

GIBSON DUNN



International Trade Update

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## Proposed Rules Call for Significant Restrictions on Facial Recognition Technologies, Defense Services, U.S. Persons Activities, and New Classes of Foreign End-Users

The U.S. government recently proposed rules to significantly expand export control restrictions on items used to perpetuate human rights abuses and to target military, intelligence, and related end users acting contrary to U.S. national security interests. The extensive nature of these proposed restrictions will require many companies to implement enhanced compliance programs.

On July 25, 2024, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) and the U.S. Department of State [announced](#) three proposed rules to add new controls on specific items (including commodities, software, and technology), services, end uses, and end users. Collectively, these rules propose significant restrictions on the export of items to many new classes of foreign end users in over 40 countries (in certain cases); impose additional restraints on the ability of U.S. persons to support foreign military, intelligence, and security end users; create new restrictions on facial recognition technology; and expand and refine the definition of "defense services" under the U.S. International Traffic in Arms Regulations (ITAR) to address concerns emanating from military, intelligence, and related end users, as well as to combat the use of certain items in perpetuating human rights abuses.

These proposed rules—published as three separate notices in the *Federal Register*<sup>11</sup>—build upon existing restrictions and, in part, implement provisions of the National Defense Authorization Act for Fiscal Year 2023 calling for prohibitions on U.S. persons assisting foreign military,

security, and intelligence services that threaten national security interests and/or are complicit in human rights abuses. The proposed rules present yet another example of the U.S.'s continued efforts "to put human rights at the center of [its] foreign policy"<sup>[2]</sup> as discussed in our recent client alert on the [Export Controls and Human Rights Initiative Code of Conduct](#) and [2023 Year-End Sanctions and Export Controls Update](#).

Importantly, the proposed rules do not immediately create any new obligations and may undergo additional changes following the public comment period, though companies should begin preparing now to enhance their compliance policies and procedures. Comments on the proposed rules can be submitted directly to the relevant agency/department or at [Regulations.gov](#) until September 27, 2024.

Below we outline key provisions of the proposed rules and the changes they will bring to the U.S. Export Administration Regulations (EAR) administered by BIS and the ITAR administered by the U.S. Department of State's Directorate of Defense Trade Controls (DDTC).

## **I. Proposed Revisions to the EAR Targeting Prohibited End Users and End Uses**

The EAR currently restricts the export, reexport, or transfer (in-country) of items falling within its jurisdiction intended for certain end users or intended for certain end uses. In certain instances, the EAR specifically identifies restricted parties on various lists, including, most prominently, the "Entity List."<sup>[3]</sup> In recent years, BIS has expanded the number of lists to which parties may be named and has named certain parties to the Entity List with footnote-specific designations to impose additional restrictions. The number of disparate lists has led many in government and industry to call for a more streamlined approach. The proposed rules from BIS appear to, in part, address this concern while also expanding restrictions to a broader range of end users.

These expanded controls will likely pose particular diligence challenges for companies that utilize distributors or resellers or who otherwise sell their goods indirectly to various end users in the identified jurisdictions.

### ***A. Revised and Expanded Restrictions on "Military End User" and "Military End Uses" (15 C.F.R. § 744.21)***

The EAR currently prohibits the export, reexport, or transfer of certain items subject to the EAR to Burma/Myanmar, Cambodia, China, Nicaragua, or Venezuela whenever the exporting party has "knowledge"<sup>[4]</sup> that the item is intended, entirely or in part, for "military end users" or for "military end uses" without a license from BIS.<sup>[5]</sup> Such military end user and end use restrictions apply to all items subject to the EAR when intended for such end users/end uses in Russia or Belarus (and to certain specifically-named Russian/Belarusian entities located outside of Russia or Belarus).

The proposed rules would dramatically expand these prohibitions to all items subject to the EAR (including lower-controlled EAR99 items) and to all countries specified in Country Group D:5<sup>[6]</sup> and Macau whenever the party has "knowledge" that the item is intended, in whole or in part, for a "military end user" or "military end use," as the terms are newly defined. Additionally, BIS would no longer list military end users on the non-exhaustive Military End User (MEU) List currently

included as [Supplement 7](#) to Part 744. Rather, such entities would be added to the Entity List with either a footnote 3 (for Russia/Belarus military end users subject to additional restrictions) or footnote 5 designation (for all other military end users).

The definition of “military end users” would be redefined to focus specifically on traditional and non-traditional military actors. National police, government intelligence, and reconnaissance organizations included in the current definition of “military end users” would fall under other types of restricted end users outlined below. Specifically, the term “military end user,” as proposed, would include the “national armed services (army, navy, marine, air force, or coast guard), the national guard, or any person or entity performing the functions of a ‘military end user,’ including mercenaries, paramilitary, or irregular forces.” BIS makes clear that this definition is meant to include private companies and non-state actors that are akin to traditional armed forces.

Similarly, the definition of “military end use” would be modified slightly to apply to any item subject to the EAR (1) incorporated into a defense article described on the U.S. Munitions List (USML) outside of the United States, (2) incorporated into items classified under “600 series” Export Control Classification Numbers (ECCNs), or (3) that “supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, ‘development,’ or ‘production,’ of defense articles described on the USML,” or items classified under “600 series” ECCNs.[\[7\]](#) As written, these restrictions would extend to end uses involving defense articles and “600 series” foreign items that are not themselves subject to the EAR.

BIS will review related license applications with (1) a presumption of denial in connection with exports, reexports, or transfers to or within Burma/Myanmar, China, Cuba, Iran, Macau, Nicaragua, North Korea, Syria, and Venezuela and (2) under the license standard of review outlined in 15 C.F.R. § 746.8(b)(1) for Belarus and Russia—currently a policy of denial[\[8\]](#) for all items subject to the EAR, including for foreign-produced items subject to the EAR by application of the Russia/Belarus-Military End User Foreign Direct Product (FDP) rule. A case-by-case review policy will apply to all other destinations consistent with the standards of review outlined in 22 C.F.R. § 126.1 of the ITAR.

### ***B. New Restrictions on “Military-Support End Users” (15 C.F.R. § 744.22)***

The proposed rules create a new type of restricted end user known as a “military-support end user” defined as “any person or entity whose actions or functions support ‘military end uses,’” as defined above. Entities that BIS proactively identifies as fulfilling this definition will be identified on the Entity List with a new footnote 6, though, importantly, this list is not exhaustive, and the restrictions apply even to entities not so designated. Specifically, parties will be prohibited from exporting, reexporting, or transferring any items subject to the EAR and specified on the Commerce Control List (CCL)—i.e., those items described by an ECCN—to all countries specified in Country Group D:5[\[9\]](#) and Macau whenever the party has “knowledge” that the item is intended, entirely or in part, for a “military-support end user” without first obtaining a license from BIS (unless authorized under License Exception GOV for certain U.S. government activities). Unlike the restrictions on military end users/end uses, however, the restriction targeting “military-support end users” does not apply to EAR99 items. Thus, companies supplying non-EAR99 items will need to ensure proper diligence is conducted on entities that are

military-adjacent or that are included in military supply chains (e.g., contractors, raw material providers, manufacturers) in the relevant jurisdictions.

BIS will review license applications with (1) a presumption of denial in connection with exports, reexports, or transfers to or within Burma/Myanmar, China, Cuba, Iran, Macau, North Korea, Syria, and Venezuela and (2) under a policy of denial for Belarus and Russia (including for items covered by the Russia/Belarus-Military End User FDP rule). License applications for all other destinations will be reviewed on a case-by-case basis review policy consistent with the standards of review outlined in 22 C.F.R. § 126.1 of the ITAR.

***C. Revised and Expanded Restrictions on “Intelligence End Users” (15 C.F.R. § 744.24)***

Since 2021, the EAR has restricted the export, report, or transfer of items intended for certain “military-intelligence end users” or for “military-intelligence end uses.” The due diligence required to verify whether certain end users/end uses meet these definitions has often proved difficult for industry, particularly in countries where the line between military intelligence and civilian government services is blurred. Likely in part to address this issue, the proposed rule drops the “military” qualifier from the new restrictions and instead expands the applicable restrictions to both military and civilian intelligence end users.

Like the restrictions targeting “military-support end users” described above, the proposed rule prohibits parties from exporting, reexporting, or transferring any items subject to the EAR and specified on the CCL (i.e., all non-EAR99 items that are subject to the EAR) whenever the party has “knowledge” that the item is intended, entirely or in part, for an “intelligence end user” without first obtaining a license from BIS (unless authorized under License Exception GOV for certain U.S. government activities). The new “intelligence end user” definition includes “foreign government intelligence, surveillance, or reconnaissance organizations or other entities performing functions on behalf of such organizations.” In the proposed rule, BIS makes clear the intended breadth of this restriction, noting that “entities performing intelligence functions such as planning and directing, processing and exploiting, analyzing and producing, disseminating and integrating, surveilling, and evaluating and providing feedback” would fall within the new definition. Entities meeting the proposed definition will be identified on the Entity List with a new footnote 7 designation, though BIS makes clear this list is not exhaustive, and the restrictions apply even to entities not so designated.

Unlike other types of restricted end users discussed previously, the geographic scope of the proposed “intelligence end user” restriction is much broader and includes “intelligence end users,” from over 40 destinations included in Country Group D or E, that are not also listed in Country Group A:5 or A:6, wherever such entities may be located.<sup>[10]</sup> For example, if an intelligence end user from China (a Country Group D country) were located in the United Kingdom (a Country Group A and B country), the restriction would still apply.

As with the restrictions targeting “military-support” end users, BIS will review license applications with a (1) presumption of denial in connection with exports, reexports, or transfers to or within Burma/Myanmar, China, Cuba, Iran, Macau, North Korea, Syria, and Venezuela and (2) under a policy of denial for Belarus and Russia (including for items covered by the Russia/Belarus-Military

End User FDP rule). License applications for all other destinations will be reviewed on a case-by-case basis review policy consistent with the standard of review outlined in 22 C.F.R. § 126.1 of the ITAR.

#### ***D. New Restrictions on “Foreign-Security End Users” (15 C.F.R. § 744.25)***

The proposed rules also create another new type of restricted end user known as a “foreign-security end user.” Parties would be prohibited from exporting, reexporting, or transferring any items subject to the EAR and specified on the CCL (i.e., all non-EAR99 items) to all countries specified in Country Group D:5 or E whenever the party has “knowledge” that the item is intended, entirely or in part, for a “foreign-security end user” without first obtaining a license from BIS or unless authorized under certain provisions of License Exception GOV (applicable to certain U.S. and NATO activities). “Foreign-security end users” are defined as:

1. Governmental and other entities with the authority to arrest, detain, monitor, search, or use force in furtherance of their official duties, including persons or entities at all levels of the government police and security services from the national headquarters or the Ministry level, down to all subordinate agencies/bureaus (e.g., municipal, provincial, regional);
2. Other persons or entities performing functions of a “foreign-security end user,” such as arrest, detention, monitoring, or search, and may include analytic and data centers (e.g., genomic data centers) forensic laboratories, jails, prisons, other detention facilities, labor camps, and reeducation facilities; or
3. Entities designated with a footnote 8 designation on the Entity List.

While not as open-ended as some other restricted party definitions, the proposed definition of “foreign-security end user” will require parties to transactions to conduct sufficient due diligence on the nature of any potential end user to determine if the new restrictions will apply, as the definition includes many entities (e.g., forensic labs, certain data centers) that may appear at first glance merely civilian oriented. BIS does, however, provide some helpful guidelines, adding in supplemental notes that the definition does not include “civilian emergency medical, firefighting, and search-and-rescue end users,” including in certain situations where such services are integrated into a single public safety department. Importantly, when any end user otherwise fulfills the definition of a “military end user,” the more restrictive “military end user” prohibitions described above will apply.

BIS proposes to use an approach grounded in human rights in reviewing license applications, stating that all such applications will be assessed according to “whether there is an unacceptable risk of use in human rights violations or abuses.” Cases posing such “unacceptable risk” will be subject to a policy of denial, though no additional information is provided for what metrics BIS will use to determine what constitutes “unacceptable.” Considering human rights in license review policies would not be a novel approach for BIS. In the context of items controlled for crime control purposes, BIS has historically treated license applications favorably “unless there is civil disorder in the country or region or unless there is a risk that the items will be used to *violate or abuse human rights*,” a restriction that is expressly designed “to deter human rights violations and abuses, distance the United States from such violations and abuses, and avoid contributing to civil disorder in a country or region.”<sup>[11]</sup> In October 2020, BIS explicitly expanded this licensing

policy beyond items controlled for crime control reasons to include those items controlled for any other reason (except for short supply reasons).[\[12\]](#)

### ***E. “As Informed” Provisions***

Finally, each of the proposed restrictions either maintains or includes an “as informed” provision, whereby BIS may inform individual parties individually or through separate notice in the *Federal Register* that a license requirement applies to specific end users. Such provisions already exist in many parts of the EAR (including with respect to restrictions on the activities of U.S. persons discussed below) and allow BIS to move quickly in response to pressing national security concerns. In recent years, such provisions were used to restrict the flow of semiconductors and associated items to certain end users in China prior to the release of more detailed regulations.

### ***F. Overview of Proposed End User and End Use Restrictions***

Please click below, where we provide a chart outlining the end users and end use restrictions contained in the proposed rules.

*The footnotes referenced in this update are available on Gibson Dunn's website at the following link. Please click on a particular footnote above to view details. The complete update is available at the following link:*

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Gibson Dunn lawyers are monitoring the proposed changes to U.S. export control laws closely and are available to counsel clients regarding potential or ongoing transactions and other compliance or public policy concerns.

Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding these issues. For additional information about how we may assist you, please contact the Gibson Dunn lawyer with whom you usually work, the authors, or the following leaders and members of the firm’s [International Trade](#) practice group:

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