

BIS ISSUES NEW RULE ON INSTALLED BASE ITEMS IN LIBYA

OVERVIEW AND SUMMARY



On March 22, 2005, the Commerce Department, Bureau of Industry and Security (“BIS”) issued revisions to the export control regulations applicable to Libya that establish a new framework for companies whose activities in Libya may involve the use, maintenance or servicing of items that may have been illegally exported or reexported to Libya in violation of the U.S. comprehensive embargo on that country.

The recent revisions include a number of changes to the regulations, but the broadest and potentially most significant revision amends the prohibition on activities involving items that were illegally exported to Libya (“installed base” items) under the Export Administration Regulations (“EAR”). The new rule creates a two-tiered framework that would allow parties doing business in Libya to engage in activities involving less sensitive installed base items subject to a reporting requirement, while maintaining a licensing requirement for activities involving installed base items subject to stricter controls. The March 22nd notice implements certain additional modifications to U.S. export controls against Libya in ways that should also be beneficial to companies with interests in the country.

As this suggests, the new rule removes certain obstacles facing companies considering opportunities in Libya. Nonetheless, the two-tiered framework means that companies must be mindful of the nature of the installed base items at existing facilities in which they conduct activities in Libya and undertake appropriate due diligence to ensure compliance under the U.S. export control laws.

BACKGROUND

Under section 764.2(e) of the EAR, BIS prohibits any person from “ordering, buying, removing, concealing, storing, using, selling, loaning, disposing of, transferring, transporting, financing, forwarding or otherwise servicing” any item exported from the United States to Libya in violation of the EAR.

Prior to the issuance of the March 22nd EAR revisions, section 764.2(e) was particularly significant for companies considering activities involving existing facilities in Libya, including U.S. companies returning to Libya after a long absence during the sanctions period. As a practical matter, the regulation effectively required due diligence prior to servicing or utilizing industrial facilities in Libya in order to avoid penalties relating to the use of goods, services or technology exported or reexported to Libya illegally during the comprehensive U.S. sanctions. U.S. export licensing was required to the extent that any aspect of a project involved such items, regardless of their sensitivity and even if the items are no longer subject to U.S. export controls.

The new regulation follows several months of consideration at the Commerce Department regarding the “installed base” issue. As set forth in detail below, the new rule creates a two-tiered approach to this issue that reflects the Commerce Department’s recognition of the need to support U.S. companies’ participation in the Libyan marketplace while continuing to deter the illegal diversion of items subject to U.S. export controls. This two-tier system is based on the sensitivity of and level of control applicable to an illegal export, with a reporting requirement and exception to the prohibition applicable to less sensitive installed base items, and a licensing requirement for activities involving more sensitive items. The new provisions are available only to those parties that did not take part in the underlying illegal exportation or reexportation.

REQUIREMENTS UNDER INSTALLED BASE RULE

The new “installed base” rule addresses two categories of activity with respect to installed base items: (1) those requiring a report to BIS, but not a license, to overcome the prohibition at section 764.2(e) on dealing with items illegally exported to Libya; and (2) those requiring a BIS license to overcome that prohibition.

Activities Involving Installed Base Items for Which No License Is Required. Under the new rule, a license is not required to overcome the prohibition for activities involving the following types of installed base items:

- (1) items subject to the EAR but not classified on the Commerce Control List (i.e., EAR99 items);
- (2) items on the CCL that are now authorized for export and reexport to Libya under a License Exception; or,
- (3) items on the CCL controlled only for NS and AT or AT reasons only and are not on the Wassenaar Arrangement’s Sensitive List or Very Sensitive List. These lists are posted on the Wassenaar Arrangement’s web site at <http://www.wassenaar.org>.

To the extent proposed activities in Libya involve installed base items that fall under one of these categories, the prohibition on dealing with installed base items does not apply subject to the reporting requirement described below. However, persons engaging in such activities must ensure that other aspects of the proposed activity comply with the EAR. For example, to the extent that activity involving the servicing or maintenance of an installed base item in Libya requires the exportation of replacement parts or other items from the United States, parties involved in the transaction must ensure that they fulfill any licensing requirements applicable for such exports.

Reporting Requirement. To the extent the activity involves installed base items falling into one of the above exception categories, the new rule requires the party engaging in the activity to submit to BIS a report containing all known material facts with respect to how the installed base item arrived in Libya. This report must be filed within ninety days of the first activity relating to the installed base item in Libya.

Licensing Procedure for All Other Activities. To the extent the proposed activity involves installed base items that do not fall into one of the categories above, the person engaged in the activity must seek a license from BIS. The license application must describe fully the relevant activity and include all known material facts as to how the item originally was exported or reexported to Libya. The regulation provides that this licensing requirement applies equally to a party who knows an item to be exported or reexported to a third party will be used on an installed base item not described in one of the above categories of exception.

ADDITIONAL REVISIONS TO U.S. EXPORT CONTROLS FOR LIBYA

In addition to the new installed base rule, the new revisions also make the following changes to U.S. export controls applicable to Libya-related activities:

- (1) modification of the licensing policy for some commercial charges which may be used in petroleum development activities;
- (2) authorization for exportation or reexportation of vessels on temporary sojourn to Libya without a license and modification to the licensing policy for exportation or reexportation of U.S.-origin civil aircraft and helicopters to case-by-case review; and,
- (3) provisions to clarify that certain kinds of portable electric power generators and related software and technology are controlled with respect to Libya for anti-terrorism reasons and are subject to review on a case-by-case basis for exportations/reexportations to non-military end-uses.

These revisions clarify or ease additional provisions of U.S. export controls against Libya, and should be beneficial to companies with interests in that country.

IMPLICATIONS FOR BUSINESS OPPORTUNITIES IN LIBYA

The revisions announced on March 22nd signify a recognition on the part of the Commerce Department of the need to facilitate the efforts of the U.S. business community as it enters the Libyan marketplace. In particular, the new installed base rule removes the flat prohibition and establishes a review policy for companies with business opportunities involving the use, maintenance or servicing of installed base items that may have been illegally exported during the embargo without their participation.

However, it is important to recognize that the new rule does not create a broad amnesty or general authorization with respect to activities involving such items. Rather, the tiered structure and related reporting and licensing obligations under the rule mean that companies must continue to undertake certain due diligence with respect to export compliance issues that may affect operations involving existing facilities in Libya. This includes steps to identify and assess

the nature of any installed base items subject to U.S. export controls, determine the classification and licensing status of such items, and determine the appropriate reporting or licensing obligations under the new framework.

Looking ahead, it is also noteworthy that the March 22nd revisions reflect the continued divisions within the U.S. Government on the question of removal of Libya from the U.S. list of State Sponsors of Terrorism. Until such action is taken, strict controls on the permissibility of certain exports and availability of certain license exceptions will remain in place. In addition, even for items not subject to a general policy of licensing denial, substantial delays in the interagency review and processing of applications can result from a negative shift in the political climate involving Libya. As this suggests, companies should be mindful of these considerations in assessing potential business opportunities with Libya.

CONTACT INFORMATION

If you have any questions or would like to learn more about this topic, please contact the partner who normally represents you, or:

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