

International Trade Alert

January 23, 2017

Key Points

- Effective April 19, 2017, those planning to export or reexport to Hong Kong items subject to the Export Administration Regulations (EAR) under a license or license exception will generally need to receive from their clients or consignees before shipping a copy of the required Hong Kong import license or a written statement from the Hong Kong government that such a license is not necessary.
- Also effective April 19, 2017, the EAR will generally prohibit the use of an EAR license or license exception to reexport **from** Hong Kong items subject to the EAR, unless the reexporter obtains a copy of the Hong Kong export license for such shipments or a written confirmation from the Hong Kong government that a license is not needed.
- These new regulatory requirements apply to items subject to control under one of the four multilateral export control regimes, specifically those controlled in the EAR for national security (NS), missile technology (MT), nuclear nonproliferation (NP column 1), or chemical or biological weapons (CB) reasons.



New Requirements for Exports and Reexports to and from Hong Kong: BIS Requires Exporters and Reexporters to Confirm Compliance with Hong Kong Import and Export Controls

On January 19, 2017, the Department of Commerce's Bureau of Industry and Security (BIS) published a final rule increasing compliance requirements associated with the export and reexport of items controlled under the EAR to and from Hong Kong. Specifically, the new rule requires that exporters and reexporters obtain from their customers or consignees, prior to shipment, a valid import license or written authorization from the Hong Kong government that no such license is required. Similarly, the rule also prohibits the reexport of EAR-controlled items from Hong Kong, unless the reexporter obtains an export license or other written authorization from the Hong Kong government.

The amendments to the EAR do not impose any new licensing burdens on exports or reexports that are in compliance with Hong Kong export and import control regulations. Rather, they leverage the EAR to effectively compel compliance with Hong Kong export and import control laws by requiring proof of compliance with Hong Kong law as a support document necessary for shipping under an EAR license or license exception. Concurrent with the publication of the final rule, BIS published Frequently Asked

Questions (FAQs), available on its website, which describe the purpose and effect of the new regulatory requirements.

This novel rule has a 90-day delayed effective date, which apparently is designed to give those affected by it time to ensure that their customers or consignees in Hong Kong are in compliance with existing Hong Kong export and import control laws and also to develop procedures to regularly provide the required Hong Kong licenses or other written confirmations. For those involved in controlled trade with Hong Kong, the failure of counterparties to provide documentation consistent with EAR requirements will likely result in delays and the possibility of penalties once the rule becomes effective.

Background on Export Controls Related to Hong Kong

Pursuant to the United States-Hong Kong Policy Act of 1992, the U.S. government treats Hong Kong and China as two separate destinations for export control purposes. Like the United States (and unlike China), Hong Kong's list of items requiring a license to export is based on the lists created by the multilateral export control regimes, specifically the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, the Missile Technology Control Regime, the Nuclear Suppliers Group and the Australia Group. Because the Hong Kong control list and most of the U.S. Commerce Control List (CCL) are developed from the same sources, the lists have significant overlap in the items subject to control. Unlike the United States, Hong Kong requires that importers of items controlled by one of these regimes have a permit to do so.

Changes to Requirements for Exports and Reexports to Hong Kong

The changes to the EAR apply to items subject to the following reasons for control under the CCL: NS, MT, NP column 1 and CB. Under the rule, exporters and reexporters using EAR licenses or license exceptions to ship such items to Hong Kong must obtain a written authorization or copy of a valid import license from Hong Kong's Trade and Industry Department (TID) prior to export. If no license is required, a copy of a "No License Required" (NLR) notification for the item or other written communication from the Hong Kong government will satisfy the requirement. These NLRs may be publicly available on the TID website. Analogous changes also affect reexporters using EAR licenses or license exceptions to export controlled items from Hong Kong. Specifically, such reexporters must obtain a valid TID export license or a written statement from the Hong Kong government that no export license is required before the reexport takes place.

While a valid TID license or NLR is required, it is not a precondition for application to BIS for a license. As clarified in BIS's FAQs, exporters and reexporters may apply for licenses before receiving documentation of the requisite approval from the government of Hong Kong. However, the Hong Kong approval must be obtained before export or reexport. As noted above, these changes go into effect on April 19, 2017.

Significance and Impact of Changes

This rulemaking marks a step forward in BIS efforts to combat unauthorized diversions in transshipments through Hong Kong. In the recently published FAQs, BIS states that the rule is intended "to provide greater assurance that U.S. origin items that are subject to the multilateral control regimes . . . will be

properly authorized by the United States to their final destination, even when those items first pass through Hong Kong.” Like other major trade hubs in the region, Hong Kong has been considered a problematic transshipment point for the United States. In the past, BIS has even published targeted guidance for exporters on conducting due diligence to prevent unauthorized transshipments through Hong Kong to China. The new rule appears to reinforce those enforcement priorities.

Notably, the new rule will essentially require those shipping EAR-controlled items to or through Hong Kong to justify their use of EAR licenses and license exceptions under Hong Kong standards. By lending the enforcement capabilities of the United States to the export and import control system of the government of Hong Kong in this way, the changes present a serious compliance risk for companies using EAR licenses and license exceptions in Hong Kong. These companies will now have to prove continued compliance with Hong Kong law as a matter of recordkeeping. While the changes do not add any licensing requirements under U.S. or Hong Kong laws, companies—particularly those that are unfamiliar with existing Hong Kong import and export license requirements—will nonetheless face an increased compliance burden when the new rule takes effect.

The new rule makes clear the U.S. government’s position that increasing compliance with TID licensing policy and requirements will further limit the unauthorized transshipment of EAR-controlled goods through Hong Kong. In the context of the new regulatory requirements, familiarity with the Hong Kong import and export system will greatly reduce burdens and delays for those entities that have, or expect to have, a significant volume or regular trade with Hong Kong in controlled items. We regularly advise companies engaged in export and import activities involving Hong Kong. We recommend that such companies assess their regulatory obligations under Hong Kong law and implement compliance protocols to ensure compliance with both Hong Kong and U.S. laws in light of these regulatory changes.

Contact Information

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