

CLIENT ALERT

Imminent overhaul of "dual-use" export rules for companies with European operations

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On 27 August 2009, new legislation controlling the export of dual-use items and certain brokering services from, within or through the European Union will come into force. Council Regulation (EC) 428/2009 of 5 May 2009 ("the Recast Dual-Use Regulation") will replace the current Dual-Use Regulation (Council Regulation (EC) 1334/2000, as amended). The Recast Dual-Use Regulation not only consolidates the many prior amendments to the original regulation, but also introduces some important new controls and seeks to foster increased harmonisation and cooperation among the EU Member States in their implementation.

The United Nations Security Council Resolution 1540 of 2004 provided one major impetus for enactment of the Recast Dual-Use Regulation. It calls upon countries to combat the proliferation of weapons of mass destruction ("WMD") by, among other things, subjecting to administrative control both the brokering of dual-use items intended for use in WMD development or production as well as the transit of such items, both of which are principal changes enacted by the Recast Dual-Use Regulation:

New provisions on brokering services. Under the Recast Dual-Use Regulation, a natural person or legal entity resident or established in a Member State must obtain authorisation for brokering of any dual-use item set forth in Annex I of the Regulation (which incorporates the major multinational export control regimes in which the EU participates) where the competent authority of the Member State in which he is resident has informed him that the items in question are or may be intended for a WMD end-use. Where such broker is aware that a dual-use item for which he proposes brokering services is intended for a WMD end-use, he has an affirmative duty to notify the competent authority.

Brokering is defined as buying or selling of dual-use items in a third country for transfer to another third country, or negotiating or arranging such a sale or transfer. Ancillary services alone (*i.e.*, transportation, financial services, insurance or re-insurance or general advertising or promotion) are not covered.

The Recast Dual-Use Regulation also authorizes Member States to adopt more stringent controls such as requiring authorisation where a broker has grounds for suspecting that the dual-use items may be intended for a WMD end-use and/or extending the brokering authorisation requirement to military end-use or to transfers involving arms embargoed countries.

New controls on transit. Under the Recast Dual-Use Regulation, Member States may require authorisation or even prohibit the transit of non-EU dual-use items (defined as passing through the Community with a destination outside the Community), where they have reasonable grounds for suspecting from intelligence or other sources that the items are or may be intended in their entirety or in part for a WMD end-use (including the means of delivery). Member States may extend the application of this requirement to transit for non-listed dual-use items where there is a potential for WMD end-use or for items for military end-use in a country subject to an arms embargo. A Member State imposing an authorisation on or prohibiting transit of dual-use items under this provision must immediately notify the other Member States.

Other Significant Changes. To foster increased harmonisation, the Recast Dual-Use Regulation requires that prior to granting authorisation for brokering services or transit, that a Member State first examine all denials or decisions to prohibit an essentially identical transaction and then consult with the competent authority that originally denied or prohibited the transaction. The Recast Dual-Use Regulation also seeks to impose some consistency in the content and form of export authorisations and directs consideration of permitting global authorisations. In assessing whether to grant such a global export authorisation, however, the Member State must consider the applicant to ensure he has adequate means and procedures (*i.e.*, a robust export compliance program) to ensure compliance with the Recast Dual-Use Regulation and the terms and conditions of the authorisation.

Applications for export authorizations made before 27 August 2009 will remain subject to the relevant provisions of the current Dual-Use Regulation. Furthermore, as is the case with the current Dual-Use Regulation, the Recast Dual-Use Regulation will be directly applicable throughout the EU but requires implementation by the individual Member States. Some, like the United Kingdom, have already controlled the transit of dual-use items for WMD end-use, but others will need new legislation or regulation to implement an equivalent control.

If you have any questions on the Recast Dual-Use Regulation or on the development and implementation of internal export control compliance programs, please contact one of the lawyers listed below, or your regular Crowell & Moring contact.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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