

## Insights

# U.S. COMMERCE DEPARTMENT IMPOSES NEW EXPORT CONTROL MEASURES TARGETING RUSSIA

Feb 25, 2022

As previewed by President Biden in his press conference on February 24, 2022, the U.S. Commerce Department's Bureau of Industry and Security (BIS) is imposing additional export control measures targeting Russia. The new measures are primarily intended to target Russia's defense, aerospace, and maritime sectors and take effect immediately.

The new measures include the following:

- Adds 746.8 of the Export Administration Regulations (EAR), which imposes a license requirement for Russia for any item described in an entry in Categories 3 through 9 of the Commerce Control List (CCL).
  - This will impose a license requirement on exports and reexports to Russia for a number of items for which no license was previously required, including for a number of items that are otherwise subject only to Anti-Terrorism (AT) controls.
  - License applications will be subject to a policy of denial (except in certain specified cases), and limited license exceptions are available. Importantly, the use of license exception ENC is no longer available for exports to Russian "government end users" and Russian state-owned enterprises.
  - The expanded license requirement does not apply to deemed exports and deemed reexports.
- Updates the *de minimis* guidelines to clarify that the controls described in 746.8 must be considered when evaluating U.S. controlled content in a foreign-made item. The end use and end user restrictions in Part 744 are not considered when determining controlled content for the *de minimis* analysis.
- Expands the existing controls for military end uses and military end users in Russia in 744.21 of the EAR to apply to all items subject to the EAR except food and medicine designated EAR99 and mass market encryption items and software classified under ECCN 5A992.c and 5D992.c that are not for Russian "government end users" or Russian state-owned enterprises (SoEs). This greatly

expands the scope of items covered by this provision for exports and reexports to Russia. It will be critical to vet essentially all export and reexport transactions to Russia involving items subject to the EAR to ensure that there is neither a military end use nor a military end user (under the very broad definition contained within 744.21) involved in the transaction.

- Establishes two new Foreign Direct Product Rules, one of which applies to all of Russia (the Russia FDP Rule) and one which specifically targets Russian military end users (Russia MEU FDP Rule). While certain license exceptions are available under the Russia FDP rule, no license exceptions are available for the Russia MEU FDP Rule.

- Under the Russia FDP Rule, a foreign-produced item located outside the United States will be subject to the EAR if:
  - There is knowledge that the foreign-produced item is destined to Russia, or will be incorporated into, or used in the “production” or “development” of any part, component or equipment not designated EAR99 and produced in or destined to Russia; AND one of the following two conditions must also apply:
    - The foreign-produced item is not EAR99 but is the direct product of U.S.-origin technology or software specified in products groups D (for software) or E (for technology) of any ECCN in Categories 3-9 of the CCL; or
    - The foreign produced item is not EAR99 but is produced by any plant or ‘major component’ of a plant that itself is a direct product of U.S.-origin technology or software specified in products groups D (for software) or E (for technology) of any ECCN in Categories 3-9 of the CCL.

This rule does not apply to foreign-produced items that would be designated as EAR99.

In the event that a foreign-made item is subject to the EAR under the Russia FDP rule, a license is required for the reexport, export from abroad, or transfer (in-country) of that item to any destination. This requirement applies to all stages of the transaction if there is knowledge that it will ultimately end up being captured by the above rule.

- The Russia MEU FDP Rule encompasses an even broader array of foreign-produced items. Under the Russia MEU FDP Rule, a foreign-produced item located outside the United States will be subject to the EAR if:
  - There is knowledge that the foreign-produced item will be incorporated into, or used in the “production” or “development” of any part, component or equipment produced, purchased or ordered by any entity on the Entity List with a footnote 3 designation or any entity on the Entity List with a footnote 3 designation is a party to any transaction involving the

foreign-produced item (e.g., as a purchaser, intermediate consignee, ultimate consignee, or end-user); AND one of the following two conditions must also apply:

- The foreign-produced item is the direct product of technology or software subject to the EAR and specified in products groups D (for software) or E (for technology) of any ECCN; or
- The foreign-produced item is produced by a plant or major component of a plant that itself is a direct product of U.S.-origin technology or U.S.-origin software subject to the EAR and specified in products groups D (for software) or E (for technology) of any ECCN.

Notably, the product scope of the Russia-Military End User FDP rule includes items designated EAR99 that are a direct product of technology or software described on the CCL or produced by a complete plant or major component of a plant that is the direct product of U.S.-origin technology or software described on the CCL.

As with the Russia FDP Rule, if a foreign-made item is subject to the EAR under the Russia MEU FDP Rule, a license is required for the reexport, export from abroad, or transfer (in-country) of that item to any destination.

EAR99 food and medicine are excluded from the scope of the rule, as are foreign produced mass market items that are described in ECCN 5A992.c and 5D992.c, unless the mass market items are for Russian “government end users” or Russian state-owned enterprises.

- Exports and reexports of foreign-made items from countries that BIS has determined are committed to implementing substantially similar controls are being excluded from the two foreign direct product rules. Further, items controlled for AT reasons only or classified under ECCN 9A991 need not be included in the *de minimis* calculation for foreign-produced items for export or reexport from one of the specified countries.
- Removes 45 Russian entities from the Military End User (MEU) List and add those entities to the Entity List with a license requirement for the export, reexport, and transfer (in-country) of all items subject to the EAR, including those items subject to the Russia-MEU FDP rule for military end users in Russia.
  - Adds two new Russian entities to the Entity List and revises two existing entries for Russian entities.
  - Adds Russia as an eligible destination under license exception CCD and clarifies that the authorization applies to in-country transfers. License exception CCD is only available for exports, reexports, and transfers of eligible commodities and software to and for the use of independent non-governmental organizations in Russia. The Russian Government and certain Russian officials are not eligible for the license exception.

- Adds Russia to the list of countries subject to an arms embargo in Country Group D:5.
- Expands the restrictions in 746.6 of the EAR to impose a license requirement for the export and reexport to and transfer within the so-called DNR and LNR regions of Ukraine for all items subject to the EAR (other than food and medicine designated as EAR99 and certain EAR99 and mass-market software that is widely available for free and is necessary to enable the exchange of personal communications over the internet). For most exports to these areas, authorization from both BIS and OFAC will be required.

## RELATED PRACTICE AREAS

- International Trade
- Public Policy & Government Affairs

## MEET THE TEAM



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