BIS Reduces Licensing Requirements on Exports to Australia and the UK

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Brian J. Egan
Partner / Washington, D.C.
202.371.7270
brian.egan@skadden.com

Jordan Cannon
Associate / Washington, D.C.
202.371.7542
jordan.cannon@skadden.com

Patrick Stewart
Associate / Washington, D.C.
202.371.7348
patrick.stewart@skadden.com

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One Manhattan West
New York, NY 10001
212.735.3000

1440 New York Ave., N.W.
Washington, D.C. 20005
202.371.7000

In an interim final rule published on April 19, 2024 (New Rule), the Department of Commerce, Bureau of Industry and Security (BIS) amended the Export Administration Regulations (EAR) to reduce licensing requirements on exports to Australia and the U.K.

These changes, which will result in Australia and the U.K. having nearly the same EAR licensing treatment as Canada, come as a result of the AUKUS Trilateral Security Partnership and measures taken by Australia and the U.K. to strengthen their export control regimes. The changes to the EAR in the New Rule will also narrow the circumstances in which an Australian or U.K. investment in the U.S. will trigger a mandatory "critical technology" filing with the Committee on Foreign Investment in the United States (CFIUS).

These changes, which facilitate and streamline defense-related trade and collaboration among the three countries, reflect strengthened U.S.-Australia-U.K. defense cooperation, as well as furtherance of the Biden administration's efforts to create a "small yard and high fence" with respect to sensitive U.S. technologies.

Export Controls

The New Rule includes four major export controls changes with respect to Australia and the U.K.

- The first is the elimination of license requirements for the export to either country of items controlled for National Security (NS), Missile Technology (MT) or Regional Stability (RS) reasons. These changes mean that "600-series" items subject to the EAR (*i.e.*, items previously controlled under the International Traffic in Arms Regulations, or that are included on the Wassenaar Agreement Munitions List), as well as most 9x515 satellite-related items, will no longer require a license for export to Australia or the U.K.
- Second, the new rules eliminate the license requirement for re-exports to Australia or the U.K. of foreign-produced military commodities that incorporate certain high-end cameras, optical sensors or 600-series items subject to the EAR.
- Third, BIS has removed the military end-use and end-user restrictions related to certain cameras, sensors and marine systems with respect to Australia and the U.K.
- Finally, BIS has eliminated the licensing requirements on the export of "hot section technology to Australia or the U.K. for the development, production or overhaul of commercial aircraft engines, components and systems.
- In addition to these changes, the revised regulations make several minor conforming changes to more closely align controls for Australia and the U.K. with those for Canada — from explicit inclusion of Australia and the U.K. in the provisions of certain license exceptions, to the more obscure note that an export license is still required for the export to either country of "horses by sea."

CFIUS

Because mandatory CFIUS "critical technology" filings are tied to export controls, the New Rule will also narrow the circumstances in which a U.S. investment from Australia or the U.K. will trigger a mandatory CFIUS filing. Specifically, and in relevant part, a mandatory CFIUS filing can be triggered by non-U.S. investments in U.S. businesses where the U.S. business manufactures or develops any "critical technology" that would require a license for export to the country of the investor.

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"Critical technologies" are defined, in part, as items controlled on the Commerce Control List for NS, MT or RS reasons. The removal of NS, MT and RS controls for Australia and the U.K. will reduce the scope of critical technology controlled to those countries, thereby narrowing the mandatory CFIUS filing requirement with respect to investments by Australian and U.K. investors.

While carve-outs from the mandatory CFIUS filing regime already exist for "excepted investors" from Australia and the U.K., the change to export controls will result in an alternative, somewhat more straightforward path to narrow the scope of mandatory filings for investors from Australia and the U.K.[1]

[1] In addition, the CFIUS "excepted investors" carve-out excludes investors from the Crown Dependencies — the Bailiwicks of Jersey and Guernsey and the Isle of Man — while the EAR treats these as part of the U.K. for export control purposes. Thus the removal of NS, MT and RS controls for items exported to the U.K. will have the effect of eliminating mandatory CFIUS filings for transactions involving investors from the Crown Dependencies where the only jurisdictional hook was critical technology controlled for NS, MT or RS reasons.