

Locke Lord QuickStudy: BIS Issues Three New Rules to Ease ?Licensing Requirements and ?Enhance Exceptions for Exports to ?Selected Countries

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On December 6, 2023, the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") unveiled three pivotal rules that amend the Export Administration Regulations ("EAR"). These rules mark a crucial step in a comprehensive BIS initiative aimed at simplifying various export categories, removing specific export controls, and widening the availability of export license exceptions for U.S. allies and partner countries, along with a number of specific multilateral export control regimes.

The first rule amends the EAR by eliminating licensing requirements to export specific U.S. goods and technology to Australia Group member countries, including controlled pathogens, toxins and related technologies, unless the item is also subject to controls for Proliferation of Chemical Weapons (CW). The BIS revised the EAR acknowledging that each Australia Group member possess a robust export control system capable of regulating dual-use exports in line with U.S. national security, foreign policy, and non-proliferation objectives. The list of members of the Australia Group can be found [here](#). All countries participating in the Australia Group are parties to the Chemical Weapon Convention (CWC) and the Biological Weapon Convention (BWC).

The rule also revises the Commerce Country Chart to remove Crime Control and Detection (CC) licensing obligations on certain items that are destined for Austria, Finland, Ireland, Liechtenstein, South Korea, Sweden, and Switzerland, all party to the Global Export Controls Coalition ("GECC"). This rule modifies the Commerce Country Chart by eliminating for these seven countries control for "CC" reasons under Column 1 and Column 3. Each controlled item on the Commerce Control List ("CCL") lists reasons for control within the applicable Export Control Classification Number ("ECCN"). Once an ECCN is identified, the exporter must cross reference the reasons for control against the CCL. In this regard, the requirements to obtain a BIS export license for reasons for control in CC Columns 1 and 3 have been removed. This change demonstrates BIS' acknowledgment that these countries (i) have instituted export controls on Russia and Belarus that closely mirror U.S. export controls and (ii) demonstrate strong records in safeguarding civil liberties, individual freedoms and upholding democratic norms. The GECC includes Iceland, Liechtenstein, Norway, Switzerland, Australia, Canada, the 27 member states of the European Union, Japan, the Republic of Korea, Taiwan, New Zealand, the United Kingdom, and the United States.

The second rule expands the availability of license exceptions to additional countries for certain Missile Technology (MT) controlled items. Specifically, the changes to the EAR for license exception eligible for MT-controlled items consist of the following: (i) expand the general license exemption for MT-controlled items

identified in § 740.2(a)(5); and (ii) revise the terms and conditions of four license exceptions. Additionally, the rule revises six ECCNs under the EAR (i.e., 1C111, 2A101, 2B119, 6A107, 9A101, and 9E515) to reflect recent changes to the Missile Technology Control Regime (“MTCR”).

Revising General License Exemption for Certain MT-controlled ECCNs:

- The final rule revises § 740.2(a)(5) to expand the general license exceptions for MT-controlled items to allow the use of portions of additional license exceptions. Prior to this final rule, this provision restricted the use of all EAR license exceptions for MT-controlled items, except for the limited number of ECCNs identified in paragraphs (a)(5)(i) and (ii) thereof. The restriction under paragraph (a)(5) had some unintended effects. For example, the export of an MT-controlled item to the U.S. Department of Defense for its own use, prior to this final rule, would have required the submission of a BIS license application. This change will better harmonize the availability of license exceptions for MT-controlled items under the EAR with those available for other EAR items of similar sensitivity and advance U.S. national security and foreign policy interests. The expanded license exception does not authorize exports to countries deemed destinations of concern for missile technology reasons or that are under a U.S. embargo (i.e., countries mentioned in Country Group D:4 and D:5).

Revising Four License Exceptions:

- § 740.9(a) TMP (Temporary imports, exports, reexports, and transfers (in-country)) is revised to specify that TMP does not authorize any export, reexport, or transfer (in-country) of a commodity controlled under ECCN 9A012 that is “capable of” delivering at least 500 kilograms payload to a range of at least 300 kilometers. The final rule, which authorizes the export of certain items moving in transit through the United States, adds an exclusion for items controlled for MT reasons when the export is to a Country Group D:4 country in supplement no. 1 to part 740.
- § 740.11 GOV (Governments, international organizations, international inspections under the Chemical Weapons Convention, and the International Space Station) adds that items controlled for MT reasons are only eligible only for transactions with the United States Government. No other authorizing paragraphs under License Exception GOV will be eligible for items controlled for MT reasons.
- § 740.13 TSU (Technology and software—unrestricted), provides that authorization TSU is not available for any software that is controlled for MT reasons.
- § 740.15 AVS (Aircraft, vessels and spacecraft), adds the authorization for exports, reexports, and transfers (in-country) to any destination identified in Country Group A:2 and supplement no. 3 to part 746 of ECCNs 7A101, 7A102, or 7A103 when the commodities are for use in or for the “production” of civil manned aircraft. Provided these licenses do not involve a part 744 prohibited end use or end user concern or a destination of missile technology concern identified under Country Group D:4 or subject to a U.S. arms embargo identified under Country Group D:5.

The third and final rule proposes to amend License Exception Strategic Trade Authorization (STA) within the EAR. BIS is soliciting public comments to gain insights into any impediments to use of License Exception STA. The proposed revisions intend to make the following changes to License Exception STA:

- clarify that it is not a list-based exception (to allow broader discretion for use);
- explicitly state that it is eligible for deemed export and deemed reexports (software and technology);
- remove the requirement for “600 series” technology (small weapons) to be listed on an approved license or other approval for deemed exports and deemed reexports;
- adopt a consistent approach for identifying ECCN's eligible for License Exception STA; and
- eliminate restrictions on using License Exception STA for reexports among certain U.S. partners and allies.

This amendment is intended to reflect the close cooperation among the U.S. and its partners on export controls while ensuring continued protection of U.S. national security and foreign policy interests for items authorized under License Exception STA.

Conclusion

This paper is intended as a guide only and is not a substitute for specific legal or tax advice. Please reach out to the authors for any specific questions. We expect to continue to monitor the topics addressed in this paper and provide future client updates when useful.

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