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Commerce Announces Wave of Export Control Changes

In a wave of recent activity, the Department of Commerce, Bureau of Industry (BIS) has announced a number of changes to export licensing requirements for items subject to the Export Administration Regulations (EAR). The regulatory changes, which range in nature from the elimination of burdensome percentage calculations to the broadening of export license exception parameters, reflect the movement within BIS to streamline and simplify export licensing requirements enumerated in the voluminous EAR.

This *GT Alert* provides a brief summary of the recently announced changes. Please contact GT's Export Controls Group directly for a more in-depth analysis of the regulatory changes discussed here.

EAR Overhaul

On October 1, 2008, BIS announced an impending final rule implementing significant revisions to the EAR. The rule constitutes the second phase in the systematic review of the Commerce Control List (CCL) that started in 2007. The substantive changes to the EAR fall into four types of revisions:

- Clarifications to Existing Controls
- Elimination of Redundant or Outdated Controls
- Establishment of More Focused and Rationalized Controls
- Addition of Controls for Clarity or Consistency with International Regimes

The CCL revisions are widespread and include revisions to existing Export Control Classification Numbers (ECCNs) and related controls, as well as the addition of new ECCNs.

Further, on October 1, 2008, BIS announced significant changes to the parts of the EAR that address controls related to the Wassenaar Arrangement. The specific CCL provisions that address items subject to the Wassenaar Arrangement were amended to implement changes agreed upon in the December 2007 Wassenaar Arrangement Plenary Meeting, as well as the provisions regarding solar cells agreed upon in the December 2006 Plenary Meeting. The changes revise the CCL to add additional ECCNs, and revise the existing ECCNs for items controlled by the Wassenaar Arrangement.

Encryption Regulations: Simplified and Expanded

To clarify and simplify encryption-related regulations, on October 3, 2008, BIS issued an interim final rule amending the various sections of the EAR that address encryption-related controls. The new rule eliminates certain prior notification requirements for specific ECCNs. It also removes License Exception KMI.

With the new rule, BIS has also significantly amended the regulations relating to License Exception ENC. The revisions aim to increase the availability of License Exception ENC by expanding its parameters to incorporate advancements in technology, and by adding new countries to the list of those receiving favorable treatment under the License Exception. In addition, the new rule sets forth the limited circumstances in which no prior review or post-export notifications are required when exporting under License Exception ENC.

Finally, items pending mass market review may no longer be exported in the same manner. Instead, once BIS has received the mass market review, items must be exported using License Exception ENC and ECCNs 5A002 and 5D002.

Intra-Company Transfers Exception

On October 2, 2008, BIS announced a new proposed license exception, License Exception Intra-Company Transfer (ICT), to allow for the intra-company transfer of EAR-controlled commodities and technology without requiring multiple export licenses from BIS. The new license exception will facilitate transfer of EAR-controlled goods and technology between an approved parent company and its approved wholly owned or controlled entities. These approved entities may include approved U.S. and foreign subsidiaries, as well as foreign national employees of a company working in the United States or for the company's foreign subsidiaries. License Exception ICT is intended to reduce the burden on companies that must obtain export licenses from BIS to transfer items subject to the EAR amongst their subsidiaries for internal company use.

Only parent companies are authorized to apply for the use of License Exception ICT. To qualify for License Exception ICT, a company will be required to submit an internal control plan to BIS for review, indicating, among other things, the specific commodities proposed for transfer and their ECCNs, as well as the subsidiaries to be covered by the license exception's authorization. Once approved by BIS for use of License Exception ICT, a company will still be subject to reporting and recordkeeping requirements associated with the license exception.

When Does the EAR Apply—the 'De Minimis' Rule

New regulations revising the EAR provisions that pertain to foreign-made items incorporating controlled U.S.-origin items, or the EAR's "*de minimis*" rules, were announced on October 1, 2008. Prior to the October 1 revision, the *de minimis* rules had not been revised since 1996. Specifically, the amendment changes the *de minimis* calculation for foreign produced hardware that is bundled with U.S.-origin software. Previously, the value of the U.S.-origin software could only be compared with the value of the foreign-origin software content in the foreign-made items. Under the new rule, the value of U.S.-origin software bundled with the end-item will be compared with the total value of the hardware. If the total value of the U.S.-origin software constitutes less than 25 percent of the commodity's value (or 10 percent in the case of exports to Cuba, Iran, North Korea, Sudan or Syria), then the commodity is not subject to U.S. export controls. The new rule also eliminates certain

reporting requirements and provides clarification on BIS’s interpretation of the term “incorporated” for purposes of performing *de minimis* calculations for items incorporating software.

In addition to the regulatory changes above, BIS has also made significant efforts to improve the public’s understanding of the Department of Commerce export licensing requirements, including publishing advisory opinions and creating web guidance on existing provisions of the CCL.

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