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News & Types: Commercial, Competition & Trade Update

U.S. Export Control Regulator Adopts 50% Rule

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By: Asa W. Markel

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Export controls have become more relevant to businesses buying and selling commercial items, as well as those engaging in transactions regarding the design and production of commercial items. Export control clauses are more routinely included in business-to-business non-disclosure agreements than they were a decade ago. Export control changes have been headline news periodically since at least 2018. Many businesses that sell industrial equipment have become used to managing export control compliance in screening new customers. However, the US Bureau of Industry and Security (BIS) within the US Commerce Department, the agency responsible for enforcing US dual-use controls over items with both commercial and military uses, has recently added a new layer of necessary checks for businesses' compliance programs.

The US Treasury's Office of Foreign Assets Control (OFAC) has long employed a "50% rule" under which an entity is considered blocked under US embargo programs even it is not on a US blacklist or technically an entity of the affected country, as long as a blocked entity owns or controls 50% of the un-blocked entity. This rule applies to most of OFAC's ongoing country-specific embargo programs. However, BIS has not specifically employed this sort of rule to restrict exports of commodities and technology to un-listed entities. Nor has the US State Department's Directorate of Trade Controls (DDTC), which enforces the International Traffic in Arms Regulations (ITAR) restrictions on military items and technology. However, frankly, ITAR imposes more licensing requirements than the dual-use rules BIS administers, so a 50% rule may not be as impactful in the military industrial sphere.

Starting in November 2026, if a business has reason to know or suspect that its customer or potential customer is owned or controlled to any degree by a blacklisted person or entity, the business will need to obtain clarification on the exact percentage of ownership or control. Where it is confirmed that a blacklisted person or entity owns or controls 50% or more of a customer or potential customer, the business must halt any transfers or sales unless and until an export license is obtained from BIS. In other words, by the end of this year, it will not be enough to verify that new and existing customers are omitted from US export blacklists. Rather, businesses will need to have some idea of the ownership and control of their customers in order to avoid potential export control violations.

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