

June 21, 2007

Cortney O'Toole Morgan

comorgan@barnesrichardson.com

1.202.628.4700

BIS Policy Update

BIS Revises Dual-Use Export Control Policy for PRC

This week, the Bureau of Industry and Security (BIS) issued a final rule, [72 Fed. Reg. 33646](#) (June 19, 2007), which proposes significant changes to U.S. dual-use export licensing policy for certain high-technology exports to the People's Republic of China (PRC). This final rule, effective June 19, 2007, amends the Export Administration Regulations (EAR) at 15 CFR Parts 742, 743, 744, 748, 750 and 758. Specifically, the final rule creates a Validated End-User (VEU) program whereby specified items may be exported or reexported without a license; revises the circumstances in which End-User Statements, issued by the PRC Ministry of Commerce (MOFCOM), must be obtained; and establishes a control, based on knowledge of a "military end-use" on exports and reexports to the PRC of certain items on the Commerce Control List (CCL) that otherwise do not require a license.

By way of background, BIS is charged with the development, implementation and enforcement of U.S. export policy for dual-use commodities, software and technology. Dual-use items subject to BIS regulatory jurisdiction have predominantly commercial uses, but also have conventional military and weapons of mass destruction applications. It is the policy of the U.S. Government to facilitate U.S. exports to legitimate civilian end-users in the PRC, while preventing exports that would enhance the military capability of the PRC. In accordance with this policy, in this final rule, BIS advises that the recent amendments to the EAR are intended to revise and clarify U.S. licensing requirements and licensing policy on exports and reexports of items to the PRC to more precisely reflect U.S. foreign policy and national security interests. The final rule follows a proposed rule and request for public comment which was published in July 2006. BIS received 57 comments totaling more than 1,000 pages.

A summary of the provisions contained in BIS' final rule follows below.

Validated End-User (VEU) Program

The final rule establishes a Validated End-User (VEU) program to facilitate exports to "trusted customers," in an eligible destination, initially PRC.¹ Companies that qualify for VEU, *with a track record of responsible civilian use* of U.S.-controlled technology, will be authorized to receive certain U.S.-controlled items without individual export licenses. According to BIS, the VEU program creates a market-based incentive for companies to use U.S. items responsibly by giving such companies easier access to controlled technology. The final rule establishes procedures for companies to apply for the VEU program (15 CFR § 748.15), similar to those already in effect for other special Commerce Department licenses or authorizations.

Customers in China may apply directly, or exporters may initiate the application process on behalf of their customers. Applicants will be required to submit general business information such as ownership structure, nature of business, items to be imported, plans to transfer or re-export the items, and internal control and recordkeeping procedures. An interagency End-User Review Committee will decide on applications, considering such factors as the applicant's record of engagement in civil end-uses; compliance with U.S. export controls; agreement to allow on-site reviews by U.S. Government officials; and relationships with U.S. and foreign companies. BIS anticipates publishing an initial list of VEU's in the PRC as early as next month and will post subsequent lists depending on the volume of applications filed.

¹ If successful, BIS anticipates expanding the VEU program to India as well as other U.S. export destinations.

End-User Statements

The final rule amends the EAR to provide that what were previously described as “End-User Certificates” are now properly termed “End-User Statements” (EUSs). EUSs are issued by the PRC’s Ministry of Commerce (MOFCOM). BIS has raised the threshold dollar amount required for EUSs for the PRC from \$5,000 to \$50,000 for most items. *See* 15 CFR § 748.10. The increased threshold, however, will not apply to items classified under ECCN 6A003 (cameras) and exports to the PRC of computers subject to section 748.10(b)(3).

Military End-Use Controls for PRC

The final rule also establishes a control, based on knowledge of a “military end-use,” on exports and reexports to the PRC of certain items on the Commerce Control List (CCL) that otherwise do not require a license for export to the PRC. *See* 15 CFR § 744.21. The controls target items that could enhance China’s military if incorporated into weapons systems, and are consistent with the longstanding U.S. embargo on arms exports to China (administered by the State Department).

The list of items covers 20 product categories, associated technologies and software, as described in 31 entries on the CCL.² *See* Supplement No. 2 Part 744. Items subject to the new military end-use control include aircraft and aircraft engines, avionics and inertial navigation systems, lasers, depleted uranium, underwater cameras and propulsion systems, certain composite materials and some telecommunications equipment for space communications or air defense.

A license will be required for the exportation, reexportation or transfer to the PRC of any of the items contained in the 31 CCLs referenced in the final rule provided the exporter *knows* that the items are intended, entirely or in part, for a military end-use in the PRC or the exporter has been informed by BIS that the item is or may be intended, entirely or in part, for a military end-use in the PRC. Note, BIS officials have stated in informal discussions that this is “would,” not a “could” standard.

Despite these new controls, BIS states that items, where applicable, may still be exported under the provisions of License Exception GOV as set forth in 15 CFR 740.11(b)(2)(i) and (ii).

Revisions to BIS Licensing Review Policy

In the final rule, BIS seeks to clarify that the United States’ overall policy for exports to the PRC is to approve exports for civil-end uses but generally to deny exports that will make “a direct and significant contribution to the PRC’s military capabilities.” Specifically, the final rule revises the license application review policy for items controlled for national security reasons to provide *a presumption of denial* for license applications to export, reexport or transfer items that would make a material contribution to the PRC’s military capabilities. *See* 15 CFR § 742.4(b)(7). The final rule also includes an illustrative list of PRC military capabilities. *See* Supplement No. 7 to Part 742 (Description of Major Weapons Systems).

The final rule further revises the EAR to clarify its license review policy for items controlled for reasons of chemical and biological weapons proliferation, nuclear nonproliferation, and missile technology for export to the PRC, requiring that applications involving such items be reviewed in conjunction with this revised national security licensing policy.

Savings Clause

The final rule also specifies that shipments of items removed from eligibility for a License Exception or for export or reexport without a license (NLR) as a result of this regulatory action that were on the dock for loading, on lighter, laden aboard an exporting or reexporting carrier or en route aboard a carrier to a port of export or reexport on June 19, 2007, pursuant to actual orders for export or reexport to a foreign destination, may proceed to that destination under the previous eligibility for a License Exception or export or reexport without a license so long as they are exported or reexported before July 19, 2007. Any such items not actually exported before midnight on July 19, 2007 will require a license in accordance with the final rule.

² Note, the proposed rule covered 46 CCLs.