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Global Trade Group

A L E R T

Proposed Changes to U.S. Export Policy of Dual-Use Items to China

By Elizabeth G. Phan and Akana K.J. Ma

A proposed U.S. government regulation aimed at curbing Chinese military modernization may restrict U.S. commercial exports to China and would require additional costly procedures for U.S. companies. A summary follows as well as information on how to submit comments to the U.S. Commerce Department.

BACKGROUND

The delicate balance between encouraging global exports while preventing exports from contributing to foreign military capabilities is a familiar conundrum for the United States (US) export control policy. The U.S. Commerce Department's (DOC) Bureau of Industry and Security (BIS) has recently proposed amendments to the Export Administration Regulations (EAR) to revise licensing policies on exports and re-exports of goods and technology to the People's Republic of China (PRC).

"These changes carefully target certain technologies that, while unrestricted until now, have the potential to materially enhance China's military capabilities."

David McCormick
Under Secretary of Commerce
for Industry and Security

PROPOSED AMENDMENTS

BIS proposes significant amendments to the current EAR sections regarding licensing requirements and restrictions on exports of goods and technology to China.

NEW LICENSE CONTROL FOR GOODS AND TECHNOLOGY DESTINED FOR MILITARY END-USE

The first change would be a revision to the licensing review policy for items listed on the Commerce Control List (CCL) for reasons of national security. Such controlled export items would be approved for civilian use but denied if they materially

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contribute to the Chinese military. Additionally, an exporter of certain CCL items bound for the PRC would be required to seek a license when the exporter has knowledge that such item is destined for a military end-use.

NEW AUTHORIZATION FOR VALIDATED END-USERS

The proposed regulation change would establish a new procedure to certify Validated End-Users (VEUs) in China to promote exports to civilian end-users. Such nonmilitary VEUs would be listed in the EAR after their review and subsequent approval. Evaluation of prospective VEUs would be conducted by BIS and other relevant agencies. Authorization would only be granted if specific criteria are met, including but not limited to, the applicant's compliance with U.S. export laws and its acquiescence to on-site compliance reviews by U.S. government representatives.

Requests to be listed as a VEU would be submitted in the form of an advisory opinion. The advisory opinion would be required to include a list of items identified by Export Control Classification Number (ECCN) that would be exported, re-exported or transferred to an eligible end-user. Certain items would not be eligible for export, re-export or transfer to VEUs.

Exporters, re-exporters and end-users who are granted authorization VEU would be required to comply with certain recordkeeping and certification requirements, prior to its initial export, re-export or transfer under the newly granted authorization. Approved users of authorization VEU would also be required to submit annual reports to BIS under this proposed rule.

NEW REVISION OF END-USER CERTIFICATE REQUIREMENTS

The last proposed change would require exporters to obtain an End-User Certificate, issued by the PRC Ministry of Commerce, for all items that both require a license to the PRC for any reason and exceed a total value of \$5,000 USD per single ECCN entry. The current requirement of a PRC End-User Certificate will continue for licensed computer exports of any amount.

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One streamlining measure would be to abolish the current requirement that exporters submit PRC End-User Certificates to BIS with their license applications. Instead, exporters would be required to include the serial number of the PRC End-User Certificate in the license application and retain certificates for five years.

WHAT IT MEANS TO YOU

These proposed changes to U.S. export control laws will require additional disclosures and administrative work by U.S. exporters and re-exporters interested in trading with China. Moreover, they may significantly increase export costs for U.S. exporters. Whether these regulatory changes will advance the U.S. government's goal of maintaining national security is unclear.

BIS welcomes your opinion on these proposed changes to the EAR. If you are interested in submitting your opinion, ***comments must be received by November 3, 2006.***

WHERE TO SEND YOUR COMMENTS

Written comments on this proposed rule may be sent to the Federal eRulemaking Portal: <http://www.regulations.gov>, or electronically to publiccomments@bis.doc.gov. Be sure to include RIN 0694-AD75 in the subject line of your message.

Comments may be submitted by mail or hand delivery to Sheila Quarterman, Office of Exporter Services, Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, 14th Street & Pennsylvania Avenue, NW., Room 2705, Washington, D.C. 20230, ATTN: RIN 0694-AD75; or by facsimile to (202) 482-3355

Ater Wynne's Global Trade and Intellectual Property Group can assist parties interested in responding to this proposed rule, including the preparation of public comments and examining strategies to comply with U.S. export controls for goods and technology.