

US government revises export controls regarding commercial nuclear commerce with China

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On 11 August 2023, the US Nuclear Regulatory Commission ('NRC')¹ and the US Department of Commerce, Bureau of Industry & Security ('BIS')² announced amendments to their existing regulations concerning exports of nuclear materials and related equipment destined for China and Macau. (BIS extends its export controls policies and regulations applicable to China to the territory of Hong Kong.) Although the notice from the NRC provided little explanation, the notice issued by BIS explained that the change in the Export Administration Regulations (15 CFR Parts 730-774³ or 'EAR') is based on an increased concern with China's military-civil fusion policy and efforts to expand its military nuclear capability. The changes implemented by the NRC are effective as of 8 August 2023, and the changes implemented by BIS are effective as of 11 August 2023.

The NRC is responsible for regulating the export and import of certain nuclear materials and nuclear-related equipment as promulgated under 10 CFR Part 110 ('Part 110'). The NRC's export control regime includes general licences that can be used under certain conditions for specified countries, as well as a procedure for exporters to request specific licences when needed. Part 110 sets forth the licensing criteria used by the NRC for regulated nuclear materials and equipment; the US Department of Energy, National Nuclear Security Administration ('NNSA'), separately regulates the export of related nuclear technology and technical assistance under 10 CFR Part 810⁴ ('Part 810'). For both general and specific licences, an overriding consideration is whether an export will be 'inimical to the common defense and security or constitute an unreasonable risk to the public health and safety.'

The NRC's amendment to Part 110 removes the general licence for exports of special nuclear material, source material, or



deuterium for nuclear end use in China, even though China was and is not an eligible destination for use of a general licence to export certain other civilian nuclear reactor components. Persons wishing to export such materials (as described in Part 110) must now apply for a specific licence in accordance with the NRC's regulations, pay the requisite licensing fee, and await a decision on the application before undertaking a regulated transaction.

At the same time, BIS issued an amendment to the EAR to impose additional export licensing requirements for exports of dual-use, nuclear-related items (i.e., commodities, software, and technology) to China and Macau. BIS explained that: 'In response to the People's Republic of China's military modernization efforts, military-civil fusion strategy, and expansion of its nuclear forces, the Bureau of Industry and Security is amending the Export Administration Regulations by adding additional nuclear non-proliferation controls on China and Macau.'

The Federal Register notice briefly sets forth the preexisting nuclear-related export controls for dual-use items destined for China (i.e., items not regulated by the NRC or NNSA), including items:

- on the Commerce Control List ('CCL') that were controlled

for enhanced non-proliferation reasons ('NP1');

- destined for military end uses/end users;
- when there is knowledge the item will be used in nuclear explosive activities, unsafeguarded nuclear activities, or safeguarded or unsafeguarded nuclear fuel cycle activities;
- when there is 'knowledge' the item is for use in a maritime nuclear propulsion project; and
- items destined for Chinese entities placed on the Entity List due to their involvement in China's military nuclear programme.

BIS explains that the tightened export controls were 'necessary to protect US national security and foreign policy interests by imposing a licence requirement to China and Macau on items that could contribute to nuclear activities of concern. These controls are being put in place to further allow the US government to monitor the export of these items to assure that they are only being used in peaceful activities such as commercial nuclear power generation, medical

developments, production of or use in medicine, and non-military related industries.'

Thus, effective 11 August, all items on the CCL that show a reason for control of 'NP2' now require a specific licence from BIS for export or reexport to, or transfer within, China (including Hong Kong) and Macau. This amendment expands the scope of dual use items subject to the EAR, beyond those previously controlled for NP1 reasons, that must be licensed for (a) export to China, Hong Kong, and Macau, (b) reexport from abroad to those destinations, and (c) transfer to a new end use or end user in country. The licensing policies that are now applied include (a) 'extended review or denial' if the item would make a significant contribution to nuclear weapons or their delivery systems, and (b) 'a presumption of denial' if the item would make a material contribution to the development, production, maintenance, repair, or operation of weapons systems, subsystems, and assemblies.'

In sum, these new amendments reflect the trend toward increasing export controls focused on China where there is a US national security, foreign policy, or economic concern associated with the supply of dual use commercial items, with a focus on military, intelligence, surveillance, and cyber capabilities. NNSA has not announced any changes to its Part 810 export controls directed at China – such technology exports already require a specific licence and do not qualify under a general authorisation set forth under Part 810 – but industry should monitor that regime for any change in the licensing review process related to China.

LINKS AND NOTES

¹ www.federalregister.gov/d/2023-17394

² www.federalregister.gov/d/2023-17243

³ www.ecfr.gov/current/title-15/subtitle-B/chapter-VII/subchapter-C

⁴ www.ecfr.gov/current/title-10/chapter-III/part-810?toc=1