



## STEPTOE OUTSIDE COUNSEL

# The long arm of the EAR: enforcement authorities beyond the US expand

Persons acting outside the US may be affected by US export control rules internationally, including reexports and transfers (in-country) of items subject to the Export Administration Regulations (“EAR”). Effective 18 November 2020, the US Bureau of Industry and Security (“BIS”) issued amendments to the EAR that significantly expand domestic and extraterritorial export enforcement powers.

**1)** The EAR now authorize BIS to conduct various activities outside the US. BIS is able to: undertake investigations; require and obtain information from foreign persons; and conduct pre-license checks (“PLCs”) and post-shipment verifications (“PSVs”). The objective of PLCs is to establish bona fides and validate information on export license applications before shipment of items subject to the EAR. The objective of PSVs is to strengthen assurance that all parties comply with US export requirements and monitor illicit diversion of items subject to the EAR after shipment, whether for licensed or non-licensed exports. When acting abroad, the amendments state that BIS officials will act “in due care”, and “to the extent possible”, consistent with the laws of the host nation.

**2)** BIS Office of Export Enforcement (“OEE”) officials and their designees are authorized to inspect, search, and detain items subject to the EAR “at any location inside or outside of the United States” that have been, are being, or about to be exported, reexported, or transferred. The scope of inspection may vary, such as item identification; technical appraisal; verifying the accuracy of export filings, or if there is no export filing, the air waybill, bill of lading, or other document covering the item about to be conveyed; and verifying the value and quantity of such item. As ultimate measures, OEE officials are authorized to prevent the lading of items subject to the EAR on a conveyance and/or seize any property when there is probable cause to believe that such property is subject to forfeiture, including outside the US such as at the premises of freight forwarders, bonded warehouses, foreign trade zones, and manufacturing, transportation, and storage facilities.

**3)** OEE officials are now allowed to require any person subject to US export control laws and regulations – including exporters, reexporters, transferors, or their agent(s), and owners and operators of carriers or their agents, as well as

intermediate consignees, ultimate consignees, and end-users, and their agent(s) – to produce for inspection and copying any books, records, and other information. These persons may be required to produce records such as invoices, orders, letters of credit, inspection reports, technical documentation, packing lists, shipping documents and instructions, and correspondence. Additionally, OEE officials are authorized to question any person about exports, reexports, and transfers (in-country), including the owner or operator of a carrier and the carrier’s agent(s), as well as the exporter, reexporter, transferor (in-country), or their agent(s).

**4)** OEE officials and its designees may authorize any “carrier” to return or unload a shipment containing items subject to the EAR, including when located abroad. Carrier includes a connecting or on-forwarding carrier, as well as the owner, charterer, agent, master, or any other person in possession, control, or charge of the vessel, aircraft, vehicle, or mode of conveyance.

Upon sufficient notice of the order, the carrier must:

- unload the shipment and make it available to OEE officials for search and inspection;
- return the shipment to the US or cause it to be returned; or
- unload the shipment at a port and take steps to assure that items do not enter any foreign country without approval of BIS.

**5)** BIS implemented certain other clarifications. For example, the EAR now provide that if there was a false or misleading misrepresentation, or falsified or concealed material fact, in connection with a license application, then any license issued by BIS is void as of the date of its issuance.

The amendments send a clear message: BIS can investigate reexport control activities and possible violations outside the US. Persons covered by the EAR’s reexport and transfer controls applicable to items subject to the EAR should be mindful of compliance obligations as well as be vigilant if OEE initiates investigations, requires information, or conducts PLCs or PSVs abroad. By doing so, foreign persons can mitigate civil and criminal penalties, liabilities, or risks for potential violations. ■

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