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July 31, 2015

Ms. Hillary Hess
Director, Regulatory Policy Division, Office of Exporter Services
Bureau of Industry and Security
US Department of Commerce

Re: RIN0694-AG32 (Proposed rule titled "Revisions to Definitions in the Export Administration Regulations" in 80 FR 31505 dated June 3, 2015)

Dear Ms. Hess:

Thank you so much for your continued supports to us, Center for Information on Security Trade Control (CISTEC), and Japanese industries.

We would refer to your 80 FR 31505 dated June 3, 2015 in which you requested comments on the revisions to definitions in the EAR. We understand through the document that these revisions are based upon the Export Control Reform Initiative, especially the policy of the harmonization of EAR and ITAR. We appreciate these BIS's review and efforts and most of the proposed revisions basically enhance or clarify the current definitions and rules. However, we have concerns on some proposed ones and thus we are pleased to submit to you our comments as stated below.

Also, taking this opportunity, we would like to re-make our ultimate requests on the US reexport control, which we have been making for a very long time.

1. Our comments on the BIS's proposed rules

1. 1. Deemed Reexport Control

(1)Ultimate Request

Please see Section 2.2 below.

(2)Requests until our ultimate request in Section 2.2 is met

The proposed rule §734.20 (a) is based upon the guidance rule quoted below in the

"Deemed Reexport Guidance" dated October 31, 2013 published on the following BIS website. However, the exemption 2.i below of this guidance, which makes it clear there would be no deemed reexport when the foreign national's most recent country of the permanent residency is the same as the country where the release is conducted, is deleted from the proposed rule §734.20(a)(2). We would like to ask BIS to add this exemption 2.i to the proposed rule §734.20(a)(2).

QUOTE ("Deemed Reexport Guidance" of October 31, 2013) (underline added)

A. Legacy BIS Dual and Third Country National Reexport Guidance

In general, you (e.g., an entity outside the United States) may reexport technology or source code subject to the EAR outside the United States to a dual or third country national without an additional license issued by BIS or the application of an EAR license exception if:

1. You are authorized to receive the technology or source code at issue, whether by an individual license, license exception, or situations where no license is required under the EAR for such technology or source code; and
2. You are certain that the foreign national's most recent country of citizenship or permanent residency is either:
   i. the same as yours (e.g., the same country in which your company outside the United States is located), or
   ii. that of a country to which export from the United States of the technology or source code at issue would be authorized by the EAR either under a license exception, or in situations where no license under the EAR would be required.

UNQUOTE

http://www.bis.doc.gov/index.php/policy-guidance/deemed-exports/deemed-reexport-guidance1

[Reasons]:

We think it indispensable to make it clear deemed reexport control does not apply to foreign nationals lawfully admitted for permanent residency by adding the above-quoted 2.i to the proposed rule § 734.20(a)(2) because such exemption provided in the current § 734.2(b)(5) quoted below is deleted from the definition of deemed reexport in the proposed rule § 734.14(a)(2) and (b).

QUOTE (Extract of § 734.2(b)(5) of the current EAR)

However, this deemed reexport definition does not apply to persons lawfully admitted

for permanent residence.
UNQUOTE

1.2. New stipulation of the condition "unclassified"

We would like to ask BIS to clearly stipulate the definition of "unclassified" used in the proposed rules §734.7(a) and §734.18(a)(4), as ITAR.

[Reasons] :

Under the proposed rule §734.7(a), one of the conditions of the published technology/software not subject to the EAR is "unclassified". Under the proposed rule §734.18(a)(4)(i) also stipulates "unclassified" as one of the conditions that sending, taking or storing technology/software is not exports/reexports/transfers. Therefore, without the clear definition of "Unclassified", there would be confusion of the interpretation and practices of these rules.

1.3. Proposed rule §740.9(a)(3)(License Exception TMP on technologies)

This proposed rule stipulates the license exception TMP on only exports of technologies by or to a US person and a foreign national employee of a US person under certain conditions and thus we would like to ask BIS to add the TMP on reexports of technologies, including those by a non-US person, and the TMP on exports of technologies by a non-US person under substantially the same conditions.

[Reasons] :

We believe the above-requested additions would be appropriate from the viewpoints of fairness between a US person and a non-US person and that between exporters and reexporters.

1.4. BIS Proposal of the deletion of Supplement No.1 to Part734 (Questions and Answers-Technology and Software subject to the EAR)

We would like to ask BIS not to delete this current Supp. No.1 to Part 734 and, as for the questions and answers which should be revised under the new final rules, we would like to ask BIS to do so in the EAR.

[Reasons] :

In this Supp. No.1 to Part734, there are many helpful questions and answers, without which it would be very difficult to precisely interpret the rules stipulated in

Part 734. There would be no guarantee of publishing and keeping these as the guidance on BIS's website if these would be deleted from the EAR. There are some cases where the useful guidelines/criteria in the EAR were deleted from the EAR but they were not published on the BIS website in the past.

1.5. Effective date of the final rules

We would like to ask BIS to make the effective date at least 3 months after the publication of the final rules.

[Reasons] :

The definitions of many kinds of important words and conditions, which are the key bases of the EAR's rules and restrictions, will be revised and thus only one month delay proposed by BIS would not be sufficient, especially for non-US companies, the mother tongue of most of which are not English and, needless to say, the EAR is not their own countries' regulations. The burdens for exactly understanding and preparing for the compliance with this proposed revision of the definitions would be substantially the same as those in case of the recent revisions of the EAR adopting 600 series ECCN, the effective date of which was 6 month delay after the publication of the final rules.

1.6. Rules on reexport cases where US origin chemical materials are incorporated into non-US origin materials and thereby they are substantially transformed

(Note): This request is the follow up of Q & A of the lecture by Mr. Kevin Wolf, Assistant Secretary, BIS, in the US export control seminar in Japan on February 19, 2015, which was held by CISTEC.

Under §560.205(b)(1) of IRANIAN TRANSACTIONS AND SANCTIONS REGULATIONS (ITSR) by OFAC on the following website, the ITSR's restrictions would not apply to the above-captioned reexport cases.
http://www.ecfr.gov/cgi-bin/text-idx?SID=189dfadea50dff52dbee0e8c86bdb996&mc=true&node=se31.3.560_1205&rgn=div8

We would like to ask BIS to stipulate the same kind of the rule on the above-captioned reexport cases also in the EAR or BIS's guidance on the BIS website.

If this stipulation would be difficult, we would like to ask BIS to stipulate de minimis rule (EAR§734.4) can apply also to the above-captioned reexport cases in the EAR or BIS's guidance on the BIS website.

[Reasons] :

There are no clear written rules on the above-captioned reexport cases in the EAR and thus these should be clarified.

2. Our ultimate request

2.1 General

Taking this opportunity, we would like to remind you that it is our ultimate request that the BIS exempt countries including Japan that are members of the international export control treaties/regimes and are implementing robust controls consistent with international standards and norms from re-export controls. We have been requesting this repeatedly in the past as stated in (1) to (5) below. We know that you responded to our request at each time, but would be pleased if you could again consider our request, which is quite reasonable, we believe.

(1) CISTEC's letter to Mr. Hirschhorn, Under Secretary for Industry and Security, and Mr. Wolf, Assistant Secretary for Export Administration, dated June 29, 2015

(2) CISTEC's letter to Mr. Mancuso, Under Secretary for Industry and Security, US Department of Commerce, at that time, dated November 7, 2007

(3) CISTEC's letter to Mr. Wall, Assistant Secretary of Export Administration, BIS, US Department of Commerce, at that time, dated February 19, 2009

(4)Our oral request to Mr. Wolf when our delegation team visited BIS in Nov. 2011

(5)Section VI of "RECOMMENDATIONS BY THE GOVERNMENT OF JAPAN TO THE GOVERNMENT OF THE UNITED STATES REGARDING REGULATORY REFORM AND COMPETITION POLICY" dated October 15, 2008
http://www.mofa.go.jp/region/n-america/us/economy/report0810.pdf

2.2 Our ultimate and specific request for exemption of deemed reexport control

Especially, we would like to ask BIS to exempt the releases to any of foreign nationals within at least each of "countries including Japan that are members of the international export control treaties/regimes and are implementing robust controls consistent with international standards and norms" from deemed reexport control.

[Reasons]:

In order for non-US companies to comply with the EAR deemed reexport control in their own countries, it is indispensable to confirm the nationality of foreign national employees who may access technologies/soucecode subject to the EAR and treat each of

them per his/her nationality quite differently. Therefore, there is a serious possibility that the compliance with the deemed reexport control in non-US countries would cause the violation of anti-discrimination laws or privacy laws of their own country. For examples, according to export control attorneys, those laws of EU countries are strictest and thus there are high risks of the violation by the compliance with deemed reexport control in EU countries. Only the proposed rule §734.20(Activities that are not "deemed reexports") would not resolve such risks of the violation.

Once again, we would like to thank you for your assistance and cooperation.

Sincerely,

K. Kitayama

Kumiko Kitayama
Leader, US Export Control Working Group
Chief, Foreign Regulations Subcommittee
International Research and Relations Committee
Center for Information
on Security Trade Control (CISTEC)