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THE PROPOSED STRATEGIC TRADE AUTHORIZATION LICENSE EXCEPTION, CONSOLIDATED EXPORT SCREENING LIST, AND NEW RESTRICTED PARTIES

On December 9, 2010, the Department of Commerce, Bureau of Industry and Security ("BIS"), proposed a new license exception to the Export Administration Regulations ("EAR"), which govern exports and reexports of commercial and dual-use goods, software, and technology. The broad new license exception, which will be denominated as a Strategic Trade Authorization ("STA"), would authorize, with conditions, the unlicensed export, reexport, and transfer of many items on the EAR's Commerce Control List ("CCL") to a group of 37 allied and regime partner countries. The proposed new license exception also would permit the unlicensed export, reexport, and transfer of less sensitive CCL items for civil end uses to 125 countries.

This new license exception is significant because of the licensing burden it promises to eliminate (albeit with conditions that may fall most heavily on non-U.S. parties). In addition, the notice setting forth the new exception offers early insight into the licensing policies that the Obama Administration plans to pursue as part of a reformed export control regime, especially with respect to which items will be designated for the most stringent controls under a new three-tier scheme into which the CCL is to be organized. Those most stringently controlled items would be ineligible for export/reexport/transfer under this new license exception.

Also on December 9, President Obama announced the launch of a government-wide consolidated electronic list for screening entities that are subject to U.S. government sanctions or special export requirements. This new screening tool is available on a new Export Control Reform Initiative webpage at www.export.gov/ecr/.

Relatedly, the Treasury Department's Office of Foreign Assets Control ("OFAC") announced on December 21, 2010, the addition of several entities to the List of Specially Designated Nationals and Blocked Persons ("SDN List"). These recently designated entities include several notable Iranian entities, including two banks and a state-owned oil and gas company. A brief overview of these additions is below.

The proposed License Exception STA and the launch of the consolidated electronic screening list were among a number of significant steps the Obama Administration took in the past two weeks toward implementing its Export Control Reform Initiative, which was announced earlier this year. BIS and the Department of State, Directorate of Defense Trade Controls ("DDTC") also issued proposed rules and requests for public comment concerning revisions to the two export control lists they administer — the CCL in the EAR and the U.S. Munitions List ("USML") in the International Traffic in Arms Regulations ("ITAR"). For more information on these other *Federal Register* notices, please see our separate E-Alert, U.S. Export Control Reform Developments, published December 16.

Comments on the proposed License Exception STA are due February 7, 2011. BIS officials have emphasized the importance of public comments as part of the export control reform process. Clients may wish to take this opportunity to offer feedback on this and the other export control reform efforts

announced recently by the Administration. We are well-positioned to assist clients and groups of clients within particular industries in formulating strategies and comments in response to these notices.

THE PROPOSED STRATEGIC TRADE AUTHORIZATION LICENSE EXCEPTION

License Exception STA would permit the unlicensed export, reexport, and transfer abroad of many items on the CCL — including commodities, software, and technology — to countries that BIS has determined pose little risk of unauthorized use or diversion, if exporters and non-U.S. recipients comply with certain requirements. STA represents a new approach in the compliance commitments it extracts from non-U.S. parties and the procedural requirements it imposes on non-U.S. parties. In essence, those parties would be charged with ensuring that items exported or reexported pursuant to STA are not reexported outside of the STA countries (or transferred to other non-U.S. parties within those countries) except in compliance with STA, unless specific BIS authorization is obtained. Non-U.S. parties also must ensure that special destination control statements follow the goods as they move within the STA territory.

The proposed new exception has three parts. Which part of the exception may apply to an export, reexport, or transfer depends on the item, its reason for control, and the destination. Because of various requirements imposed by statutes, treaties, or U.S. implementation of international commitments, items subject to control for short supply (SS), surreptitious listening (SL), missile technology (MT), or chemical weapons (CW) reasons would not be eligible for License Exception STA. In addition, items that require a license because of the end-use or end-user in a particular transaction would continue to require such licenses (such as circumstances involving exports to restricted parties or for prohibited activities).

The license exceptions contained within STA are:

1. Exports, reexports, and in-country transfers without a BIS license would be authorized to 37 countries (named in the *Federal Register* notice) that are members of all four multilateral export control regimes or other regime members that also are members of NATO, depending on the type of controls imposed on the item. Items that would qualify for this part of the exception include items that are controlled for export/reexport/transfer for the transaction at issue only for one or more of seven reasons — national security (NS), chemical or biological weapons (CB), nuclear nonproliferation (NP), regional stability (RS), crime control (CC) (with the exception of certain items that are not STA-eligible for human rights reasons), and/or because the items are encryption items (EI) or significant items (SI).

2. Exports, reexports, and in-country transfers would be authorized to the 37 countries described above plus Albania and Israel if the item is controlled for the transaction only for national security (NS) reasons and not designated in its Export Control Classification Number ("ECCN") as being ineligible for License Exception STA. A new "STA exclusion paragraph" would be added to 50 ECCNs to indicate that all or some of the items controlled under those ECCNs are ineligible for this (and the following) part of the license exception. These 50 ECCNs closely track the Sensitive List of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies.

3. Exports, reexports, and in-country transfers would be authorized to 125 additional countries (listed in the *Federal Register* notice) if the item is controlled for the transaction only for national security (NS) reasons, is not excluded from eligibility for STA by an exclusion paragraph, and is intended only for civil end-use.

License Exception STA would not be available for transactions involving countries subject to U.S. economic sanctions. It also does not apply to exports and reexports to the Russian Federation and countries against which the United States currently imposes arms embargoes, such as China and Venezuela.

License Exception STA would impose significant new requirements on exporters, reexporters, and tranferors, as follows:

1. Exporters must furnish the consignee with the ECCN of each item transferred under License Exception STA.

2. Reexporters and transferors must provide subsequent consignees with each item's ECCN as identified by the exporter, prior reexporters, or transferors.

3. Exporters, reexporters, and transferors must obtain from their consignees, prior to the shipment, a written statement which identifies the items to be shipped and restates the ECCN(s) and in which the consignee acknowledges that the items will be shipped pursuant to License Exception STA and that it understands and agrees to various requirements and restrictions on such shipments.

4. Finally, exporters, reexporters, and transferors must include a special destination control statement on documents that accompany the shipment. Unlike the destination control statement that currently applies to most exports under the EAR, this new statement would apply to reexports and transfers abroad. In addition to noting that the shipment is subject to the EAR and that any further disposition must be in accordance with those regulations, the statement would include the applicable ECCN and acknowledge that the shipment is being made pursuant to License Exception STA and that subsequent exports or reexports under paragraph (a) of License Exception APR (EAR § 740.16(a)) are prohibited.

As noted above, the new exception represents a departure from other license exceptions in the EAR in the significant requirements it would impose on non-U.S. parties who receive items pursuant to the exception. These parties would have to agree as a condition of use of the exception not to export, reexport, or transfer the items to destinations, end uses, or end users prohibited by the EAR. They also would need to agree to provide certain transaction-related documentation to the U.S. government and to ensure that robust destination control statements are transferred with the item. Non-U.S. parties may be reluctant to accept these obligations, and U.S. exporters will have a significant education process with non-U.S. consignees if they want to rely on the new exception. The new license exception also could create monitoring and enforcement challenges for the U.S. government, especially if items transferred pursuant to STA undergo multiple reexports and transfers abroad.

It remains unclear exactly how License Exception STA will fit into the broader licensing policies that the Administration intends to apply to a newly tiered single export control list. (The Administration's proposed new tiered system of export controls is described in our separate December 16 E-Alert, U.S. Export Control Reform Developments.) BIS has already determined that any items within the scope of Tier 1 of a new three-tier licensing scheme for the CCL—i.e., the most sensitive items that are critical to maintaining a military or intelligence advantage for the United States and are almost exclusively available from the United States—will not be within the scope of License Exception STA. In that regard, BIS has identified a list of 29 ECCNs in this License Exception STA *Federal Register* notice that may be designated as licensing Tier 1, and which therefore would be excluded from eligibility for STA. Many of these items are not yet identified in the *Federal Register* notice as needing to be revised to incorporate "STA exclusion" paragraphs, which indicates that the future licensing status of these items is still being reviewed.

Indeed, BIS has urged industry to submit comments discussing whether items controlled under these 29 ECCNs should be placed in Tier 1 or whether different tiers of control should apply to these ECCNs or to certain subparagraphs within them. Among the listed ECCNs are composite structures and laminates controlled under ECCN 1A002, electronic components controlled under ECCNs 3A001 and 3A201, electronic equipment controlled under ECCN 3A002, computers controlled under ECCNs 4A001 and 4A003, telecommunications equipment controlled under ECCN 5A001, numerous items controlled under Category 6 (sensors and lasers) and 7 (navigation and avionics), submersible vehicles and surface vessels controlled under ECCN 8A001, and aero gas turbine engines controlled under ECCN 9A001.

Use of License Exception STA is optional; exporters may continue to use other license exceptions or obtain a license if they prefer to do so. However, as noted above, use of STA would affect the availability of a part of License Exception APR for future reexports of the item. License Exception APR permits certain reexports from countries in EAR Country Group A:1 or cooperating countries upon receipt of an export authorization from the government of the reexporting country, assuming certain conditions are met. Once an item has been shipped pursuant to License Exception STA, however, parties would be precluded from using paragraph (a) of License Exception APR for future transfers of the item.

With respect to other license exceptions, the *Federal Register* notice states that License Exception STA "would . . . not affect the requirements for" License Exception ENC, which authorizes, with conditions, license-free transfers of certain items controlled for EI (encryption item) reasons under ECCNs 5A002, 5B002, 5D002, and 5E002. It is not clear whether this is intended to mean that License Exception STA could not be used instead of ENC for exports, reexports, and transfers of items controlled by those four ECCNs. That result seems inconsistent with the regulations as proposed, since License Exception STA expressly states that items controlled for EI reasons are eligible for STA export to 37 countries, and none of those four EI encryption ECCNs are being revised to include STA exclusion paragraphs. It may be that BIS intends that the vendors of EI-controlled items will still be required complete the encryption registration process and submit annual reports as specified by License Exception ENC even if the export or reexport is made under STA authority. If so, it appears that further revisions to the regulations may be necessary to clarify that point.

Among other issues, clients may wish to comment on the proposed item or geographic scope of the proposed new license exception and/or the requirements it would impose on non-U.S. consignees and how those might be best met, as well as on the proposed Tier 1 designations. If License Exception STA is adopted as part of the EAR, clients should carefully consider the possible consequences of using the exception in place of License Exception APR or the current licensing process.

CONSOLIDATED SCREENING LIST

The government has for the first time released a single downloadable file that consolidates restricted party screening lists maintained by the Departments of Commerce, State, and Treasury. The consolidated screening list includes entries on the Denied Persons List, the Unverified List, the Entity List, the Nonproliferation Sanctions List, the Debarred List, and the Specially Designated Nationals (SDN) List. The column titled "Source List" in the consolidated file indicates which agency screening list is the source for each entry on the spreadsheet.

The consolidated list does not replace the individual lists published and maintained by various U.S. government agencies. Individual agencies still will be responsible for identifying parties to be added to or removed from those lists, and for keeping the lists updated. Administration officials have

suggested that the consolidated screening list will be updated within one to two days of any changes being made to the individual agency lists. The ability of the consolidated list to stay current with changes to the lists it combines clearly is critical to the ability of exporters and others to rely on it as a useful tool.

The Export Control Reform Initiative website recommends that whenever screening using the consolidated list results in a "hit," users should continue to refer to the requirements of the responsible agency before taking any further action. This is because different sanctions attach to the entities on each of the agency lists. The links to the responsible agency's relevant web pages are embedded in the consolidated file.

Small- and medium-size firms that conduct manual restricted-party screening (that is, screening that does not rely on interdiction software or Web-based services) could benefit substantially from the convenience of a consolidated screening list, assuming the list is kept up-to-date. Many clients, however, may wish to continue using screening software offered by private vendors. These programs often have added benefits that allow users to save searches, document screening, and set automatic e-mail notifications which can be particularly helpful when dealing with larger volumes of exports or large numbers of customers and vendors whom clients regularly re-screen.

NEWLY DESIGNATED ENTITIES

On December 21, 2010, OFAC designated several notable Iranian entities, resulting in the blocking of certain of these entities' assets and, in certain cases, in a prohibition on exports and reexports to these entities of all items subject to the EAR without a Commerce Department license, which is subject to a presumption of denial. A complete list of the entities and persons recently added to the OFAC SDN list can be found here.

Pursuant to Executive Order ("EO") 13382 — an authority aimed at freezing the assets of proliferators of weapons of mass destruction — OFAC designated Bonyad Taavon Sepah, Ansar Bank, Mehr Bank, and Moallem Insurance Company, blocking any assets in the possession or control of "U.S. persons." OFAC has determined that Bonyad Taavon Sepah is a foundation that handles investments of the Revolutionary Guard, and that it created Ansar Bank and Mehr Bank to provide credit and services to Revolutionary Guard personnel. Moallem Insurance Company was designated for providing maritime insurance to the Islamic Republic of Iran Shipping Lines (also designated under EO 13382). OFAC also designated Liner Transport Kish as a Specially Designated Global Terrorist ("SDGT") under EO 13224 for providing shipping services outside of Iran in support of Hizballah on behalf of the Revolutionary Guard. These sanctions continue aggressive targeting by the U.S. government of Revolutionary Guard-affiliated entities and the Iranian national shipping line.

The designation of the above entities under EOs 13382 and 13224, which supplement prior action against the Revolutionary Guard, also will have implications for exports of items subject to the EAR. Under EAR §§ 744.8 and 744.12, no item subject to the EAR (including non-sensitive EAR99 items) may be exported or reexported to an entity whose property or interests in property is blocked pursuant to EOs 13382 or 13224, respectively, without specific authorization from BIS or OFAC, even if the items are to be exported or reexported by a non-U.S. person. This authorization is subject to a presumption of denial. Under the Iranian Transactions Regulations ("ITR"), U.S. persons already are prohibited from exporting goods to Iran without specific authorization from OFAC (and no separate authorization from BIS is required if OFAC has authorized such a transaction). However, since the new designations trigger the prohibition under EAR §§ 744.8 and/or 744.12, non-U.S. companies that were engaged in lawfully exporting/reexporting to these entities items subject to the EAR and who had not been involving U.S. persons in such exports/reexports now are required to

seek authorization from BIS prior to continuing such exports or reexports. As noted, a presumption of denial is in place for parties so designated.

Separately, under the ITR, OFAC identified Pars Oil & Gas Company as an entity owned or controlled by the Government of Iran. The ITR prohibit transactions between U.S. persons and the Government of Iran. Thus, OFAC is providing notice that all transactions between U.S. persons and Pars Oil & Gas Company are prohibited (without mandating the blocking of assets).

If you have any questions concerning the material discussed in this client alert, please contact the following members of our foreign trade controls practice group:

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