



STEPTOE OUTSIDE COUNSEL

Some intel on BIS's New Military-Intelligence End Use Rule

On 15 January 2021, the US Bureau of Industry and Security ("BIS") published a rule under the Export Administration Regulations ("EAR") with new restrictions targeting "military-intelligence end uses/end users" ("MIEU"). The MIEU Rule will prohibit the export, reexport, and in-country transfer of any items subject to the EAR – as well as certain support services provided by US persons – to users engaged in intelligence activities for the militaries of China, Russia, Venezuela, and certain other countries.

This MIEU Rule is related to, but distinct from, BIS's "military end use/end user" ("MEU") Rule. Together, they present challenges for exporters in the US, and reexporters and transferors outside the US.

Summary of the new rule

The MIEU Rule amends the EAR to

impose a licensing requirement, effective 16 March 2021, for certain activities involving MIEUs.

Newly added §744.22 will restrict any item (i.e., commodity, software, or technology) that is "subject to the EAR", including those designated as EAR99, where there is "knowledge"¹ that the item is intended, entirely or in part, for a 'military-intelligence end use' or a 'military-intelligence end user' in China, Russia, or Venezuela or a country listed in Country Groups E:1 or E:2 (currently, Cuba, Iran, North Korea, and Syria).

Defined at §744.22(f)(2), a "military-intelligence end user" means "any intelligence or reconnaissance organization of the armed services (army, navy, marine, air force, or coast guard); or national guard," and provides a non-exhaustive list of agencies related to restricted countries.

The term "military-intelligence end use" is defined at §744.22(f)(1) to cover the design, "development," "production," use, operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of, or incorporation into, items described on

the US Munitions List or classified under Export Control Classification Numbers ("ECCNs") ending in "A018" or under "600 series" ECCNs – when those items "are intended to support the actions or functions of a [MIEU]."

These export, reexport and in-country transfer licensing requirements restrict "items subject to the EAR", and thus can apply to both US and non-US persons.

Amended §744.6(b)(5) will prohibit US persons² from providing any "support" to any restricted MIEU without a BIS license. The definition of "support" is broad, such as shipping or transferring any items, or performing any "contract, service, or employment," with knowledge items may be used in or by, or assist or benefit, a MIEU. Notably, this US person support prohibition applies to items that *are not* subject to the EAR.

A BIS policy of denial will apply to any license applications involving MIEUs.

MEU Rule: not to be confused

The MIEU Rule is different from the MEU Rule, which BIS published in June 2020. The MEU Rule imposes a licensing requirement on the export, reexport, and in-country transfer of certain ECCNs (i.e., not EAR99 items) described in Supplement No. 2 to Part 744, when destined to either a "military end user" or a "military end use" in China, Russia, and Venezuela (only). In December 2020, BIS published a non-exhaustive list of end users under the MEU Rule.³

Due diligence

BIS recommends exporters utilize Supplement no. 3 to part 732 – BIS's "Know Your Customer" Guidance and Red Flags to conduct due diligence for parties identified as, or representing a risk of diversion to, prohibited end users/uses. In practice, it may be difficult to ascertain whether items subject to the EAR are "intended to support the functions" of MIEUs and will require a license. Reexporters of items subject to the EAR may decide not to supply such items to affected countries. However, given associated US export control risks, BIS would likely expect heightened due diligence, compliance terms and conditions, and other safeguards for exports, reexports, transfers, and US person support services to the affected countries or where a supplier has information that its customer may deal directly or indirectly with MIEUs. ■

About the authors:

Jack Hayes (Washington, DC) is Of Counsel, and Nick Turner (Hong Kong) is Of Counsel at Steptoe.

www.steptoel.com

¹ "Knowledge" generally means actual knowledge, reason to know, or conscious disregard or willful avoidance of facts.

² "US person" generally means any: (1) individual who is a citizen or lawful permanent resident of the US, wherever employed; (2) juridical entity organized under the laws of or within the US, including foreign branches; or (3) person in the US.

³ Supplement No. 7 to Part 744 of the EAR.