

US

BIS Amends EAR to Suspend License Exceptions for Hong Kong

On July 31, 2020, the US Department of Commerce, Bureau of Industry and Security (BIS) published in the *Federal Register* a Final Rule amending the Export Administration Regulations (EAR) to suspend the availability of all License Exceptions for Hong Kong Special Administrative Region (Hong Kong) of the People's Republic of China (China) that previously provided differential treatment compared with the License Exceptions available for China. This Final Rule removes the availability of the following License Exceptions for all exports, reexports or transfers (in-country) of items to Hong Kong:

- Shipments of Limited Value (LVS) (§ 740.3)
- Shipments to Group B Countries (GBS) (§ 740.4)
- Technology and Software under Restriction (TSR) (§ 740.6)
- Computers, Tier 1 only (APP) (§ 740.7(c))
- Temporary Imports, Exports, Reexports and Transfers (in-country) (TMP) (§ 740.9(a)(11), (b)(2)(ii)(C), and (b)(5))
- Servicing and Replacement Parts and Equipment (RPL) (§ 740.10(a)(3)(viii), (a)(4), (b)(1) except as permitted by Country Group D:5, and (b)(3)(i)(F) and (ii)(C))
- Governments (GOV) (§ 740.11(c)(1) – Cooperating governments only)
- Gift Parcels and Humanitarian Donations (GFT) (§ 740.12)
- Technology and Software Unrestricted (TSU) (§ 740.13)
- Baggage (BAG) (§ 740.14) (except as permitted by § 740.14(d))
- Aircraft, Vessels, and Spacecraft (AVS) (§ 740.15(b)(1), (b)(2), and (c))
- Additional Permissive Reexports (APR) (§ 740.16(a) and (j))
- Strategic Trade Authorization (STA) (§ 740.20(c)(2))

BIS Designates Huawei Entities, Removes Temporary General License and Amends Foreign-produced Direct Product Rule

On August 20, BIS published in the *Federal Register* a Final Rule promulgating three actions. First, BIS added 38 non-US affiliates of Huawei Technologies Co., Ltd. (Huawei) to the Entity List. This followed BIS's May 16, 2019 action where it first added Huawei and 68 of its non-US affiliates to the Entity List, and BIS's subsequent August 19, 2019 action where it designated an additional 46 of Huawei's non-US affiliates to the Entity List.

Second, BIS removed the Temporary General License (TGL) previously available for certain transactions involving Huawei and its non-US affiliates. However, the Final Rule makes a limited permanent authorization for the Huawei entities on the Entity List. While the Final Rule allows most of the provisions of the TGL to expire, it has revised the Entity List by adding a new footnote 2 and revising the License Requirement column for the Huawei entries on the Entity List to add a reference to footnote 2. The new footnote 2 is based on the same criteria from paragraph (c)(3) (Cybersecurity research and vulnerability disclosure) of the TGL.

Third, BIS amended the EAR by making changes to General Prohibition 3, also known as the foreign-produced direct product rule (FDPR). This change in the FDPR follows an earlier change by BIS from May 2020, where BIS published in the *Federal Register* an interim final rule that amended the FDPR by expanding the rule as applied to certain organizations on the Entity List (Designated Entity Direct Product Rule). See [our publication](#) on the May 2020 changes to the FDPR.

National Security Direct Product Rule

Prior to the new rule, foreign-made items that were the direct product of US technology and software were subject to the EAR only if (i) the US technology and software were subject to national security controls; (ii) the direct product was subject to national security controls; and (iii) the foreign-made product was destined for a D:1, E:1 or E:2 country. With respect to the output of plants, foreign-made items were subject to the EAR if they were the direct product of a complete plant or any major component of a plant, but only if (i) such plant or component is the direct product of technology subject to national security controls; and (ii) such foreign-made direct products of the plant or component were subject to national security controls (National Security Direct Product Rule).

Designated Entity Direct Product Rule

The new rule expands the scope of certain technology or software subject to the EAR, where there is knowledge that the foreign-produced item is destined to a designated organization on the Entity List. BIS amended the foreign-produced direct product rule in General Prohibition Three by adding prohibitions on the reexport, export from abroad or transfer (in-country), without a license or license exception, of any foreign-produced item controlled under a new footnote 1 of Supplement No. 4 to part 744 (Entity List) when there is "knowledge" that:

1. The foreign-produced item will be incorporated into, or will be used in the "production" or "development" of any "part," "component," or "equipment" produced, purchased, or ordered by any entity with a footnote 1 designation in the license requirement column on the Entity List (Designated Entity)

2. Any entity with a footnote 1 designation in the license requirement column of this supplement is a party to any transaction involving the foreign-produced item, e.g., as a “purchaser,” “intermediate consignee,” “ultimate consignee” or “end-user”

Paragraph (a) to footnote 1 makes certain foreign-produced items subject to the EAR if the foreign-produced item is the direct product of “technology” or “software” subject to the EAR and specified in the following Export Control Classification Numbers (ECCN): 3D001; 3D991; 3E001; 3E002; 3E003; 3E991; 4D001; 4D993; 4D994; 4E001; 4E992; 4E993; 5D001; 5D991; 5E001; or 5E991 (Specified Technology or Software). Under paragraph (a), a person (US or non-US) would be in violation of the EAR, if:

- The person reexported, exported from abroad or transferred (in-country) a foreign-made item without a license or license exception
- The person had “knowledge” that (i) the foreign-produced item was going to be used in the production or development of any part, component, or equipment produced, purchased, or ordered by any Designated Entity; or (ii) that the Designated Entity is a party to any transaction involving the foreign-produced item
- The foreign-made item is the direct product of Specified Technology or Software (including US-origin Specified Technology or Software or foreign-made Specified Technology or Software that is subject to the EAR)

Paragraph (b) to footnote 1 makes certain foreign-produced items subject to the EAR if the foreign-produced item is produced by any plant or major component of a plant that is located outside the US, when the plant or major component of a plant, whether made in the US or a foreign country, itself is a direct product of US-origin Specified Technology or Software. Note (1) to paragraph (b) to footnote 1 defines a major component of a plant located outside the US as equipment that is essential to the “production” of an item, including testing equipment. Note (2) to paragraph (b) to footnote 1 states that a foreign-produced item includes any foreign-produced wafer whether finished or unfinished.

Under paragraph (b), a person (US or non-US) would be in violation of the EAR, if:

- The person reexported, exported from abroad or transferred (in-country) a foreign-made item without a license or license exception
- The person had “knowledge” that (i) the foreign-produced item was going to be used in the production or development of any part, component, or equipment produced, purchased, or ordered by any Designated Entity; or (ii) that the Designated Entity is a party to any transaction involving the foreign-produced item
- The foreign-made item is the direct product of a plant or major component of a plant located outside the US when the plant or major component of a plant, whether made in the US or a foreign country, itself is a direct product of Specified Technology or Software

Finally, in addition to the amendments to the FDPR, BIS also added a note to the introductory paragraph of footnote 1, which adjusts the license review policy for certain Designated Entities on the Entity List for license applications for foreign-produced items that are capable of supporting the “development” or “production” of telecom systems, equipment and devices at only below the 5G level (e.g., 4G, 3G, etc.). Such license applications will be reviewed on a case-by-case basis.

BIS Publishes ANPRM Regarding Certain Foundational Technologies

On August 27, BIS published in the *Federal Register* an advanced notice of proposed rulemaking (ANPRM) regarding the identification and review of controls for certain foundational technologies as described in Section 1758 of the Export Control Reform Act (ECRA) of 2018 (ECRA) (50 USC § 4801). Section 1758 of ECRA requires the Department of Commerce to establish appropriate export controls on “emerging and foundational technologies,”¹ which are those technologies that are essential to the national security of the US and are not “critical technologies” described in Section 721(a)(6)(A)(i)-(v) of the Defense Production Act of 1950, as amended (DPA). Those items that are both subject to the EAR (15 CFR parts 730-774) and also are not “critical technologies” under the DPA are items whose reasons for control on the Commerce Control List (CCL) are only for anti-terrorism (AT), crime control (CC), or short supply (SS) reasons, subject to United Nations (UN) embargoes, or designated as EAR99.

The export controls established by BIS under section 1758 of ECRA would apply, at a minimum, to countries subject to an embargo, including an arms embargo, imposed by the US. BIS seeks to determine whether there are foundational technologies that warrant more restrictive controls, such as technologies that have been the subject of illicit procurement attempts, which may indicate certain dependency on US technologies to further foreign military or intelligence capabilities in countries of concern or development of weapons of mass destruction. Additionally, ECRA requires the following factors be taken into account when identifying emerging and foundational technologies and establishing appropriate controls:

- The development of foundational technologies in foreign countries
- The effect export controls may have on the development of such technologies in the US
- The effectiveness of export controls imposed pursuant to ECRA on limiting the proliferation of foundational technologies to foreign countries

¹ The term “foundational technologies” includes “technology,” “commodities,” and “software” as those terms are defined in the EAR.

As part of its ANPRM, BIS is seeking public comments, which will inform the interagency process to identify and describe foundational technologies. Such technologies could include, for example, items currently controlled for military end use or military end user reasons under Supp. No. 2 to part 744 of the EAR, which may be tied to indigenous military innovation efforts in China, Russia or Venezuela, and may pose a national security threat. Certain other items controlled on the CCL for AT reasons or that are classified as EAR99, and which may not require an export license for certain countries subject to a US arms embargo, may also warrant review to determine if such items are foundational technologies essential to US national security interests. However, BIS is not seeking to expand jurisdiction over technologies that are not currently subject to the EAR, such as “fundamental research” described in § 734.8 of the EAR.

BIS is seeking comments on the following:

1. How to further define foundational technology to assist in identification of such items
2. Sources to identify such items
3. Criteria to determine whether controlled items identified in AT level Export Control Classification Numbers (ECCNs), in whole or in part, or covered by EAR99 categories, for which a license is not required to countries subject to a US arms embargo, are essential to US national security
4. The status of development of foundational technologies in the US and other countries
5. The impact specific foundational technology controls may have on the development of such technologies in the US
6. Examples of implementing controls based on end-use and/or end-user rather than, or in addition to, technology-based controls
7. Any enabling technologies, including tooling, testing, and certification equipment, that should be included within the scope of a foundational technology
8. Any other approaches to the issue of identifying foundational technologies important to US national security, including the stage of development or maturity level of a foundational technology that would warrant consideration for export control

Parties wishing to submit comments can do so either through the [Federal eRulemaking Portal](#) using the docket ID BIS-2020-0029 or parties may physically submit comments by referring to RIN 0694-AH80 and mailing comments to the following address:

**Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
Room 2099B
14th Street and Pennsylvania Avenue NW
Washington DC 20230**

Comments must be submitted on or before October 26, 2020.

DDTC Announces Upcoming Changes to the Policy of Denial for the Republic of Cyprus

On September 2, the Department of State, Directorate of Defense Trade Controls (DDTC) announced that, on October 1, 2020, the Department will temporarily amend the International Traffic in Arms Regulations (ITAR) § 126.1(r) to reflect the temporary waiver of policy of denial for the export, reexport, retransfer, and temporary import of non-lethal defense articles and defense services destined for or originating in the Republic of Cyprus (ROC). The waiver is effective for one fiscal year.

DDTC published the following FAQs regarding the temporary policy changes:

FAQs

Q: What type of equipment will the ROC be able to buy that it could not buy before?

A: The temporary waiver will allow for commercial purchases of non-lethal defense articles and defense services described on the US Munitions List. Potential exports to Cyprus will be reviewed on a case-by-case basis for compliance with US law and policy, the same practice we follow with all our partners.

Q: What is the definition of non-lethal defense articles and defense services?

A: The ITAR does not define “non-lethal.” The interagency license approval process will review potential exports to Cyprus on a case-by-case basis to ensure only non-lethal defense articles and defense services are approved for export.

Q: Will this waiver apply only to government purchases or also to civilian/private end users?

A: Currently, the ITAR allows the commercial sale of defense articles and defense services for the UN Forces in Cyprus or for civilian end-users. The only change this temporary ITAR amendment makes is to enable the ROC government to purchase non-lethal defense articles and defense services.

Q: If the government receives an export license in FY21, do the subject defense articles and defense services need to be delivered within FY21?

A: No. Export authorizations issued by DDTC may be valid for up to 48 months, or four years, and will not be automatically revoked or rescinded if/when the temporary amendment to the ITAR expires.

Q: Why is the temporary waiver only for one year?

A: The provisions of the Eastern Mediterranean Security and Energy Partnership Act of 2019 and the FY 2020 National Defense Authorization Act (NDAA) dictate that waivers can only be issued on a one-year basis.

OFAC Announces Settlement Agreement With an Individual

On August 11, OFAC [announced](#) a US\$5,000 settlement with a natural US person (US Person-1) for 24 apparent violations of the Foreign Narcotics Kingpin Sanctions Regulations, 31 CFR part 598. According to OFAC, “between approximately October 2015 and August 2016, US Person-1 engaged in at least 24 transactions that dealt in the blocked property interests of a foreign individual who, at the time, was a specially designated narcotics trafficker in apparent violation of the FNKSR.” Further, according to OFAC, US Person-1 did not voluntarily disclose these apparent violations.

OFAC Announces Settlement Agreement With Deutsche Bank Trust Company Americas

On September 9, OFAC [announced](#) two settlements totaling US\$583,100 with Deutsche Bank Trust Company Americas (DBTCA) for apparent violations of the Ukraine-related Sanctions Regulations. DBTCA “agreed to pay US\$157,500 for processing a large payment, related to a series of purchases of fuel oil, through the US that involved a property interest of a designated oil company in Cyprus.” DBTCA also “agreed to remit US\$425,600 for processing payments destined for accounts at a designated financial institution.” OFAC determined that neither case was voluntarily self-disclosed to OFAC, and that the apparent violations constitute non-egregious cases.

OFAC Targets Hizballah Executive Council Companies and Official

On September 17, OFAC [announced](#) that it sanctioned two Lebanon-based companies, Arch Consulting and Meamar Construction, for being owned, controlled or directed by Hizballah. OFAC also designated a Hizballah Executive Council official for being closely associated with both companies. According to Secretary Mnuchin, “Through Hizballah’s exploitation of the Lebanese economy and manipulation of corrupt Lebanese officials, companies associated with the terrorist organization are awarded government contracts.” Secretary Mnuchin further stated, “The US remains committed to targeting Hizballah and its supporters as they corruptly abuse Lebanese resources to enrich their leaders while the Lebanese people suffer from inadequate services.”

OFAC Amends Cuba Assets Control Regulations

On September 23, 2020, OFAC [announced](#) that it amended the Cuban Assets Control Regulations (CACR) in order to further implement President Trump’s foreign policy to deny to Cuban regime sources of revenue. Specifically, the changes involve limitations surrounding restricting lodging at certain properties in Cuba, importing Cuban-origin alcohol and tobacco products, attending or organizing professional meetings or conference in Cuba, and participating in and organizing certain public performances, clinics, workshops, competitions and exhibitions in Cuba. According to Treasury Secretary Steven Mnuchin, “The Cuban regime has been redirecting revenue from authorized US travel for its own benefit, often at the expense of the Cuban people.” OFAC has also released new and updated [Frequently Asked Questions](#).

EU

EU Issues Notice to Stakeholders Regarding UK’s Withdrawal and Export Controls

On September 16, the EU Commission issued a [notice](#) to all stakeholders explaining the legal situation after the end of the transition period of EU export control regulations with regard to the UK. The Commission has confirmed that:

- Regulation (EC) No 428/2009 setting up a community regime for the control of exports, transfer, brokering and transit of dual-use will no longer apply to the UK after the end of transition period
- Export licenses issued by the UK under Regulation (EC) No 428/2009 will no longer be valid for exports of dual-use items from the EU to third countries after the end of transition period, and such exports of dual-use items from the EU to third countries will require a license issued by the competent authority in the relevant EU member state
- Intra-EU transfer licenses (applicable to intra-EU transfer of very sensitive dual-use items listed in Annex IV to Regulation (EC) No 428/2009) issued by the competent authority of an EU member state for transfers to the UK issued before the end of the transition period will become valid licenses for exports to the UK after the end of the transition period, and until the validity of the license expire
- Under Article 47(1) of the Withdrawal Agreement, movements of goods ongoing at the end of the transition period (including dual-use goods) will be treated as intra-Union movements regarding importation and exportation licensing requirements in EU law
- Under the Protocol of the Withdrawal Agreement on Ireland/Northern Ireland, at least for the next four years, Northern Ireland will be considered as part of the EU for the purposes of Regulation (EC) No 428/2009 setting up a community regime for the control of exports, transfer, brokering and transit of dual-use

EU Imposes Sanctions Against Cyberattacks

On July 30, the European Council (the Council) imposed [restrictive measures](#) against six individuals and three entities responsible for or involved in various cyberattacks. The sanctions, adopted in May 2019 and recently renewed, include a travel ban and an asset freeze, with regards to those involved in the attempted cyberattack against the Organisation for the Prohibition of Chemical Weapons, also part of organizations such as “WannaCry,” “NotPetya” and “Operation Cloud Hopper.”

EU Announces Sanctions on Belarus

On October 2, the Council imposed [restrictive measures](#) against 40 individuals identified as responsible for repression against peaceful demonstrators, opposition members and journalists following the 2020 presidential election in Belarus.

EU Extends Sanctions With Respect to the Situation in Ukraine

On September 10, the Council issued [Implementing Regulation 2020/1267](#) concerning restrictive measures in respect to Ukraine, extending the sanctions until March 15, 2021 for 175 persons and 44 entities. The restrictions include travel restrictions and freezing of assets.

EU Imposes Sanctions Related to the Libyan Conflict

On September 21, through [Decision 2020/1310](#) the Council imposed targeted restrictive measures on two persons and three entities for the involvement in activities violating the UN arms embargo on Libya.

Commission Announces Actions to Make Europe's Raw Materials Supply More Secure and Sustainable

On September 3, the Commission presented an [Action Plan on Critical Raw Materials](#), the 2020 List of Critical Raw Materials and a foresight study on critical raw materials for strategic technologies and sectors from the 2030 and 2050 perspectives. The Action Plan looks at the current and future challenges and proposes actions to reduce Europe's dependency on third countries, diversifying supply from both primary and secondary sources and improving resource efficiency and circularity while promoting responsible sourcing worldwide.

UK

UK Prepares to Join US and Canada in Sanctioning Belarus for Human Rights Violations

On September 24, UK Foreign Secretary Dominic Raab [announced](#) in the House of Commons that the UK does not accept the results of the rigged election and "thuggery" imposed on protestors in Belarus. Despite efforts on behalf of the EU to impose sanctions, Raab made clear that delays in Brussels meant that the UK would adopt other allies to target sanctions against those responsible for human rights abuses. Raab has directed the Foreign Office to prepare Magnitsky sanctions for those responsible and stated that the UK was working in coordination with the US and Canada in preparation of appropriate listings. Raab also told the House of Commons that the UK will give a further £1.5 million to human rights groups, independent media organizations and community groups over the next two years. This will include £800,000 in support for journalists helping to draw attention to the ongoing repression in Belarus.

EU Raises Possibility on Sanctioning the UK for Breach of Brexit Withdrawal Agreement

If passed, the UK's controversial [Internal Market Bill](#) (the Bill) threatens to breach certain provisions of the Brexit Withdrawal Agreement. This could result in a dispute between the parties before the European Court of Justice in Luxembourg. If the UK was found to be in breach of the agreement, the EU would have the power to impose a fine, tariffs and even sanctions on the UK. The Bill sparked controversy because if passed, it would give unilateral legal power to UK ministers to oversee elements of the Northern Ireland protocol.

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About Us

Our export controls and sanctions lawyers have the ability to provide advice on the shifting regulatory framework on both sides of the Atlantic. We have extensive experience in advising and representing a wide range of companies and financial institutions in Europe, the US and other jurisdictions on export control and sanctions from a multijurisdictional perspective. Our team is part of our overall International Trade Practice, providing a “one-stop shop” solution to global trade compliance through rapid, professional and tailored advice and compliance tools to fit your business needs and processes.

ITAR Handbook

Organizations engaged in the trade of items specially designed for military or space applications are encouraged to download our complimentary [*ITAR Practitioner's Handbook*](#), which covers the International Traffic in Arms Regulations (ITAR) and the US Department of Commerce “600 Series.”