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U.S. Department of Commerce Establishes Favorable Export Control Policies for India

On January 19, 2017, the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") published a final rule (the "Rule") making two significant changes to U.S. export control policy with respect to India. First, the Rule establishes a more favorable licensing policy with respect to the export of most controlled items to India; second, it also expands the scope of an export license exemption program for eligible Indian entities.¹ These changes immediately follow the United States government's designation of India as a "Major Defense Partner" on June 7, 2016, as well as other changes BIS has made in recent years to ease export controls relating to India and strengthen the U.S.-India trading relationship.² Together, these developments have established a very favorable export control policy with respect to India, which should allow both U.S. companies operating in India and Indian companies transacting with American counterparties to quickly and efficiently engage in an increased volume of trade.

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New "Presumption of Approval" Standard for BIS License Applications

Under the Export Administration Regulations ("EAR"), parties seeking to export, re-export, or transfer items controlled under the Commerce Control List ("CCL") typically first require a license from BIS. Items on the CCL, which include materials, software, and technology across a variety of sectors including electronics, telecommunications, and aerospace, among others, are classified according to a five-digit Export Control Classification Number ("ECCN"). The ECCN provides information about the nature of the product, the reason why the product is controlled, and to which countries the product may be shipped only upon receipt of a license. Previously, all license applications for exports of controlled items to India were subject to "case-by-case review" by BIS.

In contrast, the new Rule establishes a significantly more favorable "presumption of approval" standard for (1) exports and re-exports to, and transfers within, India of items subject to the EAR, including "600 Series" military items,³ for civil or military end use (including by the Government of India); (2) re-exports to countries BIS has categorized as "A:5" countries, which includes Australia and most countries in Europe; and (3) return of items to the United States, so long as the items are not intended for use in nuclear, missile, or chemical or biological weapons activities. While the change does not eliminate the need for U.S. companies operating in India or Indian companies to seek approval from BIS, the new presumption of approval standard means that companies may now routinely expect to receive regulatory approval to engage in transactions relating to almost all controlled items, including those that previously would have been subject to significantly more restrictive export control rules.

¹ Amendments to the Export Administration Regulations Implementing an Additional Phase of India-U.S. Export Control Cooperation, 82 Fed. Reg. 6218 (Jan. 19, 2017) (to be codified at 15 C.F.R. §§ 742, 748).

² The White House, Joint Statement: The United States and India, Enduring Global Partners in the 21st Century (June 7, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/07/joint-statement-united-states-and-india-enduring-global-partners-21st>.

³ "600 Series" military items are items that were formerly listed on the United States Munitions List ("USML") and subject to the International Traffic in Arms Regulations ("ITAR") and regulated by the Department of State's Directorate of Defense Trade Controls ("DDTC"). Pursuant to President Obama's policy of export control reform, a number of ITAR-controlled items were shifted to the EAR, which is generally a less restrictive export regime.

Expansion of Validated End-User Program for Authorized Entities

The Rule also expanded the Validated End-User (“VEU”) program applicable to certain approved Indian entities. The VEU program was established by BIS in 2007 to facilitate trade by allowing exporters to ship certain items that would otherwise be controlled under the CCL (and therefore require a BIS export license) to approved end users without a license. Currently, China and India are the only two countries eligible under the VEU program, and twelve entities have been awarded VEU status.⁴

Either the prospective VEU, or exporter acting on its behalf, may apply to BIS through this program, identifying both the specific destinations and the CCL items that would be covered should the application be approved. All VEU applications are then screened through a cross-departmental group chaired by the Department of Commerce and including representatives from the U.S. Departments of State, Defense, and Energy.

Prior to the Rule, controlled items could only be shipped under the VEU program if the items were for civil end use. Although the civil use limitation still applies to China,⁵ approved VEUs in India are now authorized to use controlled items for civil *or* military use, so long as the items are not transferred or used to further nuclear, missile, or chemical or biological weapons activities.⁶ Accordingly, while the VEU application process can be cumbersome, approval offers even greater commercial benefits for Indian end users. Any Indian company that is awarded VEU status will now be able to export items for both civil and military use without the need for a license, significantly cutting down on the regulatory burdens inherent in the BIS license application process.

Conclusion

Taken together, these changes mean that U.S. companies operating in India and Indian companies working with U.S. partners now can expect most applications to engage in transactions involving controlled items to be approved. They are also now eligible to bypass the application process entirely through the VEU program for a greater number of transactions. It has been estimated that over 810 licenses have been granted in the last five years for goods covered under the new Rule, representing \$5 billion in trade.⁷ Accordingly, these changes are likely to have a significant impact, and should continue to expand the volume of trade and strengthen relations between the United States and India.

For more information, please contact your usual Ropes & Gray advisor.

⁴ 15 C.F.R. § 748 Supp. 7 (listing the 11 Chinese entities and one Indian entity that have been awarded VEU status).

⁵ 15 C.F.R. § 748.15(d).

⁶ 82 Fed. Reg. at 6219.

⁷ PTL, *US makes changes in export control laws to benefit India*, THE ECONOMIC TIMES (Feb. 7, 2017, 2:43 PM), <http://economictimes.indiatimes.com/news/economy/foreign-trade/us-makes-changes-in-export-control-laws-to-benefit-india/articleshow/57017564.cms>