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Indirect Tax Alert

US Government suspends defense exports and EAR export license exceptions for exports to Hong Kong

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Executive summary

The United States (US) Government has taken action to halt the export of US-origin military equipment to Hong Kong, as well as suspend the use of export license exceptions for exports to Hong Kong of controlled commercial products and software.

In response to the new security measures imposed by the People's Republic of China on Hong Kong, on 29 June 2020,¹ the US Government published notice of two measures it was implementing immediately. First, the Department of State announced that exports of US-origin defense equipment would be halted with immediate effect. Secondly, on 30 June 2020, the US Department of Commerce, Bureau of Industry and Security (BIS) suspended the license exceptions applicable to exports, re-exports and transfers (in-country) to Hong Kong of items subject to the Export Administration Regulations (EAR). This includes the transfer of export-controlled technology to Hong Kong nationals (deemed exports).

The new measures place Hong Kong under the same restrictive US export controls as mainland China.

Detailed discussion

The US Government expressed concern that the new security measures imposed by China on Hong Kong have increased the risk of sensitive US items being “illegally diverted to the Chinese People’s Liberation Army, the Ministry of State Security, North Korea or Iran.”² To mitigate this increased risk, the US Department of State ended the export of US origin defense equipment to Hong Kong,³ and BIS suspended the use of license exceptions for EAR controlled products and technology destined to Hong Kong.

Hong Kong previously qualified for a number of different license exceptions, found in Part 740 of the EAR (allowing for the export, reexport and transfer (in-country) of items that would otherwise require an export license), but is now on par with the limitations placed on exports to China. The move now limits license exceptions available for Hong Kong to only those that are also available for China.⁴ Recent revisions to the Military End User and End Use provision of EAR Section 744.21 will now also apply to exports to Hong Kong.

The suspension of the license exceptions include a savings clause that allowed shipments which were on dock for loading, on lighter, laden aboard an exporting or transferring carrier, or in route aboard a carrier to a port of export or reexport on 30 June 2020 to proceed to their destination under the previous License Exception eligibility.⁵ Further, deemed export/reexport transactions involving Hong Kong persons authorized prior to 30 June 2020 under a License Exception may continue until 28 August 2020. Those taking advantage of this 60-day savings clause must maintain documentation showing that the Hong Kong recipient was hired and granted access to this eligible technology prior to 30 June 2020.

Actions for businesses

Companies involved in the export, reexport and transfer (in-country) of items and technology to Hong Kong are encouraged to identify the potential impact of this amendment to avoid potential violations. Immediate actions for such companies should include:

- ▶ Recognizing the broad and extraterritorial reach of the US export compliance regime (which can touch scenarios such as foreign distribution centers as gateways for re-exports to other markets; the location of global repair and return hubs; technology collaboration involving foreign entities; and the storing of controlled technology outside the US)
- ▶ Evaluating your export compliance program to ensure it properly monitors export control and sanctions compliance requirements
- ▶ Understanding and determining the export licensing requirements for company products subject to the EAR that are exported to Hong Kong (i.e. review previously applicable license exceptions such as: APR (Additional Permissive Re-exports from Wassenaar member countries and from Hong Kong); STA (Strategic Trade Authorization - exports, re-exports and transfers permitted for certain countries); GOV (certain permissible government related exports); and requirements applicable to certain exports to the PRC (i.e. including an End-User Statement issued by the Chinese Ministry of Commerce with the license application))
- ▶ Implementing or updating effective software to track transactions and appropriate licensing requirements (i.e., restricted party/blacklist screening)

Endnotes

1. These set a new legal framework which criminalize acts of secession - breaking away from the country; subversion - undermining the power or authority of the central government; terrorism - using violence or intimidation against people; and collusion with foreign or external forces.
2. <https://www.bis.doc.gov/index.php/documents/pdfs/2568-suspension-of-license-exceptions-for-exports-and-reexports-to-hong-kong/file>.
3. <https://www.state.gov/u-s-government-ending-controlled-defense-exports-to-hong-kong/>.
4. <https://www.bis.doc.gov/index.php/documents/pdfs/2568-suspension-of-license-exceptions-for-exports-and-reexports-to-hong-kong/file>.
5. Id.

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