in China and Elsewhere

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Overview

On July 29, 2024, the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") issued proposed rules that would significantly expand controls under the Export Administration Regulations ("EAR") regarding exports for certain end uses, certain end users, and U.S. person activities.

At a high level, the proposed EAR modifications would (1) add new controlled categories of ["military support end users"](#), ["intelligence end users"](#), and ["foreign-security end users"](#); (2) expand the items and country destinations that would be subject to these end use and end user prohibitions; and (3) modify the Commerce Control List ("CCL") to add certain surveillance items that can be used to violate human rights. BIS also proposes to modify and expand the controls on activities of U.S. persons in section 744.6 of the EAR to complement the changes proposed to the end-use and end-user controls.

Proposed End-User and End-Use Changes

The proposed modifications to the EAR would amend and expand the existing end-use and end-user prohibitions on exporting, reexporting, or transferring (in-country) certain items subject to the EAR contained in current sections 744.21 (restrictions on certain military end uses and military end users) and 744.22 (restrictions on certain military-intelligence end uses and end users), and would create new sections 744.24 and 744.25. Because these controls apply to any person in the world dealing in items that are "subject to the EAR," they are potentially far-reaching.

Military End Uses and End Users. The proposed amendments would modify existing section 744.21 by expanding both the items controlled and the countries covered.

- Specifically, the proposal would expand the scope of items covered by the current regulations from a list of specific items in current Supplement No. 2 to Part 744, to cover *all* items subject to the EAR (thus including even EAR 99 items).
- The proposal would also expand the countries covered from the current list of seven (Belarus, Burma, Cambodia, China, Nicaragua, Russia, and Venezuela) to cover any country in Country Group D:5 (that is, countries subject to U.S. arms embargoes, including China) and Macau.
- New section 744.21(f)(2) would add “mercenaries, paramilitary, or irregular forces” to the definitional scope of “military end user” (“MEU”).
- “National police,” “government intelligence or reconnaissance organizations,” and persons or entities whose actions support military end uses would be removed from 744.21, and addressed instead in proposed new sections 744.22, 744.24, and 744.25 (discussed below).

Military Support End Users. The proposal would add a new section 744.22, covering a new controlled category of “military-support end users” (“MSEUs”).

- MSEU is defined as “any person or entity whose actions or functions support ‘military end uses’,” as defined in 744.21.
- Items covered would be items subject to the EAR that are specified in any Export Control Classification Number (“ECCN”) on the CCL (so EAR 99 items would not be controlled), when the person has knowledge that the item is intended for an MSEU in Macau or a country in Country Group D:5.

Intelligence End Users. Next, the proposed regulations would add a new section 744.24 covering export, reexport, and in-country transfers to “intelligence end users” (“IEUs”).

- This provision would cover and expand on the “government intelligence or reconnaissance organizations” controls currently covered in 744.21 (on military end uses and MEUs).
- For purposes of new 744.24, IEU is defined as “any foreign government intelligence, surveillance, or reconnaissance organization or other entities performing functions on behalf of such organizations”.
- Items covered would be any item subject to the EAR, when the person has knowledge that the item is intended, in whole or in part, for an IEU, wherever located, that is in Country Group D or E (not just D:5 as in the other controls described above, and excluding countries that also are in groups A:5 or A:6, *i.e.*, Cyprus and Israel.)

Foreign Security End Users. Last, the proposed rules add a new section 744.25 covering “foreign-security end users” (“FSEUs”).

- In contrast to the proposed changes involving sections 744.21, 744.22, and 744.24, which largely relate to U.S. national security concerns, new section 744.25 would address the potential use of crime control items that can be used to suppress human rights.
- FSEUs are defined as “governmental and other entities with the authority to arrest, detain, monitor, search, or use force in furtherance of their official duties, including persons and entities at all levels of the government police and security services,” and any “other persons or entities performing functions of a ‘foreign-security end user.’”
- Such functions include arrest, detention, monitoring, or search, and may include analytic and data centers, forensic laboratories, jails, prisons, other detention facilities, labor camps, and reeducation facilities.
- An exception is permitted for civilian emergency medical, firefighting, and search-and-rescue

users.

- FSEU restrictions pertain to any item in the EAR with an ECCN classification, where a person has “‘knowledge’ that the item is intended, entirely or in part” for FSEUs of a Country Group D:5 or Group E country.

Modifications to the CCL. In conjunction with the FSEU proposal, BIS would make two modifications to the CCL, to address certain surveillance items that can be used to violate human rights.

- Proposed ECCN 3A981 would cover items that could be misused by the police or similar organization to contravene human rights. For example, the new ECCN would cover polygraphs, fingerprint analyzers, and facial recognition systems.
- Expanded ECCN 3D980 would cover software to analyze voices, fingerprints, and facial features.
- Export licenses would be required for countries other than NATO allies, Switzerland, Japan, South Korea, Australia, and New Zealand.

Additional Entity List and Other Restrictions. Each of the end-use and end-user controls described above would be aligned with certain entities on the BIS Entity List by way of new Entity List footnotes designating specific entities that fall into one of the above use or user categories. (The text of the footnotes, and the entities to be listed within these footnotes, is not yet known.) BIS could also trigger restrictions by specific notifications of licensing requirements if it identifies a high risk of diversion to the relevant category of end user.

License Exceptions. License Exception GOV would be the only license exception available for these end-use and end-user controls.

Controls on Activities of U.S. Persons in Section 744.6 of the EAR

Section 744.6 describes categories of activities in which U.S. persons may not engage without a BIS license, even when a transaction does not involve an item that is subject to the EAR. In tandem with the expanded and redefined end-use and end-user restrictions described above, BIS is proposing to expand controls on restricted activities of U.S. persons covered in current section 744.6 of the EAR.

- The principal proposed changes to section 744.6 would expand and restructure the current prohibition in 744.6(b)(5), which currently prohibits U.S. persons from providing “support” to “military-intelligence end uses” or “military-intelligence end users” in a small group of specified countries (Belarus, Burma, Cambodia, China, Russia, Venezuela, Cuba, Iran, North Korea, and Syria).
- Under the proposed changes, U.S. persons would be prohibited from knowingly providing “support” to four kinds of end users, in a much broader range of countries (generally speaking, all countries that are subject to a U.S. arms embargo as listed in the EAR’s Country Group D:5, or Macau), as follows:
 - A “military end user” as defined in the proposed new 744.21(f) in Country Group D:5 or Macau;
 - An “intelligence end user” as defined in the proposed new 744.24(f), wherever located, from a destination in Country Group D or E, but not also listed in Country Group A:5 or A:6;
 - A “military-production activity,” when that activity occurs in Country Group D:5 or Macau. A “military-production activity” would be defined as:
 - Incorporating any item into a “600 series” items, including foreign items that

are not subject to the EAR.

- Incorporating any item into any other item described in the CCL, or that would be EAR 99, including foreign items that are not subject to the EAR, if the U.S. person knows that the item is ultimately destined to or for use by a “military end user.”
- Any other activity that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, development, or production of the items described above.
 - A foreign security end user as defined in proposed new section 744.25(f).
- BIS would continue to be able to provide specific notice that a license is required for other U.S. person activities if BIS determines that an activity could involve “support” to the end uses or end uses covered in section 744.6.
- The rule largely retains the current definition of “support,” and would also add a list of activities not constituting “support.”
 - The following, for example, would not constitute “support”: activities regulated under the International Traffic in Arms Regulations; clerical work; advertising; and legal advice.
 - Furthermore, regarding restrictions on “support” for military end users, military-production activity, and intelligence end users, the following would not constitute “support”: activities in connection with or on behalf of U.S. Government agencies or cooperative programs; and “commercial activities related to the movement of goods by common carrier.”

Takeaways

The proposed BIS amendments represent a significant expansion in export and U.S. person activity controls, particularly when dealing with Country Group D:5. While the U.S. person activity controls only apply to U.S. persons, the expanded export, reexport, and in-country transfer controls apply to any person anywhere in the world doing business in one of these countries and dealing in items subject to the EAR. All persons engaging in transactions potentially subject to these new controls should carefully review and update their compliance policies accordingly.

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