

## International Trade Alert

January 19, 2017

### Key Points

- License applications to export to India most military, satellite and other items subject to the EAR will be presumptively approved.
- The Commerce Department has expanded its VEU program to include the production of military items in India.
- Neither amendment changes the policies regarding nuclear, missile, or chemical or biological weapons items or activities.
- These changes reflect the Obama administration's implementation of India's status as a "Major Defense Partner."



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### U.S.-India Partnership: BIS Establishes Licensing Policy of General Approval, Expands Validated End-User Program

On January 19, 2017, the Department of Commerce's Bureau of Industry and Security (BIS) published new regulations that establish a licensing policy of general approval for exports or reexports to, or transfers within, India for most military, satellite and other items subject to the Export Administration Regulations (EAR) that do not involve weapons of mass destruction. Specifically, the items at issue in the new policy are those that are controlled for "National Security" or "Regional Stability" reasons only, which include most "600 series" military items and most satellite items. Additionally, BIS has significantly expanded the scope of potential license-free exports, reexports and transfers of items to India by allowing military end uses for the first time under the Validated End-User (VEU) program, in addition to civil end uses. This rulemaking follows the Obama administration's recognition of India as a "Major Defense Partner" on June 7, 2016, and implements various commitments made by the United States related to that unique partnership status. It is the first major change to the India VEU program since July 2009, and the broader policy changes reflect the ongoing expansion of U.S.-India cooperation in civil space, defense and other high-technology sectors since 2010. Importantly, today's changes create opportunities for more production of military, satellite and controlled dual-use items in India involving U.S.-origin items with fewer regulatory burdens and delays.

### Background on Authorization VEU

BIS created Authorization VEU in June 2007 to facilitate trade with civilian end users located in eligible destinations to which eligible dual-use items could be exported, reexported or transferred without a license. It allows exporters and reexporters to ship certain items on the Commerce Control List (CCL) to pre-approved facilities of validated end users under a general authorization without needing to apply for,

and receive, an export license before shipping. India and China are presently the two eligible VEU destinations.

The VEU program is voluntary. Any entity in an eligible destination may apply for the VEU program, or exporters may apply on behalf of entities in eligible destinations. Validated end users are qualified through review by the End-User Review Committee (ERC), a group chaired by the Department of Commerce, with representation from the departments of State, Defense and Energy, and other agencies as appropriate. For each end user qualified by the ERC, approved facilities of that VEU are authorized to receive eligible items without a license. Applicants can choose which of their facilities to include in their applications for VEU status, and the items eligible for shipment to each VEU facility are specified in the individual entries found in Supplement No. 7 to Part 748 of the EAR. These are the only items that may be shipped to a given VEU facility under Authorization VEU.

### **Changes to the India VEU Program**

Today's changes to the India VEU Program allow items obtained under Authorization VEU in India to be used for military end uses, rather than civil end uses only. (The VEU program for China is still limited to civil end uses only.) In particular, military end uses are now permissible to the extent that they do not involve items controlled for missile technology reasons, or uses in nuclear, missile, or chemical or biological weapons activities.

In evaluating an end user for VEU eligibility, the ERC will consider factors such as the entity's record of experience and compliance with U.S. export controls, the entity's consent for the U.S. government to conduct periodic on-site reviews at VEU facilities, and the entity's relationships with U.S. and foreign companies.

### **Changes to Licensing Policy**

Additionally, today's rulemaking establishes a presumption of approval for exports and reexports to, and transfers within, India of items subject to the EAR, including "600 series" military items, for civil or military end uses in India or for the ultimate end use by the Government of India, for reexport to a Country Group A:5 country (NATO and other closely allied countries), or for return to the United States, so long as such items are not for use in nuclear, missile, or chemical or biological weapons activities. Previously, BIS maintained a policy of case-by-case review.

### **Significance of Changes**

Today's rulemaking concludes the Obama administration's steady efforts toward enhancing defense and security cooperation with India. In recognizing India as a "Major Defense Partner" on June 7, 2016, the United States pledged "to work toward facilitating technology sharing with India to a level commensurate with that of its closest allies and partners."<sup>1</sup> This commitment came in the context of an ongoing,

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<sup>1</sup> <https://www.whitehouse.gov/the-press-office/2016/06/07/joint-statement-united-states-and-india-enduring-global-partners-21st>

deepening U.S.-India defense and security relationship, rooted in the 2005 *New Framework for the U.S.-India Defense Relationship*, the U.S.-India Strategic Dialogue established in 2010, the Defense Technology and Trade Initiative established in 2012, and the 2015 *Framework for the U.S.-India Defense Relationship*. Congress further reiterated the underlying objectives of these endeavors in the National Defense Authorization Act for Fiscal Year 2017 (Section 1292, “Enhancing Defense and Security Cooperation with India”).

While the new licensing policy does not remove any licensing requirements, it mimics the scope of License Exception Strategic Trade Authorization (STA), a license exception created as part of the President’s Export Control Reform initiative to facilitate trade in most defense and dual-use items by and among the United States and its close allies. India is not eligible for License Exception STA treatment under current U.S. policy because it is not a member of the four multilateral export control regimes. India is, however, seeking membership in the four regimes, an effort the Obama administration has supported.

Although the preparation and submission of an application to become a VEU takes some effort, becoming a VEU can significantly reduce regulatory burdens and delays for those entities that have, or expect to have, a significant volume or regular trade with the United States in controlled items. To date, only one Indian company has applied for VEU status. The U.S. government clearly believes that expanding the VEU program to include the production of military and other items in India will encourage other Indian companies to participate in the program and, thus, further enhance the defense, aerospace, satellite and other trade relationships with the United States. We continue to advise clients doing business in India and recommend that companies assess their opportunities in India in light of today’s regulatory changes.

## Contact Information

If you have any questions regarding this alert, please contact the Akin Gump lawyer with whom you usually work or:

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