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EXPORT CONTROLS UPDATE October 2008

This newsletter is a summary of changes to US export control regulations or other regulatory matters of interest for the month of October 2008.

REGULATORY UPDATES

The President

Oct. 8, 2008: President Bush signed into law the United States-India Nuclear Cooperation Approval and Nonproliferation Enhancement Act, which allows the United States to share civilian nuclear technology with India. As part of the arrangement between the two countries, India will separate its civilian and strategic nuclear facilities and open its civilian facilities to international inspection.

Oct. 14, 2008: President Bush signed into law the Mercury Export Ban Act of 2008, an amendment to the Toxic Substances Control Act that will prohibit all exports of mercury from the U.S. beginning January 1, 2013.

Oct. 28, 2008 – *73 Fed. Reg. 63841*: Fulfilling a requirement of the U.S.-India Nuclear Cooperation Approval and Nonproliferation Enhancement Act (*see above*) President Bush certified that the nuclear agreement with India is consistent with the U.S. obligation under the Nuclear Non-Proliferation Treaty (NPT) not to advance India's nuclear weapons program, and that it is the policy of the United States to work with members of the Nuclear Suppliers Group to further restrict transfers of equipment and technology related to the enrichment of uranium and reprocessing of nuclear fuel.

Department of Commerce

During the first days of October, the Bureau of Industry and Security (BIS) issued several regulations that are both important and complex. *The summaries that follow are necessarily incomplete. Call us for details of these important new rules.*

Oct. 1, 2008 – *73 Fed. Reg. 56964*: BIS amended the “*de minimis*” rules for determining the proportion of U.S. content in a foreign-made product that would subject that product to U.S. export control rules. A major change in this rule affects foreign-made hardware bundled with U.S.-origin software. Previously, the *de minimis* calculation was made separately for the hardware, software, and technology in such a product. Under this new rule, the value of the US-origin commodities is now bundled with the U.S.-origin software, and the total value is determined in relation to the value of the entire foreign-made product, increasing the likelihood that the U.S. content will fall within the *de minimis* amount, freeing the item from U.S. export controls. This rule went into effect upon publication, but comments are invited and must be received by December 1, 2008. *This amendment includes other important provisions that limit its applicability.*

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Oct. 3, 2008 – 73 Fed. Reg. 57495: BIS published an “Encryption Simplification” rule amending the Export Administration Regulations (EAR) provisions on the export of hardware, software, and technical data using encryption technology. This interim final rule is effective immediately. Among other provisions, this 18 page rule –

- eliminates the requirement to notify BIS before exporting mass-market products that use “weak” cryptography classified under Export Control Commodity Numbers (ECCNs) 5A002, 5B002, 5D002, and 5E002;
- defines a new category of products performing “ancillary cryptography” that are not primarily useful for computing, communications, networking or information security (e.g., supply chain management, gaming, or facilities systems controllers including fire alarms and HVAC) and freeing them from review and reporting requirements under License Exception ENC;
- frees wireless “personal area networks” from review and reporting requirements under License Exception ENC;
- raises the thresholds for eligibility for unrestricted export under License Exception ENC (EAR Sec. 740.17); and
- adds Bulgaria, Canada, Iceland, Romania, and Turkey to the list of countries comprising Supplement No. 3 of EAR Part 740 (the “License Free Zone”), which can receive encryption products under License Exception ENC after submission of a review request.

However, the regulation also tightens the rule that allowed exporters to temporarily classify mass-market products under ECCN 5A992 and 5D992 and export them under No License Required (NLR) pending a 30-day review by BIS. Such products will now be temporarily classified under ECCN 5A002 and 5D002, and therefore will need to meet the requirements of License Exception ENC. *This is a very complex rule, and these are not the only provisions that were changed. Call us if you think this rule may apply to a product of yours.*

Oct. 3, 2008 – 73 Fed. Reg. 57554: This proposed rule would establish a new License Exception *Intra-Company Transfer (ICT)* that under limited conditions would allow a parent company and its wholly-owned and controlled subsidiaries to export, reexport, or transfer (within a foreign country) certain controlled items among themselves for internal company use. This exception would apply only for specified CCL items, only for certain countries, and only after BIS approves each of the participating entities. In order to utilize License Exception ICT, companies would be required to adopt a detailed compliance plan, and submit documentary evidence of its compliance with each of the specified requirements. Further, they would be expected to make voluntary disclosures of any violations that are discovered in the required internal audit, and they would need to agree to be audited by BIS every two years. *Comments on this proposed rule are due on November 17, 2008.*

Oct. 6, 2008 – 73 Fed. Reg. 58033: In the second phase of its systematic review of the Commerce Control List (CCL) (*see July 2007 Update*), BIS announced revisions of the CCL intended to clarify existing controls, eliminate redundant or outdated controls, establish more focused and rationalized controls, and add additional controls for clarity or for consistency with international regimes. Affected ECCNs include 1E001, 1E002, 1C350, 1C351, 1C352, 1C353, 1C354, 1C360, 2B018, 2B119, 2B350, 2B351, 4A101, 4A980, 4A994, 4E992, 5A991, 7D001, 7D002, 7E002, 7E101, and 9E101. *Call us for details if you export any of these items.*

October 14, 2008 – 73 Fed. Reg. 60910, corrected on Nov. 3, 2008 – 73 Fed. Reg. 65258: BIS amended the CCL to implement decisions made by the Wassenaar Arrangement at its December 2007 plenary, and to implement decisions about solar cells that had been agreed at Wassenaar’s 2006 plenary. In addition,

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changes were made in some unilateral or national security U.S. controls that were affected by the Wassenaar controls. The following ECCNs were amended: 1A004, 1E001, 1E201, 2B001, 2B002, 2B006, 2B007, 2B008, 3A001, 3A002, 3A229, 3B001, 3C002, 3C005, 3D001, 3E001, 5A001, 5A002, 6A001, 6A005, 6A995, 7A002, 7A003, 7A008, 9A012 and 9E003. The following ECCNs were added: 1A006, 1A007 and 3C006. The rule is effective immediately, but pending shipments of affected items may proceed if they are exported or reexported by December 15, 2008.

Department of State

Oct. 6, 2008 – *73 Fed. Reg. 58041*: Following a determination by the Deputy Secretary of State adding Eritrea to the list of countries that are not cooperating fully with anti-terrorism efforts, the Directorate of Defense Trade Controls (DDTC) amended International Traffic in Arms (ITAR) Section 126.1 to add Eritrea to the list of countries to which DDTC has a policy of denying license applications. Other countries on this list are Belarus, Cuba, Iran, North Korea, Syria, and Venezuela.

Oct. 24, 2008 – *73 Fed. Reg. 63540*: The Secretary of State rescinded a determination made in January 1988 that North Korea is a country supporting acts of international terrorism. This decision will eventually result in changes to the EAR, including removing North Korea from Country Group E:1, but no such changes will take effect until amendments to the EAR are published in the Federal Register.

Government Accountability Office

Sep. 25, 2008: The Government Accountability Office (GAO) released a report titled “Export Controls – Challenges with Commerce’s Validated End-User Program May Limit Its Ability to Ensure That Semiconductor Equipment Exported to China Is Used as Intended.” *The title says it all!* The GAO recommended that the Commerce Department suspend the Validated End User (VEU) Program until it can assure a more reliable means of verifying the end use of items – particularly semiconductors -- exported under it. The VEU Program was designed to facilitate exports to certain end users in China after BIS had reviewed them and found them to be reliable. (*See June 2007 and October 2007 Updates.*) Read highlights from this report at <http://www.gao.gov/highlights/d081095high.pdf>. The entire report is at <http://www.gao.gov/new.items/d081095.pdf>.

SANCTIONS

Department of Commerce

Oct. 1, 2008 – *73 Fed. Reg. 57051*: BIS renewed for a further 180 days the Temporary Denial Order (TDO) against Balli Group PLC, Balli Aviation, Balli Holdings, Vahid Alaghband, Hassan Alaghband, Blue Sky One Ltd., Blue Sky Two Ltd., Blue Sky Three Ltd., Blue Sky Four Ltd., Blue Sky Five Ltd., Blue Sky Six Ltd., Blue Airways, Mahan Air, Blue Airways FZE, and Blue Airways.

Oct. 9, 2008 – *73 Fed. Reg. 59598*: BIS denied the export privileges of Philip Cheng through Dec. 3, 2015, following his conviction for willfully engaging in brokering of ITAR-controlled thermal imaging and infrared technology without having registered with DDTC or receiving the required DDTC authorization. (*See December 2007 Update.*) In addition to the two-year prison sentence that he is currently serving, Cheng was sentenced to three years of supervised release and a \$50,000 criminal fine.

Oct. 10, 2008 – *73 Fed. Reg. 60237*: BIS renewed for a further 180 days the TDO against Aviation Services International, B.V., Delta Logistics, B.V., Robert Kraaijpoel, Niels Kraaijpoel, T.P.C., B.V., Mia Van Gemert, Mojir Trading, Reza Amidi, Lavantia Ltd., Mita Zarek.

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Oct. 27, 2008 – 73 Fed. Reg. 63676: BIS issued a 7-year denial order against NEAZ Trading Corporation of Karachi, Pakistan. NEAZ acted with intent to evade U.S. licensing requirements by falsely informing a freight forwarder that an export of an EAR99 online chemical monitoring system was destined for the UAE when in fact, the end user was to be KANUPP, a Pakistani organization listed on the Entity List.

Oct. 27, 2008 – 73 Fed. Reg. 63678: BIS issued a 7-year denial order against Yasmin Ahmed of Karachi, Pakistan. Ahmed failed to respond to charges that she had falsely advised a U.S. exporter that the end user for an export of EAR99 radar parts was the Bangladeshi Air Force, when in fact the parts were destined for Pakistan via the UAE, and that she also submitted a forged end-user certificate.

Department of State

Oct. 9, 2008 – 73 Fed. Reg. 59705: The Bureau of Verification, Compliance and Implementation terminated sanctions that had been imposed on Sokkia Singapore, a Singaporean entity on April 17, 2007. (See April 2007 Update.) The terminated sanctions included a ban on exports to Sokkia of items controlled under the EAR and the ITAR.

Oct. 23, 2008 – 73 Fed. Reg. 63226: The Bureau of Verification, Compliance and Implementation imposed sanctions on the following entities under the Iran, North Korea and Syria Nonproliferation Act:

- China Xinshidai Company (China)
- China Shipbuilding and Offshore International Corporation LTD (China)
- Huazhong CNC (China)
- Islamic Revolutionary Guard Corps (Iran)
- Korea Mining Development Corporation (North Korea)
- Korea Taesong Trading Company (North Korea)
- Yolin/Yullin Tech Inc. Ltd. (South Korea)
- Rosoboronexport (Russia)
- Sudan Master Technology (Sudan)
- Sudan Technical Center Company (Sudan)
- Army Supply Bureau (Syria)
- R and M International FZCO (United Arab Emirates)
- Venezuelan Military Industries Company (Venezuela)

The sanctions include a ban on all sales of defense articles or defense services to these entities and a ban on individual export licenses for exports of items controlled under the EAR to them.

FINES & PENALTIES

Sep. 26, 2008: Marysol Technologies, Inc., of Clearwater, FL agreed to pay \$180,000 to settle charges by BIS of unlicensed exports of laser resonator modules, module cavities, and their components -- items classified under ECCN 6A005 -- to China, India, Belarus, and Russia.

Oct. 3, 2008: Maxim Integrated Products of Sunnyvale, CA, a designer and manufacturer of semiconductor circuits and other analog and digital electronics, agreed to pay \$192,000 to settle charges that it had exported technology for the development of electronic components that was controlled under ECCN 3E001 to a Chinese-national employee without the required export license. Further, BIS charged that Maxim had done this knowing that a violation would take place, because after it had applied for an export license for these deemed exports, the exports continued while the application was being

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considered. Maxim was also charged with deemed exports of technology for the development of telecommunications equipment that was controlled under ECCN 5E992 to an Iranian-national employee. The settlement also covered charges of unauthorized product exports of integration circuits controlled under ECCN 3A001 to Ukraine and the PRC, and charges of unauthorized reexports of integration circuits from the Philippines to Russia, Estonia, and the PRC.

Oct. 8, 2008: In a case involving the U.S. antiboycott regulations, Rohde & Liesenfeld, Inc., a Germany-based freight forwarder operating in Houston, TX, agreed to pay \$108,000 to settle charges by BIS that on 36 occasions, in connection with the sale and transfer of goods from the U.S. to Syria, it had transmitted a prohibited negative certificate of origin stating: "We certify that the goods enumerated in this Invoice are not of Israeli origin and do not contain any Israeli materials."