



THE US-CHINA BUSINESS COUNCIL
美中贸易全国委员会

Modifications of License Exception Additional Permissive Reexports (APR)
Docket Number: BIS-2020-0010

US-China Business Council
May 22, 2020

The US-China Business Council (USCBC) is pleased to provide comments to the Department of Commerce's Bureau of Industry and Security (BIS) on the proposed rule modifying License Exception Additional Permissive Reexports (APR). USCBC represents over 220 American companies that operate in a diverse range of industries and employ millions of Americans.

USCBC also values this opportunity to provide additional thoughts regarding the two final rules expanding license requirements for Military End Use and Military End Users in China, and the elimination of License Exception Civil End Users (CIV) to countries of national security concern. We were pleased to hear that BIS is seriously considering developing additional guidance for how these rules would be implemented before they take effect in June 2020, and are grateful for BIS's consideration of industry comments.

Our members are steadfast partners in assuring US national security, and appreciate the concerns that these new and proposed rules seek to address. USCBC has consistently advocated that export restrictions be narrowly tailored to specific national security interests, with the support of multilateral regimes, to minimize unintended consequences to American commercial interests. We are concerned the broad scope and unilateral nature of these new and proposed rules would undermine US global competitiveness, particularly in the high-technology, innovation-driven sectors that also underpin America's national and economic security.

USCBC is pleased to provide the following comments for consideration.

Removal of License Exception Additional Permissive Reexports

We encourage BIS to consider the broader impact of the proposed rule to remove license exception APR on US global competitiveness and the US alliance structure, both of which are central to guaranteeing America's national security priorities are achieved.

We understand that BIS is reviewing license exception APR because it is concerned about differences in licensing review standards between the United States and other multilateral regime members regarding the supply of controlled dual-use items to countries such as China, among others. USCBC is concerned that the removal of license exception APR will disadvantage US companies, specifically because it would primarily impact foreign made products that are subject to the EAR due to being above de minimis levels or covered under the Foreign Direct Product

(FDP) rule. If APR is removed for such items, affected foreign companies will actively look to adjust their procurement and development strategies to ensure their products are not subject to the EAR—likely resulting in US technology being removed from their final products and supply chains. This would undermine US global competitiveness, as our allies turn to other global sources. It would also negatively impact our national security interests—the presence of high-standard, secure American technology in global supply chains, is as important to protecting American interests as it is to our allies.

Rather than pursue the removal of license exception APR, it would be more effective and beneficial to long-term US national security to redouble efforts to ensure our allies maintain and enforce the same, high-caliber licensing policies and export restrictions as the United States. The transfer of sensitive, national security-related technologies to authoritarian regimes is a concern shared by America’s closest allies, many of which would be impacted by the proposed change. USCBC encourages the US government and BIS to find common ground with our allies in dealing with these regimes and to not implement policy and regulatory changes that might negatively impact the US alliance structure.

Additionally, the world is in the midst of an unprecedented challenge—COVID-19 continues to strain the US economy, the economies of our closest allies, and our economic and trade relationships. As countries grapple with the unexpected and heavy economic toll of the pandemic, we urge BIS to reconsider any action that might further damage the economies of our allies or further impact US trade alliances. This is an opportunity for the United States to lead through engagement, rather than unilateral action that could further alienate our allies at a time when more global collaboration is needed.

Elimination of License Exception Civil End Users

USCBC and our members are also concerned about diverse impacts of the elimination of license exception Civil End Users (CIV) for countries of concern. These include potential interruptions to research and development activities, supply chains for electronics, telecommunications and information technology services, as well as manufacturing. Such disruptions would weaken US global leadership in commercial technology segments that do not confer military advantages and enjoy wide foreign availability. These same technologies have proven vital in keeping business, essential services providers, and individuals connected and productive during the COVID-19 crisis. The CIV exception should be restored to avoid disruptions to delivery and operation of these technologies and preserve US technological leadership.

Expansion of Export, Reexport, and Transfer (In-Country) Controls for Military End Use or Military End Users in the People’s Republic of China, Russia or Venezuela

Before it becomes effective on June 29, 2020, additional clarification of the scope of the final rule on “military end use” is necessary to facilitate compliance and effectively achieve national security objectives. USCBC and our members recognize the national security challenges outlined by this new rule. However, as drafted the rule raises considerable questions and uncertainty about what entities and transactions would fall under the scope of the new restrictions, in turn

raising questions about how companies can ensure reasonable compliance without unduly impeding regular commercial operations.

Provide a more narrow and precise definition for “military end use” and “military end user”

The vague terminology in the expanded definition of “military end use” creates considerable compliance uncertainty for business. Specifically, it is unclear how BIS will interpret the terms “supports” and “contributes” when implementing the rule, and if that interpretation might now encompass previously acceptable commercial transactions. For example, would commercial items used by employees in functional departments, such as human resources, of an entity that is engaged in both civilian and military activities now be considered to be supporting a military end use?

Similarly, the scope of Chinese entities that BIS will determine constitute “military end users” is unclear. Given the concern around China’s civil-military integration, the term “military end user” could apply to a wide range of counterparties, which could significantly complicate existing supply chains and commercial relationships. Additional clarity on what is considered a “military end user” in China, as well as BIS’s decision-making process for determining how otherwise commercial entities might be deemed to be military end users is necessary. For example, would local, regional, or provincial police or public security agencies in China fall under the scope of “national police” and be considered military end users? How will BIS treat hospitals and universities that are either affiliated or indirectly involved with the military or a military end user?

Limit the scope of license restrictions to items of true national-security concern

The inclusion of several mass-market commercial items in the expanded scope of items subject to license requirements will undermine long-term US global technological leadership by ceding market share to foreign competitors. Several of the newly added Export Control Classification Numbers (ECCNs), including 5A992 and 5D992, capture commercial consumer products that do not enhance military capabilities and that are widely available from foreign sources. As a result, US manufacturers of off-the-shelf products and software will lose market share in China to foreign competitors, with no positive benefit to US national security. We encourage BIS to publish further guidance excluding mass-market products from coverage under the rule.

Provide greater clarity on the licensing process and due diligence expectations

The broad scope of the rule due to the premise of China’s civil-military integration doctrine, as well as a lack of clarity on how key terms such as “military end use” and “military end user” will be interpreted, raise significant compliance questions for industry. Without further clarification, the high-burden of additional due diligence as well as the presumption of denial review policy will significantly impact existing commercial relationships and disrupt important supply chains.

For example, does the civil-military integration doctrine mean there is an automatic red flag on all exports and reexports of controlled items to China? Should companies expect licenses to rarely be granted based on a traditional understanding of a presumption of denial? And what

level of enhanced diligence and additional information on commercial customers' supply chains should be expected? Would formal End Use Certificates and/or non-transfer statements be sufficient to demonstrate due diligence?

Additional guidance on how BIS will handle license applications, including detailed guidance on the additional diligence required of companies, such as recommended language or templates, would help facilitate timely compliance.

USCBC greatly appreciates BIS's attention to industry feedback, and is grateful for BIS's consideration.