Overview
On February 24, 2020, the US Department of Commerce, Bureau of Industry and Security (BIS), issued a rule that expands the scope of US proliferation-related export controls on Russia under the US Export Administration Regulations (EAR). The changes are significant for the nuclear and aerospace sectors, but also have relevance in other sectors. Products and technologies that may now require a license for Russia include many industrial goods, such as certain valves, machine tools and robots, along with certain composites, electronics production technologies and others. In many cases, applications to BIS for licenses to export these technologies to Russia will now be subject to a “presumption of denial.” As a result, trade with Russia in these technologies will now be restricted if subject to US export controls jurisdiction.

The rule also broadens export controls on Yemen to reflect US national security concerns related to Yemen. As these changes were made to US export controls that are agreed upon at the multilateral level, it will be important to watch whether the EU and other jurisdictions that participate in the relevant multilateral bodies will follow. Moreover, BIS explained that additional changes of this type to US export controls will follow, and that this is only “the first action related to the larger effort to re-structure and re-align the Country Groups” in the EAR. The Country Groups are a key mechanism in the EAR for imposing export controls based on the type of technology and destination.

New Export Controls on Russia
The key change made by BIS is the removal of Russia from Country Groups A:2 and A:4, which receive more favorable treatment under the EAR’s proliferation-related controls implemented pursuant to the multilateral Missile Technology Control Regime (MTCR) and Nuclear Suppliers Group (NSG), respectively. Russia is now the only MTCR state excluded from Country Group A:2, and Russia now joins China as the only NSG state excluded from Country Group A:4. Russia is already excluded from the other “A” country groups eligible for favorable treatment under the EAR, including A:1 for the Wassenaar Arrangement participating states, even though Russia is a Wassenaar Arrangement participating state. The US government’s view appears to be that, even though Russia participates in these multilateral export control bodies, it is not adequately adhering to their rules and norms and therefore should not benefit from less restrictive trade in advanced goods and technologies within this like-minded community of states.

Correspondingly, this new BIS rule adds Russia to Country Groups D:2 and D:4, which list countries that are subject to more restrictive nuclear nonproliferation and missile technology export controls, respectively. Russia was already included in the other more restrictive “D” country groups, except for the D:5 arms embargo list (although many US arms embargo policies have nonetheless applied to Russia).

As a result, under the EAR’s Commerce Country Chart, a license will now be required for Russia for items controlled for nuclear nonproliferation (NP1) reasons under the EAR. NP1 controls already apply to China and most other countries in the world, but historically there had been a relatively high degree of civil nuclear trade and cooperation between the United States and Russia, allowing Russia to benefit from less restrictive export controls in this area. That status under the EAR is now largely revoked. However, Russia is not being subjected to the more restrictive “NP2” controls that apply to countries such as Pakistan, Libya, Iraq and Israel. Items controlled for missile technology (MT) reasons already required a license to Russia (along with all other countries except Canada), so no new destination-based licensing requirements are being imposed as a result of Russia’s addition to Country Group D:4.
As a result of these changes, there is now a “presumption of denial” for any BIS license applications for Russia when the items are controlled for NP1 or MT reasons, except such items that are in support of US-Russia civil space cooperation activities or commercial space launches, which will be reviewed on a case-by-case basis. Furthermore, Russia is no longer eligible for certain license exceptions under the EAR.

In addition, new licensing requirements based on certain restricted end-uses are being imposed on Russia, even where the Commerce Country Chart’s destination-based licensing requirements do not apply to Russia (e.g., for “EAR99” items). This change is being implemented through the EAR’s end-use controls in Part 744, which operate independently from the destination-based Commerce Country Chart controls. These restricted end uses include the design, development, production, or use of nuclear explosive devices, missiles, and certain rocket systems and unmanned aerial vehicles (UAVs).

According to BIS, these new trade restrictions on Russia have been imposed due to “proliferation concerns,” in particular “to address US concerns about Russia’s lack of cooperation and accountability for US-origin items and diversion to unauthorized or prohibited proliferation activities, end uses, and end users. Specifically, Russia has not been cooperative in allowing BIS to perform pre-license checks or post-shipment verifications related to US-origin goods.” In short, the US government appears to view Russia as a less reliable partner in adhering to and enforcing international non-proliferation norms, and as more likely to allow US products and technologies to end up in the wrong hands.

This rule also imposes a “presumption of denial” when BIS reviews applications for licenses to export to Russia items that are controlled for chemical and biological weapons proliferation (CB) reasons. BIS explained that these changes “further accentuate[] the seriousness” with which the US government viewed the attempted Novichok nerve agent assassination of former Russian military intelligence officer Sergei Skripal and his daughter in the United Kingdom in 2018. In response to this incident, the US government had imposed additional restrictions on trade with Russia in August 2018 and August 2019 pursuant to the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (CBW Act). We anticipate that this most recent BIS rule change will have a more significant impact on trade with Russia than these earlier actions under the CBW Act.

New Export Controls on Yemen

The February 24, 2020 rule issued by BIS also tightens export controls on Yemen, removing it from more favorable treatment under Country Group B and adding it to Country Group D:1 to impose a licensing requirement for items controlled for NS reasons. These include a broad array of military and spacecraft technologies, sensitive electronics, and others.

License applications to provide NS-controlled items to Yemen can still be granted if BIS determines that the items are for civilian use or otherwise would not make a significant contribution to Yemen's military potential that would prove detrimental to US national security interests. Additional Part 744 end-use restrictions will also apply, including for microprocessors and associated software and technology for military end uses or end users, and for vessels and aircraft located in Yemeni ports or registered in Yemen. Moreover, the jurisdictional scope of the EAR will expand to cover reexports to Yemen of certain foreign “direct products” of certain US-origin technology or software.

Furthermore, restrictions on the use of the following license exceptions have been imposed for Yemen:

- 740.3, Shipments of limited value (LVS)
- 740.4, Shipments to Country Group B countries (GBS)
- 740.6, Technology and software under restriction (TSR)
- 740.9, Temporary imports, exports, reexports, and transfers (in-country) (TMP)
- 740.10, Servicing and replacement of parts and equipment (RPL)
- 740.12, Gift parcels and humanitarian donations (GFT)
- 740.14, Baggage (BAG)
- 740.15, Aircraft and vessels (AVS)
- 740.16, Additional permissive reexports (APR)
- 740.17, Encryption, commodities, software, and technology (ENC)

Conclusion and Takeaways

For companies with shipments already on dock for loading, loaded for shipment, or en route to Russia or Yemen that would now require an EAR license under this rule, there is a narrow “savings clause” allowing the completion of those shipments under the pre-existing rules within 30 days of February 24.

US export controls change frequently, and BIS has stated specifically that more changes to the EAR’s country groups are to be expected. Companies should follow these developments closely and seek assistance from counsel to ensure that their export compliance procedures are properly tailored to the risks in their business.
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