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"Export Control Reform Update: Preparing for Transition" Webinar

Hosted by American Shipper on Tuesday, April 23, 2013

Responses from the Q&A Portion of the Broadcast

This information has been provided by the Bureau of Industry & Security and Beth Peterson Enterprises.

1. How will the ECR impact the FMS process?

Export Control Reform (ECR) will not substantively change the Foreign Military Sales (FMS) process. The Bureau of Industry and Security's (BIS's) initial implementation rule inserts a new § 734.3(e) to clarify that exports, re-exports, or in-country transfers that exceed the scope of the terms of the FMS Letter of Offer and Acceptance or the applicable Department of State authorization will require separate authorization from BIS for items subject to the EAR. Currently, the EAR is silent on this issue, so this new provision is intended to provide guidance on FMS from an EAR perspective.

2. Will Temporary Export Licenses exist under ECR such as we currently have with Dept. of State (DSP-73's)?

ECR will not impact the issuance of temporary export licenses (DSP-73s) by the Directorate of Defense Trade Controls (DDTC). With respect to the EAR, BIS does not issue temporary export licenses. Upon the effective date of the initial implementation rule (October 15, 2013), all licenses issued by BIS will have a default validity period of four years, regardless of whether the transaction is a permanent or temporary export. Please note, however, that certain temporary exports, re-exports and transfers (in-country) may qualify for License Exception TMP (§ 740.9) if all relevant terms and conditions are met in §§ 740.2 and 740.9.

3. When the recently published final rule goes 'active' in October, will the revised 'specially designed' definition be applicable to the old existing USML/ECCN categories? Or is it only for use on the newly published categories and lists?

Upon the effective date, the definition of "specially designed" will apply to all instances where "specially designed" is used in the Commerce Control List (CCL). Thus, it will apply regardless of whether the item is a 600 series item or not, and regardless of whether the term is used as a control parameter or a decontrol parameter. With respect to the USML, the ITAR definition of "specially designed" will apply to USML Categories VIII and XIX upon the effective date. As subsequent revised USML categories are published in final form and become effective, the term "specially designed" will apply to those additional USML categories as well.

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4. **Re: The 180 days. Do we have 180 days to re-review the hardware and technical data in said Categories, then determine the new appropriate ECCN category? Or is it 2 years from the end of the 180 days?**

   Organizations must review the jurisdiction and classification of their items prior to the effective date of the final rule, as the final rule will apply to exports that occur on or after the effective date even if the transaction began prior to the effective date. The two-year period only refers to the ability to grandfather existing DDTC licenses, agreements, or other approvals that have been issued prior to the effective date. Any new license applications submitted to DDTC after the effective date solely for items moving to the CCL will be returned-without-action by DDTC. Thus, organizations must review the impact of the final rule prior to the effective date.

5. **Since this rule now defines 'specially designed' and this was not previously defined, can we start applying this definition to the CCL before 10/15/13?**

   Yes, organizations may apply the definition of "specially designed" prior to the effective date. The new definition is consistent with how BIS has interpreted the term previously, so going forward companies may use the new "specially designed" definition for classification determinations prior to October 15, 2013.

6. **If an exporter has an item on the USML and it will be eligible for the 600 series on the CCL, can the exporter simply 'self-declare' it to be CCL or do they need to notify the government?**

   An exporter may self-classify an item without notifying the U.S. Government. One of the goals of ECR is to more positively identify those items warranting control, and thus make it easier for exporters to self-determine the jurisdiction and classification of an item. Only if an exporter is uncertain about jurisdiction must the exporter seek a commodity jurisdiction determination.

7. **Can we start requesting the classification through SNAP-R for the 600 series items?**

   Yes, organizations may submit classification ("CCATS") requests to BIS requesting a prospective classification for items that may be moving from the USML to the CCL. Such CCATS determinations indicating an item is a 600 series item will not become effective until the applicable effective date that the item moves to the CCL.

8. **Will 'Dual Use' articles (e.g. 9A991d) remain 'Dual Use?'**

   Yes, at this point BIS has not undertaken or scheduled a review of the EAR items.

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9. I am the Director of Import Compliance & Transportation for a mid-size outdoor equipment importer, and I file all Customs Entries for the company. We are looking at doing more Exports of our products. Is something as small as a switch, even if it is a switch for a tiller or log splitter, something that we should be keeping a closer eye on? Where is the best place to get the information?

The best place to go is to the Federal Register Notices. Review the products to determine if your products are on the list. That said, if your products are not currently on the USML, the ECR process should not result in them being added to the USML.

10. So how does this effect companies that have really never had export issues as far as our products?

The intent of ECR is to move items that require less control from the USML to the CCR. It is not the intention of ECR to move things to higher control.

11. One of the Export Reform Benefits: to ease licensing burden...how?

As items are moved to the CCL, they will be eligible for license exceptions. This will ease licensing burdens because items on the USML require licenses.

12. Beth: You mentioned clarity on 'specially designed.' What is meant by or intended by 'for use in or with' a defense article?

The definition of ''specially designed'' proposed in the June 19 (specially designed) rule adopted a catch and release approach because the agencies found that it was easier to describe what the term did not or should not include rather than what it does include. Thus, paragraph (a) of the definition proposed in the June 19 (specially designed) rule contained three broad bases for items to be ''specially designed''— the catch. If an item were caught by at least one of the three bases in paragraph (a), then paragraph (b) contained five exceptions to that item's being ''specially designed''— the release. If it isn't clear, the April 16, 2013, Federal Register Notice provides instructions on how to submit "Classification Requests To Confirm That Items Are Not 'Specially Designed'." For questions about the definition of ''specially designed,'' contact Timothy Mooney, Regulatory Policy Division, Office of Exporter Services, Bureau of Industry and Security, at 202–482–2440 or timothy.mooney@bis.doc.gov.

13. Where does encryption technology and other software systems fall?

Encryption software and technology will continue to fall under Category 5, Part 2.

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