



## STEPTOE OUTSIDE COUNSEL

# A Chinese company just acquired my biggest customer. What do I do?

**Y**ou work for a Belgian distributor. Your company procures US-origin components and sells those products and related technology to global customers that produce end-items. A top customer outside the EU has just been acquired by a Chinese company, reportedly with close ties to the Chinese government. You've heard of expanded US export controls targeting China, but how do you assess the risks? Here are some considerations and tips.

### Recent changes to US export controls on China

Effective 29 June 2020, amendments by the US Bureau of Industry and Security ("BIS") to the Export Administration Regulations ("EAR")<sup>1</sup> will expand licensing requirements for the export, reexport, and transfer (in-country) of certain commodities, software, and technology (i.e., "items") that are "subject to the EAR."<sup>1</sup> BIS is expanding reexport

restrictions by: (1) broadening the definitions of "military end use" and "military end user" in China (and Russia and Venezuela);<sup>2</sup> and (2) increasing the list of export control classification numbers ("ECCN") of items that are subject to these restrictions.<sup>3</sup> Additionally, BIS eliminated license exception Civil End-Users ("CIV"),<sup>4</sup> which previously authorized exports and reexports of items that are controlled for national security ("NS") reasons to China for civilian end uses, among other jurisdictions.

These restrictions may apply where controlled items may be reexported from third countries to China, or where such items may be transferred or released within China. Based on these expanded controls, here are some questions to ask:

**What ECCN applies?** Consider whether the US-origin component is subject to these new military end use or end user restrictions. Determine or ask the US supplier to provide the applicable ECCN. Only items with ECCNs listed in Supplement No. 2 to Part 744 of the EAR are restricted to military end uses and end users in China. Examine that list to assess whether the US-origin items to be distributed would be subject to such

restrictions. This list now covers broader categories of items relating to materials processing, electronics, telecommunications, information security, sensors/lasers, and propulsion.<sup>5</sup> EAR99 items are not subject to the expanded restrictions.

**What is a "Military End Use"?** Items with covered ECCNs may not be reexported without a license where there is "knowledge" that the items are intended "entirely, or in part" for a military end use in China.<sup>6</sup> Under the EAR, "military end use" now covers a broader category of activities, including if such item will be incorporated into, or "support or contribute to" the (1) operation, (2) installation, (3) maintenance, (4) repair, (5) overhaul, (6) refurbishing, (7) "development," or (8) "production" of, military items. If you know or have reason to know such item is used in any one of the eight undertakings for a military end use in China, then reexport controls apply. Do not consciously disregard or willfully avoid facts about how your customer intends to use the covered items.

**What are "Military End Users"?** Covered items may not be reexported without a license where there is "knowledge" that they are intended "entirely or in part" for a "military end user" in Russia, Venezuela, and – as of 29 June – China. A military end user is "any person or entity whose actions or functions are intended to support military end-uses," as well as members of the national armed services (army, navy, marine, air force, or coast guard), national guard and national police, and government intelligence or reconnaissance organizations.<sup>7</sup>

**Have you been relying on CIV for reexports?** You can no longer utilize CIV to reexport items that are controlled for NS reasons to jurisdictions in Country Group D:1 (which includes China),<sup>8</sup> even if the item is intended for civil end uses.

**What are your odds of getting a license?** If US export controls apply, you can apply for a reexport license. However, BIS has adopted a "presumption of denial" licensing policy for items covered by the military end use/user restrictions. Thus, it may not be possible to obtain a license. ■

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Both Jack and Martin are based in Washington, DC, and advise global clients on how to comply with US export controls and economic sanctions laws, and reduce liability and reputational risks.

<sup>1</sup> 15 C.F.R. § 734.3 (defining "subject to the EAR").

<sup>2</sup> 85 Fed. Reg. 23,459-23,470 (28 Apr. 2020).

<sup>3</sup> 15 C.F.R. § 744.21.

<sup>4</sup> 15 C.F.R. § 740.5.

<sup>5</sup> 85 Fed. Reg. 34,306-34,323 (3 June 2020).

<sup>6</sup> 15 C.F.R. § 744.21(f).

<sup>7</sup> 15 C.F.R. § 744.21(g).

<sup>8</sup> Supplement No. 1 to Part 740 of the EAR.