

CLIENT ALERT

US Export Controls and Hong Kong – Change Underway

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On May 29, 2020, President Trump announced his intention to direct his administration to begin the review and removal of Hong Kong’s special treatment for dual-use export controls. Over the last week, we have seen the U.S. State and Commerce Departments begin to implement these changes through a coordinated series of announcements that, collectively, represent the largest change in Hong Kong’s status under export control laws since the 1997 handover ending British sovereignty.

Specifically, on June 29, 2020, the U.S. State Department announced that it will “end exports of U.S.-origin defense equipment and will take steps toward imposing the same restrictions on U.S. defense and dual-use technologies to Hong Kong as it does for China.” On the same day, Secretary of Commerce Ross announced, “Commerce Department regulations affording preferential treatment to Hong Kong over China, including the availability of export license exceptions, are suspended. Further actions to eliminate differential treatment are also being evaluated.”

On July 2, 2020 the Commerce Department’s Bureau of Industry and Security (BIS) formally announced the suspension of all license exceptions for all exports and re-exports and transfers in country to Hong Kong that provide different treatment than those available to China. Essentially, the announcement limits available license exceptions for Hong Kong to only those that are also available for China. Items already prepared for loading, on a carrier, or en route to Hong Kong may proceed under the prior license exceptions. Similarly, deemed export transactions to Hong Kong previously authorized under these licensing exceptions may proceed until August 28, 2020. After which, deemed exports to Hong Kong will have licensing requirements.

Among the more significant changes are:

- **License Review Policy:** BIS currently has a more favorable case-by-case licensing policy for exports to Hong Kong, whereas exports to China involving military end uses or end users, or crime control items, are subject to a licensing policy of denial if the exports will “make a material contribution to the [PRC] military capabilities.”
- **License Exception APR:** License Exception APR for additional permissive re-exports found in section 740.16 of the EAR is available for re-exports of items subject to the EAR from Wassenaar member countries and from Hong Kong, which although not a Wassenaar Arrangement member, complies with the principles of the arrangement. Under license exception APR, items may be exported from Country Group A:1 (Wassenaar member states) and Hong Kong to Hong Kong and other A:1 countries for end use in those countries. Certain items are also permitted to be re-exported to other country groups and NS-controlled items are permitted to be exported to country group D:1 which includes the PRC. BIS has proposed an amendment to APR which would eliminate China (and other D:1 countries) from eligibility for re-exports under APR (see our prior alert here). If this amendment is adopted, and Hong Kong becomes a D:1 country rather than an A:1-like country, NS controlled items would require a license for re-export to Hong Kong. Additionally, the termination of Hong Kong’s A:1-like status would result in license requirements for other items re-exported from Wassenaar member states.

- **License Exception STA:** Hong Kong is currently designated as an A:6 country. These countries are eligible for exports under license exception STA (Strategic Trade Authorization) found in section 740.20 of the EAR. Under STA, certain items may be exported to countries in groups A:5 and A:6 provided that the exporter obtains certain written statements from the consignee among other procedural requirements.. Although Hong Kong currently remains an A:6 country, as a result of the June 30, 2020 changes to license exceptions available to Hong Kong, it will no longer be eligible for any exports under license exception STA.
- **License Exception GOV:** License Exception GOV, EAR section 740.11(c), allows exports of certain items to NATO members and other “cooperating governments.” Hong Kong is currently one of the cooperating governments and was eligible to receive exports under License Exception GOV. However, the new changes will eliminate this license exception from those previously available for exports to Hong Kong.
- **Hong Kong Import License Requirements:** Currently, under section 748.13, exporters to Hong Kong are required to include either (a) import licenses from Hong Kong or (b) statements from the Hong Kong government that no import license is required, when the exporter is applying for a license for items subject to the EAR and controlled for NS, MT, NP1, or CB reasons. Similarly, re-exporters of items subject to the EAR and controlled for NS, MT, NP1 or CB reasons must obtain an export license from Hong Kong or a statement from the Hong Kong government that no export license is required. However, these requirements are expected to be eliminated because exports to Hong Kong will be treated as exports to China.
- **PRC License Requirements:** Treating exports to Hong Kong as exports to China will not only entail the loss of certain advantages but also the imposition of additional burdens by the application of special requirements for the PRC. Under section 748.10 of the EAR, exports to the PRC valued at more than \$50,000 that require a license (as well as licensed 6A003 cameras valued at more than \$5,000, and licensed computers of any value) must include with the license application a PRC End-User Statement issued by the Chinese Ministry of Commerce (MOFCOM). Exports to Hong Kong will also be subject to the recently revised Military End User and End Use provision of section 744.21.

What to Watch for

Additional changes to both the ITAR and EAR will likely be announced soon. In the meantime, those exporting and re-exporting items subject to the EAR to Hong Kong would be well-served to closely examine their activities with respect to Hong Kong, including any upcoming shipments, in light of the recent announcements, and prepare for possible interruptions or suspensions to their business.

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