

**February 13, 2017
Regulatory Alert:**

BIS Imposes New Documentation Requirements for Certain Transfers to and from Hong Kong

[Export Controls and Sanctions Group](#)

Benjamin H. Flowe, Jr.

John A. Ordway

Daniel Fisher-Owens

Babak Hoghooghi

Perry S. Bechky

Ray Gold

Jason A. McClurg

Michelle Turner Roberts

For more information on this Alert, please contact Michelle Turner Roberts (mtroberts@bcr-dc.com), Ray Gold (raygold@bcr-dc.com), or your regular contact at BCR.

To subscribe to our practice group Alerts, please contact exportalerts@bcr-dc.com.

This Alert contains general guidance, is for informational purposes only, and should not be construed as a legal opinion on the application of this guidance to any specific facts or circumstances. Opinions expressed herein are solely those of the authors.

In a final rule issued on January 19, 2017, the Bureau of Industry and Security (“BIS”) dropped an unwelcome bombshell on exporters and reexporters to and from Hong Kong of certain items subject to the Export Administration Regulations (“EAR”). [82 Fed. Reg. 6216 \(Jan. 19, 2017\)](#). Though not effective until April 19, 2017, the final rule will require exporters and reexporters to Hong Kong of items controlled on the Commerce Control List for National Security (“NS”), Missile Technology (“MT”), Nuclear Proliferation (“NP column 1”), or Chemical/Biological Weapons (“CB”) reasons (hereafter, the “Subject Items”) to obtain from the Government of Hong Kong a copy of a Hong Kong import license for the items, or else a statement verifying that no such import license is required. The latter statement need not be addressed specifically to the exporter/reexporter but may be a generally applicable statement from the Hong Kong Government, such as one posted on a Hong Kong Government website, stating that no import license is required. Such a statement may be used for multiple exports/reexports to Hong Kong as long it remains an accurate statement of Hong Kong law.

The required documentation from the Hong Kong Government does not need to be submitted with the export/reexport license application to BIS, but does need to be obtained before the time of actual export/reexport, and the Hong Kong import license needs to be valid and unexpired as of the date of export/reexport.

Similarly, the final rule will also require reexporters from Hong Kong of the Subject Items to obtain a valid (not expired) Hong Kong export license or writing from the Hong Kong Government verifying that no such export license is required.

This BIS final rule will have a big impact on industry because it will affect many transfers to and from Hong Kong, including downloads. While technically this rule applies to exports by download, Hong Kong does not control intangible transfers, so U.S. recordkeeping requirements can be satisfied by keeping written confirmation of that on file. Examples of affected ECCNs include, among many others, 5A002, 5D002, 3A001, 3B001, 3B002, 4A003, and software and technology ECCNs relating to the foregoing ECCNs. Not only do these new documentation requirements apply to transfers of the Subject Items to/from Hong Kong under BIS licenses, they also apply to transfers of the Subject Items to/from Hong Kong under any applicable EAR license exception, such as License Exception ENC, GBS, or TMP. Far more of the subject items are exported/reexported to/from Hong Kong under EAR license exceptions than under BIS licenses.

The new documentation requirements apparently do not apply to transfers to/from

Hong Kong of Subject Items that are authorized as NLR (“No License Required”) under the EAR. However, this is a small loophole. All of the Subject Items require either an export/reexport license or License Exception for transfer to/from Hong Kong, except for those items controlled for NP2 or CB3 reasons. Items controlled for NP2 or CB3 reasons are generally authorized to Hong Kong as NLR under the EAR. (Under the EAR, Hong Kong and the People’s Republic of China (“the PRC”) are treated as two separate destinations. The EAR’s controls on the PRC are significantly more stringent than those on Hong Kong.)

BIS has made available FAQs on the final rule on its website, which provides some helpful information and clarifications. (<https://www.bis.doc.gov/index.php/forms-documents/pdfs/1637-2017-hong-kong-rule-faqs/file>) FAQs 1 and 2 provide the relevant website address of the Hong Kong Government’s Trade and Industry Department. FAQ 4 concerns reexports of EAR items from Hong Kong and whether the original transferor of such EAR items to Hong Kong has related responsibility under the final rule, and provides:

Q4. If I know that my EAR item is being reexported from Hong Kong, am I required to obtain a copy of the Hong Kong export license?

No, parties whose items have been exported to Hong Kong (subject to the requirement that the exporter has obtained a copy of the Hong Kong import license or a copy of “NLR Notification” or “website information” prior to export) that are subsequently reexported from Hong Kong are not required to obtain a copy of the Hong Kong export license.

However, the Hong Kong party must have obtained a Hong Kong export license or “NLR Notification” or “website information” before reexporting an EAR item pursuant to BIS authorization under an export license or license exception. See also Q2 above. BIS’ final rule does not impose any new licensing requirements under the EAR. Instead, it attempts to use the EAR to force parties exporting/reexporting certain EAR items to comply also with Hong Kong’s import and export controls. The final rule will necessitate that exporters/reexporters of the Subject Items increase cooperation and coordination with recipients and other parties in Hong Kong.

The final rule is in response to the perception that Hong Kong continues to be used as a hub for unlawful diversion, though many in the trade community are wondering how this action will address that concern. Regardless of the rule’s efficacy, exporters in the United States and those abroad supplying any of these Subject Items to Hong Kong need to be sure to have in place revised policies and procedures so that they are ready to implement by April 19, 2017.

Industry groups should consider providing comments to BIS even though the changes to the EAR were made in the form of a final rule. For example, modifying the new documentation requirements to exclude transfers qualifying for an EAR license exception would substantially reduce the burden on industry while still maintaining the new requirements on the most sensitive items (the ones requiring BIS licenses).

BIS’ final rule will result in many industry inquiries to the Hong Kong Government’s Trade and Industry Department, who will hopefully have sufficient resources to provide clear guidance to industry in a timely manner. On January 20, 2017, the Strategic Trade Controls Branch of Hong Kong’s Trade and Industry Department issued a Circular (Strategic Trade Controls Circular No. 3/2017) providing guidance on BIS’ final rule and stating that it would be providing a briefing “to help traders to better understand the new rule.” (http://www.stc.tid.gov.hk/english/circular_pub/2017_stc03.html)