

CLIENT ADVISORY



Commerce Department Releases New China Export Control Regulations

The US Commerce Department—through its regulatory policy division at the Bureau of Industry and Security (BIS)—has published in the Federal Register its *Revisions and Clarification of Export and Reexport Controls for the People's Republic of China (PRC); New Authorization End-User; Revision of Import Certificate and PRC End-User Statement Requirements*. This is the final rule resulting from BIS' efforts to revise its export control policies regarding China. The revisions tighten controls on exports to China for military applications. The Commerce Department has also introduced the concept of a verified end-user in China which would reduce license requirements for end-users in China vetted in advance by the US government.

THE CATCH-ALL PROVISION

The new regulations include a catch-all provision, 15 C.F.R. §744.21, requiring licenses for exports to China of certain items on the Commerce Control List (CCL) for which the exporter has knowledge are intended for a "military end-use." These items would normally not require a license for export to China in cases in which they were not being exported for military end-use. The practical effect of the new regulation is to impose additional licensing requirements on exports to China.

ADDITIONAL ITEMS SUBJECT TO LICENSING

A broad range of items are subject to additional licensing including composites, certain machine tools, very fast computers, telecommunications equipment operating outside of normal operating temperatures, and certain lasers and underwater systems.¹

¹ The items subject to the catch-all provision are classified under 31 separate Export Control Classification Numbers (ECCNs), which are listed in Supplement No. 2 to Part 744. Not every item covered by these ECCNs is subject to the catch-all provision; Supplement No. 2 to Part 744 lists the specific types of items under each ECCN that are subject to the catch-all provision. Overall, according to the Commerce Department, the catch-all regulation covers 20 distinct products and associated technologies.

The ECCNs affected by the new rule are: 1A290, 1C990, 1C996, 1D993, 1D999, 1E994, 2A991, 2B991, 2B992, 2B996, 3A292.d, 3A999.c, 3E292, 4A994, 4D993, 4D994, 5A991, 5D991, 5E991, 6A995, 6C992, 7A994, 7B994, 7D994, 7E994, 8A992, 8D992, 8E992, 9A991, 9D991m and 9E991.

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The regulations define “military end-use” as incorporation into a military item described on the US Munitions List (USML), incorporation into a military item described on the International Munitions List (as set out on the Wassenaar Arrangement website at www.wassenaar.org); incorporation into items listed under ECCNs ending in “A018” on the CCL, items for the “use,” “development,” or “production” of military items described on the USML or IML, or items with ECCNs ending in “A018.” The “knowledge” required by the exporter under the catch-all provision is defined in part 772.1 of the EAR—not only positive knowledge, but also awareness of a high probability that the item is going to a military end-use in China.

Companies exporting items to China will need to consult Supplement No. 2 to Part 744 prior to exporting, to determine whether the items they are exporting are subject to the catch-all provision. If so, companies should be certain that the item is intended for civilian use only. These companies should carefully assess the proposed transaction for any warning signs that the export may be intended for military end-use.

THE PRESUMPTION OF DENIAL FOR EXPORTS MAKING A “DIRECT AND SIGNIFICANT CONTRIBUTION” TO CHINESE MILITARY CAPABILITIES

The revised regulations also introduce a presumption of denial for license

applications to export, retransfer, or reexport items that would make a “direct and significant contribution” to the PRC’s military capabilities, as assessed by BIS licensing officials. 15 C.F.R. 742.4(b)(7). The new Supplement No. 7 to Part 742 lists certain major weapons systems for which exports making a “direct and significant contribution” are subject to this presumption of denial. These systems are: battle tanks; armored combat vehicles; large-caliber artillery systems; combat aircraft; attack helicopters; warships; missiles and missile launchers; guided or unguided rockets or ballistic or cruise missiles; MANPADS; UAVs; offensive space weapons; command, control, communications, computer, intelligence, surveillance, and reconnaissance items; precision guided munitions; and night vision equipment. It is important to note that the items subject to the presumption of denial are not limited to those making a “direct and significant contribution” to Chinese military capabilities on the list above.

Items subject to controls for chemical and biological, nuclear, and missile technology are also reviewed under this provision to determine whether they make a “direct and significant contribution” to Chinese military capabilities.

AUTHORIZATION VALIDATED END-USER (VEU)

In an effort to streamline and facilitate exports to civilian end-users, the

Commerce Department has added an Authorization Validated End-User (VEU). The VEU authorization permits the export, reexport, and transfer of specified items to end-users that have been previously validated by the Commerce Department without having to obtain licenses for each export. Under the new regulation, 15 C.F.R. § 748.15, end-users in certain “eligible destinations” are eligible for VEU status. The first, and only eligible destination thus far, is China. Entities that qualify for VEU treatment will be those that have a demonstrated record of engaging in civil end-use activities only.

End-users that qualify as VEU will be listed in Supplement No. 7 to Part 748 of the EAR, along with the items eligible for export under VEU and the eligible destination of the end-user. End-users under VEU are permitted to use items exported under VEU at facilities owned or controlled by the end-user in an eligible destination. These items may be consumed during use, but may not be transferred or exported without authorization from BIS.

End-users seeking VEU status must submit an advisory opinion request to BIS, containing a variety of descriptive information, including the name of the end-user, its locations, its corporate and compliance structure, and, importantly, a list of items that will be exported to it under VEU and

their end-uses. The complete list of required information is included at Supplement No. 8 of Part 744. Exporters may initiate the process of having a Chinese end-user validated under VEU.

Exporters exporting under VEU must submit an annual report to BIS with information regarding each export made under VEU as specified in the new regulation. Prior to making an initial export to an end-user under VEU, the exporter must receive and retain a certification from the end-user containing the information submitted to BIS by the end-user to obtain VEU status (listed in Supplement No. 8 to Part 748).

Items controlled for missile technology (MT) and crime control (CC) reasons are not eligible for export under VEU.

REVISIONS TO END-USER STATEMENTS

For exports to China, if the total value of exports requiring a license for any reason in the CCL exceeds \$50,000, an End-User Statement from the PRC Ministry of Commerce (MOFCOM) is required. BIS retains the right to require an Import Certificate or a PRC End-User Statement for exports valued at less than \$50,000.

INDUSTRIES AFFECTED

Nearly every company that exports goods or services could be affected by these proposed new

regulations. Particularly affected would be companies that export dual-use products to China and with a concentration in advanced technology that could be used for both civil and military applications.

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