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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 742

[Docket No. 201022-0277]

RIN 0694-AI05

Amendments to National Security License Review Policy under the Export Administration Regulations

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: In this final rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) to revise the license review policy for items controlled for national security reasons destined to the People’s Republic of China (PRC), Venezuela, or the Russian Federation (Russia). With this revision, BIS and reviewing agencies will determine whether the export, reexport, or transfer (in-country) of items controlled for National Security (NS) reasons will make a material contribution to the “development,” “production,” maintenance, repair, or operation of weapons systems of the PRC, Venezuela, or the Russian Federation, as well as setting forth several factors that will be considered in reviewing license applications.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

Background

The Bureau of Industry and Security is amending the license review policy for items that have a national security (NS) reason for control (i.e., pursuant to the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies) when destined to the People's Republic of China (PRC), Venezuela, or the Russian Federation (Russia)(§ 742.4(b)(7)). BIS and reviewing agencies will determine, on a case-by-case basis, whether the proposed export, reexport, or in-country transfer of such items will make a material contribution to the weapons systems capability of those countries. The determination will include an illustrative list of factors that will be considered in reviewing license applications. The illustrative list of factors will provide more guidance to exporters on information to be included with their license applications and assist BIS and reviewing agencies in evaluating those applications. Provisions in other sections of part 742 continue to apply to the review of license applications for the export, reexport, or in-country transfer of NS controlled items to the PRC, Venezuela or Russia. When an export, reexport, or in-country transfer is destined for a civil end user for civil end uses in the PRC, Venezuela, or Russia, there is a presumption of approval. There is a presumption of denial for license applications to export, reexport, or

transfer items that would make a material contribution to the “development,” “production,” maintenance, repair, or operation of weapons systems, subsystems, and assemblies.

As required by section 1756(d) of the Export Control Reform Act of 2018 (50 U.S.C. 4815(d)), the review will also include an assessment of the impact of a proposed export of an item on the United States defense industrial base and the denial of an application for a license that would have a significant negative impact on such defense industrial base.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA) (codified, as amended, at 50 U.S.C. 4801-4852). ECRA provides the legal basis for BIS’s principal authorities and serves as the authority under which BIS issues this rule.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. This final rule will support the national security and foreign policy objectives of the United States by making the

license review policy for national security items destined to the PRC, Venezuela, or the Russian Federation more restrictive, as well as clarifying the license review policy by setting forth and making transparent to the public a robust illustrative list of license application review factors for such applications.

2. Notwithstanding any other provision of law, no person may be required to respond to or be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves a collection currently approved by OMB under control number 0694-0088, Simplified Network Application Processing System. This collection includes, among other things, license applications, and carries a burden estimate of 42.5 minutes for a manual or electronic submission for a total burden estimate of 31,878 hours. BIS expects that all applicants may spend more time gathering information to include in the license applications to satisfy the newly added license application review factors. However, others will refrain from applying because they either cannot satisfy the newly-added license review criteria or know that their license would be denied because their item would make a ‘material contribution’ to the military capabilities of PRC, Venezuela, or the Russian Federation. Therefore, BIS believes that the added hours for preparing an application will be offset by the decrease in applications and result in no change to the burden hours associated with this collection.

3. This rule does not contain policies with federalism implications as that term is defined under Executive Order 13132.

4. Pursuant to section 1762 of the Export Control Reform Act of 2018 (50 U.S.C. 4821), which was included in the John S. McCain National Defense Authorization Act for Fiscal Year 2019, this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date.

5. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

6. This final rule is not subject to the requirements of Executive Order 13771 (82 FR 9339, February 3, 2017) because it is issued with respect to a national security function of the United States. The cost-benefit analysis required pursuant to Executive Orders 12866 and 13563 indicates that this rule is intended to improve national security as its primary direct benefit. Specifically, setting forth a robust illustrative list of license application review factors and revising the national security license review policy by expanding the meaning of what would be considered a national security threat should increase license outcome predictability and consistency, as well as increase the number of application submissions that include information that satisfies the license application review factors, which should reduce the risk that exports, reexports, and transfers (in-country) of items subject to the EAR could be diverted and contribute to the military capability of countries of concern, contrary to U.S. national security interests. Accordingly, this rule meets the requirements set forth in the April 5, 2017 OMB guidance

implementing Executive Order 13771 (82 FR 9339, February 3, 2017), regarding what constitutes a regulation issued “with respect to a national security function of the United States,” and is, therefore, exempt from the requirements of Executive Order 13771.

List of Subjects in 15 CFR Part 742

Exports, Terrorism.

Accordingly, part 742 of the Export Administration Regulations (15 CFR parts 730-774) is amended as follows:

PART 742 – CONTROL POLICY – CCL BASED CONTROLS

1. The authority citation for part 742 continues to read as follows:

Authority: 50 U.S.C. 4801-4852; 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; Sec. 1503, Pub. L. 108–11, 117 Stat. 559; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Presidential Determination 2003-23, 68 FR 26459, 3 CFR, 2004 Comp., p. 320; Notice of November 12, 2019, 84 FR 61817 (November 13, 2019).

2. Section 742.4 is amended by revising paragraph (b)(7) to read as follows:

§ 742.4 National security.

(b) ***

(7)(i) For the People's Republic of China (PRC), Venezuela, and the Russian Federation, all applications will be reviewed to determine the risk of diversion to a military end user or military end use. There is a general policy of approval for license applications to export, reexport, or transfer items determined to be for civil end users for civil end uses. There is a presumption of denial for license applications to export, reexport, or transfer items that would make a material contribution to the "development," "production," maintenance, repair, or operation of weapons systems, subsystems, and assemblies, such as, but not limited to, those described in supplement no. 7 to part 742 of the EAR, of the PRC, Venezuela, or the Russian Federation.

(ii) The following factors are among those that will be considered in reviewing license applications described in paragraph (b)(7)(i) of this section:

- (A) The appropriateness of the export, reexport, or transfer for the stated end use;
- (B) The significance of the item for the weapons systems capabilities of the importing country;
- (C) Whether any party is a 'military end user' as defined in § 744.21(g) of the EAR;
- (D) The reliability of the parties to the transaction, including whether:
 - (1) An export or reexport license application has previously been denied;
 - (2) Any parties are or have been engaged in unlawful procurement or diversion activities;
 - (3) The parties are capable of securely handling and storing the items; and
 - (4) End-use checks have been and may be conducted by BIS or another U.S. government agency on parties to the transaction;
- (E) The involvement of any party to the transaction in military activities, including

activities involving the “development,” “production,” maintenance, repair, or operation of weapons systems, subsystems, and assemblies;

(F) Government strategies and policies that support the diversion of exports from their stated civil end use and redirection towards military end use; and

(G) The scope and effectiveness of the export control system in the importing country.

(iii) The review will also include an assessment of the impact of a proposed export of an item on the United States defense industrial base and the denial of an application for a license that would have a significant negative impact, as defined in section 1756(d)(3) of the Export Control Reform Act of 2018 (50 U.S.C. 4815(d)(3)), on such defense industrial base.

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