

## AMENDING THE WAY EXPORT LICENSES WILL BE GRANTED (OR NOT)

The US Department of Commerce, Bureau of Industry and Security ("**BIS**") issued a final rule "*Amendment to Licensing Policy for Items Controlled for Crime Control Reasons*" (the "**Final Rule**")<sup>1</sup> amending the US Export Administration Regulations ("**EAR**") that impacts how BIS could consider human rights concerns when making licensing decisions. Starting October 6, 2020, certain BIS licensing decisions will be based, in part, on "*U.S. Government assessments of whether items may be used to engage in, or enable violations or abuses of, human rights.*" The change gives BIS a new ground on which to deny a license application and will apply to a broad range of goods.

### Background

Under the Final Rule, BIS has broadened how it can use the EAR to deter alleged human rights abuses. While it may appear on an initial read that the amendments only apply to items controlled for crime control ("**CC**") reasons<sup>2</sup> as the Final Rule amends the licensing policy applied to such items, this is far from the case.

Specifically, the Final Rule amends the licensing policy described in § 742.7(b). Previously, the policy provided that BIS would generally consider license applications for CC items "*favorably on a case-by-case basis unless there is civil disorder in the country or region or unless there is evidence that the government of the importing country may have violated internationally recognized human rights.*" The prior policy imposed parameters around the BIS decision making linking it to a consideration of the government of the importing country.

As revised, § 742.7(b) has been broadened to state that BIS will generally consider such applications "*favorably on a case-by-case basis . . . unless there is a risk that the items will be used to violate or abuse human rights*" (§ 742.7(b)(1)). As

<sup>1</sup> <https://www.govinfo.gov/content/pkg/FR-2020-10-06/pdf/2020-21815.pdf>.

<sup>2</sup> Under the EAR, there are several "reasons for control," including CC, national security, nuclear nonproliferation, anti-terrorism, and others. Each reason for control corresponds to the Commerce Country Chart, a list of countries for which export, re-exports, or transfers would require a license or license exception from BIS. Items controlled for CC reasons include equipment, technology, and software that might be used by police or law enforcement entities, such as biometric computers or police-model infrared viewers.

amended, § 742.7(b) further states that BIS "*will review license applications in accordance with th[is] licensing policy*" for items that require a license other than CC items "*and could be used by the recipient Government or other end user specifically to violate or abuse human rights.*" (§ 742.7(b)(2)). Here, BIS can consider where the items are going, who will be using them, and whether there is a "risk" that will be used in a manner contrary to US policy considerations around human rights.

### **Potentially Broad Implications for Future License Applications**

The contours of these changes are not clear. First, under the revised policy, BIS has latitude to consider the individual end user, rather than just the government of the country of the end user. Second, in removing the "*internationally recognized*" standard from "*human rights*" in § 742.7(b), BIS can make decisions based on US Government determinations, thus broadening the types of actions or activities that could trigger a license denial.

Third, BIS needs only judge that there is a "*risk*" that the items would be used in such a manner and to-date there is no guidance as to how BIS will evaluate or determine such "risks."

Finally, as noted above, the amendments to this license policy are not limited to CC-controlled items. The Final Rule further amends the EAR so that the new licensing policy will apply even to those items controlled for a reason other than CC. The Final Rule states that BIS will apply the new licensing policy to items controlled for any reason if the item could be used by the recipient government or specific end user to violate or abuse human rights. However, there is one exception – items that are controlled for short supply (a rather small group of items) are exempt.

Companies should consider whether the new licensing policy might apply to their transaction (chances are it will) and can anticipate that BIS will have greater scrutiny relating to end users. If not already doing so, companies should be prepared to submit information or answer questions directed at the risk that the goods for which the license is being requested would be contrary to BIS's policy.

### **More Changes to Come?**

The change comes on the tail of other US Government imposed trade restrictions with respect to human rights. BIS has added a number of entities to its Entity List for alleged human rights abuses, including both government and commercial entities. The listings mark the first time that BIS has used human rights as a basis for adding an entity to the Entity List. The US House of Representatives has passed a bill which is now under consideration in the US Senate that would further entrench human rights protections and provide tools to the US Government and US Government agencies in restricting and penalizing behavior linked to human rights abuses.

Unlike an entity listing, the new EAR licensing policy seems to allow BIS to take a more targeted approach to restricting exports, reexports, or transfers by granting a case-by-case risk-based decision.

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