

E-ALERT | International Trade Controls

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COMMERCE DEPARTMENT ISSUES FINAL RULE ON THE NEW STRATEGIC TRADE AUTHORIZATION LICENSE EXCEPTION

On June 16, as part of the ongoing Export Control Reform (“ECR”) Initiative, the Commerce Department, Bureau of Industry and Security (“BIS”) published a final rule establishing a new Strategic Trade Authorization (“STA”) License Exception authorizing the unlicensed export, reexport, or transfer of certain goods, software, and technology on the Commerce Control List (“CCL”) of the Export Administration Regulations (“EAR”) to and within specified countries as long as the exporter, reexporter, or transferor fulfills certain requirements. As explained in our E-Alert of December 23, 2010 on the [Proposed Strategic Trade Authorization License Exception](#), License Exception STA, 15 C.F.R. § 740.20, now permits, under certain circumstances, the unlicensed export, reexport, and transfer abroad of many items on the CCL to countries that BIS has determined pose little risk of unauthorized use or diversion. Although the final rule is similar in structure and operation to the proposed rule, it differs from the proposed rule in a number of significant respects. The final rule:

- Sharply reduces the number of countries to which less sensitive items may be exported, reexported, or transferred in country under the exception;
- Clarifies the eligibility of certain highly controlled items for export under STA;
- Revises the consignee notification requirements for deemed exports of software source code and technology;
- Reduces the notification and consignee statement requirements for exports made under STA;
- Adds a new recordkeeping requirement for exporters, reexporters, or transferors using STA to authorize shipments or transfers of controlled articles or software; and
- Expands the range of items ineligible for export, reexport, or transfer under the exception.

OVERVIEW OF LICENSE EXCEPTION STA

License Exception STA authorizes the export, reexport, and in-country transfer of certain CCL-controlled items to and within two different groups of countries. The first group consists of 36 countries—“low risk” countries which are members of all four major multilateral export control regimes—to which exports, reexports, or in-country transfers of items controlled for national security (NS), chemical and biological weapons (CB), nuclear nonproliferation (NP), regional stability (RS), crime control (CC), and/or significant items (SI) reasons do not require a license.¹ A second group of eight countries are authorized to receive exports, reexports, or transfers of less sensitive items controlled under the CCL solely for national security (NS) reasons under License Exception STA, if the item is not specified in its ECCN as being ineligible for export, reexport, or transfer under the

¹ Eligible countries are Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Turkey, and the United Kingdom.

exception.² In the final rule, BIS designated 49 highly controlled Export Control Classification Numbers (“ECCNs”) that contain items ineligible for transfer to these eight countries under License Exception STA.

As described below, the rule explicitly authorizes use of the new license exception for deemed exports and reexports, assuming specific conditions for use of the exception are met.

Requirements for Use of License Exception STA

To use License Exception STA, exporters, reexporters, and transferors must comply with mandatory notification and acknowledgment requirements. In particular, they must:

- 1. Furnish the ECCN of each item shipped under the exception to the consignee.** Reexporters and transferors must also furnish the ECCN to subsequent consignees. However, the ECCN need not be provided for subsequent shipments of the same item by the same party to the same consignee if the previously provided ECCN remains accurate.
- 2. Obtain a written consignee statement.** Prior to the first shipment under the exception to a consignee, exporters, reexporters, and transferors must obtain a written consignee statement certifying that the consignee understands the limitations and requirements for use of the exception, and that the consignee agrees to abide by the recordkeeping and record production requirements of the exception. One consignee statement can be used for multiple shipments of the same item by the same party to the same consignee, provided that the ECCN and party information remains accurate and the exporter, reexporter, or transferor keeps a written record identifying each shipment made under License Exception STA and the consignee statement associated with that shipment.
- 3. Notification to the consignee of STA shipment.** The exporter, reexporter, or transferor must notify the consignee in writing (either in paper or electronic form) if a shipment is made pursuant to License Exception STA. The notice must identify the shipment to which the exception applies, and must indicate whether the entire shipment is made pursuant to STA or whether only certain items are shipped under STA.
- 4. Releases of software source code or technology to foreign nationals.** Parties releasing software source code or technology under STA to a foreign national, either within or outside the U.S. (*i.e.*, a “deemed export” or “deemed reexport”) must notify the recipient in writing of restrictions on further transfer or release.

Limitations on the Scope of License Exception STA

Regardless of the country to which the item is being shipped, License Exception STA does not apply in the following circumstances:

- 1. End-use/end-user restrictions.** License Exception STA cannot be used for exports, reexports, or transfers controlled because of their intended end use or proposed end-user, or because their proposed destination is subject to an embargo or other special restriction under Part 746 of the EAR.
- 2. Items controlled pursuant to certain multilateral export controls regimes.** License Exception STA cannot be used if the item to be exported, reexported, or transferred is controlled for the intended destination for encryption item (EI), short supply (SS), surreptitious listening (SL),

² The eight eligible destinations are Albania, Hong Kong, India, Israel, Malta, Singapore, South Africa, and Taiwan. These countries were likely selected because the U.S. Government has strong confidence in their export control systems and/or because the export controls relationship between the U.S. and these countries is politically significant.

missile technology (MT), and/or Chemical Weapons Convention (CW) reasons because of requirements imposed by statutes, treaties, or US implementation of international commitments.

3. **STA is unavailable for specified items.** License Exception STA cannot be used for exports, reexports, or transfers of certain items controlled for Crime Control reasons in Category O of the CCL (ECCNs 0A981, 0A982, 0A983, 0A985, or 0E982) because of human rights concerns related to these items, nor can it be used for certain pathogens and toxins in Category 1, or certain gas turbine engine-related software and technology in Category 9.
4. **APR Exclusion.** Once shipped under STA, an item may not be subsequently reexported or transferred under the Additional Permissive Reexports (APR) License Exception.

CHANGES FROM THE PROPOSED RULE

BIS received 41 comments in response to its proposed rule on License Exception STA. Based on foreign policy considerations and these comments, BIS made a number of changes to the final version of License Exception STA. The most significant changes are as follows:

Elimination of the Authorization for Less Sensitive Items Exported for Civil End-Uses, Sharply Reducing the Number of Countries Eligible to Receive Less Sensitive Exports Under License Exception STA

The proposed rule included three levels of authorizations under License Exception STA—one allowing items subject to the seven (now six) specified reasons for control to go to 37 (now 36) destinations, a second allowing less sensitive items subject to only national security (NS) controls for a particular transaction to go to two additional destinations, and a third allowing less sensitive items controlled only for national security (NS) reasons to go to 125 destinations for civil end-uses. The final rule eliminated this third authorization and expanded the number of countries eligible for the second authorization (containing no civil end-use requirement) to eight. This change eliminated 119 countries as destinations eligible to benefit from License Exception STA for exports of NS-controlled items.

BIS cited foreign policy considerations as the reason behind the change in the number of eligible destinations, and BIS staff have stated that the cutback is due to the lack of strong export controls systems in these countries. The removal of these 119 countries affects only an estimated 1-2% of BIS-licensed trade, so the effect of excluding these countries, in practice, is minimal. The final rule also eliminated one country—Ukraine—from the original list of 37 countries eligible to receive exports of more sensitive items under the exception.

Clarification of License Exception STA Eligibility for Certain Highly Controlled ECCNs

In the proposed rule, NS-controlled items that were ineligible for export under the second authorization provision (authorizing exports of less sensitive items to the now eight designated countries) would be identified by “STA exclusion paragraphs.” The proposed rule identified 50 highly controlled ECCNs to which STA exclusion paragraphs would be added, making exports of items controlled by those ECCNs ineligible for export, reexport, or transfer under STA except to the now 36 destinations eligible for exports of more highly sensitive articles. In the final rule, BIS clarified that exclusion paragraphs would be added to 49 ECCNs, only 10 of which would be excluded entirely from STA eligibility. The remaining 39 entries would have exclusion paragraphs limiting the use of STA only for certain items within those ECCNs. The final rule also revises the exclusion paragraphs to specify the destinations which are ineligible to receive exports of the specified items pursuant to STA. The STA exclusion paragraphs closely track the Wassenaar Arrangement Sensitive List.

The proposed rule also identified 29 ECCNs which BIS was to evaluate for Tier 1 control status (the highest proposed level of CCL control). However, as the planned export control tier system has not yet been established, BIS decided not to designate any particular ECCNs as Tier 1 in this final rule.

Revised Notification Requirements for Deemed Exports of Software Source Code and Technology

Recognizing the difficulty of providing formal notifications and obtaining written consignee statements every time in-country transfers of software source code and technology are made to foreign nationals, the final rule established a separate notification requirement for deemed exports or deemed reexports of software source code and technology. Deemed exports are releases of controlled software source code or technology to a foreign national in the United States, while deemed reexports are releases of such items to a foreign national of a third country in the country of destination of an export. Such transfers are considered to be an export or reexport of these items to the country of which the foreign person is a national. The final rule requires the party releasing software source code or technology pursuant to the STA license exception to provide the recipient with a one-time notification, in writing, of the restrictions on further release of the source code or technology. Both the releasing and receiving parties must retain a copy of this written notification, which can be included in an employment contract or other similar document.

Reduced Notification and Consignee Statement Requirements

Though retaining the proposed rule's general requirement that the exporter, reexporter, or transferor furnish the consignee with the ECCN of each item to be shipped under the exception, the final rule lifts this requirement for subsequent shipments of the same item to the same consignee, as long as the ECCN that was earlier provided to the consignee remains accurate. Similarly, the final rule allows one written consignee statement to be used for multiple shipments of the same item by the same party to the same consignee, rather than requiring a new statement for each shipment, as long as the information about the parties and ECCN remains accurate.

Both the proposed and final rules addressing License Exception STA are ambiguous in that they use the term "consignee" rather than "ultimate consignee," the latter of which is defined elsewhere in the EAR. Although the nature of the requirements suggests that the exporter, reexporter, or transferor must comply with these requirements only with respect to the ultimate consignee, as opposed to intermediate consignees, it is possible that BIS could read "consignee" as referring to both "ultimate" and "intermediate" consignees. Additional clarification from BIS on this issue would be helpful in determining the precise application of the rule.

The final rule also eliminates the requirement that a special destination control statement be included on all export control documents related to the shipment. This requirement was replaced in the final rule by a more general requirement that exporters provide consignees with a written notice (in either paper or electronic form) that the shipment is made pursuant to License Exception STA and identifying which items in the shipment are subject to the exception.

Additional Recordkeeping Requirements

To facilitate verification of compliance with the consignee statement requirement, the final rule adds a new requirement that the exporter, reexporter, or transferor keep a written log or record of each shipment made under License Exception STA and the consignee's written statement associated with that shipment.

Removal of Additional Items from Eligibility for Export Under License Exception STA

As indicated above, items controlled on the CCL for encryption item (EI) reasons are ineligible for export, reexport, or transfer under License Exception STA. Although EI items would have been eligible for STA under the proposed rule, BIS determined that STA is not an appropriate mechanism for addressing government interests in encryption export controls, and removed EI items from eligibility. In addition, the final rule also removed from eligibility certain controlled pathogens and toxins in Category 1, additional items controlled for Crime Control reasons,³ and certain gas turbine software and technology controlled under Category 9. It also clarified that certain ECCNs (7E001 and 7E002) are subject to MT controls, and are therefore ineligible for STA.

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Although it is not yet clear how useful the exception will be for industry, BIS estimates that it will eliminate the need for some 3,000 licenses annually, allowing BIS to focus licensing resources on transactions where there is potentially a greater risk of diversion. In addition, License Exception STA is positioned to play a major role in current and future ECR initiatives, as it has been proposed as an approved license exception for exports of items on the recently proposed “Commerce Munitions List,” which will be discussed in a separate Covington E-Alert.

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³ Under the proposed rule, only ECCNs 0A981 and 0A983 were ineligible for STA. The final rule added 0A982, 0A985, and 0E982 to the list of ECCNs subject to crime control reasons for control which are ineligible for STA.