

Insights

MORE END USE/END USER RESTRICTIONS COMING FROM BIS

Feb 24, 2021

SUMMARY

Adding to the challenges of implementing the expanded military end use/end user rule in Part 744.21 of the Export Administration Regulations (“EAR”), restrictions on transactions involving military-intelligence end uses and military-intelligence end users are set to go into effect on March 16, 2021. The US Commerce Department, Bureau of Industry and Security (“BIS”) is accepting comments until March 1, 2021, on the Interim Final Rule it published January 15, 2021 (“MIEU Rule”) introducing these changes. Although further modifications may follow, the current published Interim Final Rule will become effective March 16. Organizations should ensure that their processes have been updated to reflect these new restrictions.

The military-intelligence end users and military-intelligence end uses covered by the MIEU Rule are a subset of the former definitions of military end use and military end user in Part 744.21 of the EAR. Military-intelligence end uses include the design, development, production, use, operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of, or incorporation into, items on the U.S. Munitions List, or classified under ECCNs ending in A018 or under 600 series ECCNs, which are intended to support the actions or functions of a military-intelligence end user.

Military-intelligence end users include intelligence or reconnaissance organizations of any armed service or national guard. 744.22(f)(2) includes examples of military-intelligence end users in each of the jurisdictions covered by the rule.

There are two key aspects of these new regulations: restrictions on items subject to the EAR and restrictions on activities by US persons. First, the MIEU Rule creates a new Part 744.22, pursuant to which a license is required for the export, re-export, or in-country transfer of any item subject to the EAR when there is knowledge that the item is intended entirely or in part for a military-intelligence end use or a military-intelligence end user in China, Cuba, Iran, North Korea, Russia, Syria, or Venezuela. Unlike the restrictions in the military end-use and military-end-user rule in Part 744.21 of

the EAR which apply only to those items set out in Supplement No. 2 to Part 744, the restrictions in 744.22 apply to all items subject to the EAR, including items designated as EAR99.

Second, the MIEU Rule also imposes a license requirement for activities by US persons, when such activities support a military-intelligence end user or military-intelligence end use in China, Cuba, Iran, North Korea, Russia, Syria, or Venezuela. All such activities are covered by the rule, regardless of whether they involve items subject to the EAR. Support is broadly defined to include the following:

- Shipping, transmitting, or transferring (in-country) items that are not subject to the EAR, but that the person knows or should know will be used for a military-intelligence end use or by a military-intelligence end user;
- Facilitating any shipment, transmission, or in-country transfer described above; or
- Performing any contract, service, or employment—including, but not limited to ordering, buying, removing, concealing, storing, using, selling, loaning, disposing, servicing, financing, or transporting, freight forwarding, or conducting negotiations—with knowledge that the performance may assist or benefit a military-intelligence end use or a military-intelligence end user.

While the geographic scope of the restrictions under the MIEU Rule is broader than the military end use/end user restrictions in Part 744.21 of the EAR, the key impact will be with respect to transactions involving China, Russia and Venezuela since the other destinations (Cuba, Iran, North Korea and Syria) are already covered by broad embargoes and economic sanctions that restrict activities of US persons and transactions involving items subject to the EAR. One outlier involves items designated EAR99 that might previously have been supplied to Iran out of inventory in a third country by non-US persons. If the end user or end use for such a transaction is within the MIEU Rule, a license would now be required (and likely denied).

Organizations that engage in transactions involving any of the countries covered by this rule, and particularly China, Russia, and Venezuela, should ensure that they have updated their compliance programs to address these additional considerations, including identifying military-intelligence end uses and military-intelligence end users so that licenses may be sought as required under the rule.

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- International Trade

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