

Now & Next

Export Controls Alert

April 22, 2024

BIS significantly loosens U.S. export controls for (re-)exports to, and transfers within, Australia and the UK

By Jule Giegling¹ and Alexandra López-Casero

The changes give both countries almost the same privileged status as Canada under the EAR.



What's the impact?

- The interim final rule removes the license requirements for NS-1, RS-1, and MT-1 reasons for control for Australia and the UK.
- While BIS expanded License Exceptions AVS and APR, it did not remove the "EI" controls for the (re-)export and transfer of Cat. 5 Part 2 encryption items to or within Australia and the UK.

On April 18, 2024, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) released an interim final rule that removes specific license requirements, expands the availability of license exceptions, and reduces the scope of end-use and end-user-based license requirements for (re-)exports to, and transfers within, Australia and the United Kingdom (UK).

¹ Jule Giegling (Legal Intern—Corporate Practice) assisted with the preparation of this alert.

The stated goal is to *"enhance technological innovation among the three countries and support the goals of the AUKUS [Australia, United Kingdom, and United States] Trilateral Security Partnership."*

By way of background, AUKUS was established on September 15, 2021, to *"deepen diplomatic, security, and defense cooperation in the Indo-Pacific region, including by working with partners, to meet the challenges of the twenty-first century."* It is, in essence, a collaborative multinational effort between the United States, the UK, and Australia to (1) support collective security and defense interests; (2) deepen information and technology sharing; and (3) foster the integration of security and defense-related science, technology, industrial bases, and supply chains. The AUKUS partnership was further advanced on December 22, 2023, when President Biden signed the National Defense Authorization Act (NDAA) for Fiscal Year 2024, Public Law No. 118-31, which enacted provisions related to streamlining defense trade between and among the United States, UK, and Australia, provided certain conditions were met. These conditions were, e.g., the implementation of additional measures to enhance technology protection and promote secure trade. Importantly, BIS has now stated that Australia and the UK have met these conditions: *"The UK and Australia have robust export control systems and have taken additional measures in recent months to enhance technology protection and promote secure trade."*

This new interim final rule, essentially, lifts significant restrictions under the Export Administration Regulations (EAR), specifically concerning items controlled for National Security (NS), Regional Stability (RS), and Missile Technology (MT) reasons. Going forward, Australia and the UK will have nearly the same licensing treatment under the EAR as Canada.

It should be noted that BIS did not remove the "EI" controls for the (re-)export and transfer of Cat. 5 Part 2 encryption items to or within Australia and the UK under § 742.15 of the EAR. The "EI" controls for encryption items do not apply to (re-)exports to, or transfers within, Canada.

Companies can submit comments on the new rule to BIS until June 3, 2024.

Below are the key changes.

Removal of NS-1, RS-1, and MT-1 Controls

This final rule removes the license requirements for NS-1, RS-1, and MT-1 reasons for control for (re-)exports to, and in-country transfers within, Australia and the UK by deleting the respective "X" in the boxes in the Commerce Country Chart. Since Australia and the UK had no "X" for NS-2 or RS-2 reasons, this removes *all* NS- and RS-based controls for both countries. To mirror this change in the EAR, the provisions in Part 742 that specify the license requirements for NS, MT, and RS reasons (§§ 742.4(a), .5(a), and .6(a), respectively) were revised to fully remove the related license requirements. Through this change, many highly controlled items, including "600 series"

items (which are generally items on the Wassenaar Arrangement Munitions List) and many 9x515 satellite-related items, will no longer require a license to or within Australia or the UK.

Removal of military end-use(r) restrictions

The new rule removes military end-use and end-user-based license requirements for exports, (re)exports, and in-country transfers of certain cameras, systems, or related components specified under § 744.9(a)(1)(i) and (a)(1)(iii) of the EAR. Paragraph (a)(1)(i) of § 744.9 pertains to commodities described in ECCN 6A003.a.3, 6A003.a.4, or 6A003.a.6 that will be or are intended to be used by a “military end-user,” as defined in § 744.9(d). Paragraph (a)(1)(iii) pertains to commodities described in ECCNs 0A504 (incorporating commodities controlled by ECCNs 6A002 or 6A003, or commodities controlled by 6A993.a that meet the criterion of Note 3.a to 6A003.b.4), 6A002, 6A003, or 6A993.a (having a maximum frame rate equal to or less than 9 Hz and therefore meeting the criteria of Note 3.a to 6A003.b.4), or 8A002.d that will be or are intended to be incorporated into a “military commodity” controlled by ECCN 0A919. Before this rule, the only exception to the requirements under these paragraphs was for exports to Canada.

Significant items

BIS is further revising § 742.14(a), which regulates the license requirements for significant items (SI), i.e., hot section technology for the development, production, or overhaul of commercial aircraft engines, components, and systems controlled under ECCN 9E003.a.1 through a.6, a.8, .h, .i, and .l, and related controls. With these revisions, these items can be (re-)exported or transferred to or within Australia and the UK without a license, consistent with the current exception for Canada.

License Exceptions AVS, APR, and ENC

Under §§ 740.15, 740.16, and 740.17 (License Exceptions Aircraft, Vessels, and Spacecraft (AVS); Additional Permissive Reexports (APR); and Encryption Commodities, Software, and Technology (ENC)), BIS has revised these license exceptions for Australia and the UK as follows:

(Re-)exports to Australian and UK airlines under License Exception AVS will generally be treated as an export to Australia or the UK, respectively. Previously, this accommodation was only available for exports to Canadian airlines.

License Exception APR has been significantly expanded to allow re-exports of any item from Australia and the UK that, at the time of re-export, may be exported directly from the United States to the new country of destination under *any* license exception. The same applies to re-exports from a foreign destination to Australia or the UK. Before this rule, this was *only* possible for re-exports from or to Canada.

While BIS has not (yet) removed the “EI” controls for encryption items (such as for ECCN 5A002 hardware or 5D002 software) for Australia or the UK, it has revised the § 740.17(e) reporting requirements. Going forward, U.S. exporters no longer need to submit semiannual reports to BIS for exports to Australia or the UK of items described under Paragraphs (b)(2) and (b)(3)(iii) of § 740.17. Instead, companies in Australia and the UK will need to submit those reports under the revised § 740.17(e) when they *re-export* these items to third countries.

Such reports need to include, for each item, the Commodity Classification Automated Tracking System (CCATS) number, the name of the reexported item(s), and the other information specified in § 740.17(e)(1)(i)(A)-(C).

New Footnote 9 in the Commerce Country Chart

Under the EAR, firearms-related items and other items controlled for Crime Control reasons will continue to require a license when destined to and within the UK and Australia. This license requirement mirrors the license requirement for firearms-related items destined to Canada. Before the new rule, license requirements for these items to the UK and Australia were implemented through the NS-1/RS-1 reasons for control. Since BIS has now removed these license requirements for the UK and Australia, the final rule adds footnote 9 to the Commerce Country Chart for the UK and Australia. This footnote clarifies that a license is still required for these 0x5zz firearms-related items. This, however, does not change the scope of the license requirements for these items to the UK and Australia that applied before the effective date of this rule.

Practical implications

Even though some existing license requirements, e.g., for certain satellites and related items; items controlled pursuant to the Chemical Weapons Convention (Reason for Control CB-1); items controlled for short-supply reasons or EI; and certain law enforcement restraints and riot control equipment will remain in place, this new rule removes the majority of restrictions for (re-)exports to, and transfer within, Australia and the UK. When a license exception may apply, exporters should ensure that they carefully review the respective requirements, including under §§ 740.15, 740.16, and 740.17, respectively. Companies in Australia and the UK should also check and comply with their new reporting requirements to BIS under § 740.17(e) if they *re-export* encryption items described in § 740.17 (b)(2) and (b)(3)(iii) to third countries and train their respective staff accordingly.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

[Alexandra López-Casero](#)

202.213.0171

alopezcasero@nixonpeabody.com