

## International Trade Alert: Bureau of Industry and Security Announces Intra-Company Transfer License Exception

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After years of requests from the export community, the Bureau of Industry and Security (BIS) finally proposed creation of the Intra-Company Transfer (ICT) license exception. It was published in the October 3, 2008 Federal Register and was introduced at BIS Update 2008 by Christopher Wall, BIS assistant secretary for export administration. The proposed license exception could eliminate the need for licenses for most exports of goods and technology between U.S. companies and their foreign operations.

But (and yes, there is a *but*), there are strings attached and qualifying to get BIS approval to use the ICT will not be as easy as industry had hoped. To use the ICT license exception, an exporter will be required to obtain *advance* BIS approval, part of which will include adoption of an ICT "control plan" and agreement to allow BIS to conduct audits of the exporter. In addition, use of the ICT exception will impose recordkeeping requirements for all trade conducted under the exception and all foreign persons authorized to have access to controlled technology under the exception.

### The Basics

An application to be eligible to use the ICT will be similar to the current license applications, and will go through the same interagency review (BIS, State, Defense) as export license applications. Applicants must agree to conduct self-evaluations and BIS will expect ICT holders to file voluntary self-disclosures of any violations uncovered during these self-audits. Each approved ICT would be limited to those exporters, users, and recipients, including foreign nationals identified in the application and to specific Export Classification Control Numbers (ECCNs). The proposed ICT would be available for use by approved eligible applicants, eligible users, and eligible recipients. According to BIS, "[t]he eligible applicant must be incorporated in or have its principal place of business in any country listed in Supplement No. 4 to part 740." "Eligible users" may be eligible applicants and their wholly owned or "controlled in fact" entities that are included in the applications submitted by eligible applicants. "Eligible recipients" must meet the same criteria.

### The Excluded

"No items controlled for Encryption Items (EI) reasons under ECCNs 5A002, 5D002, or 5E002 may be exported, reexported, or transferred (in-country) under this license exception," the proposed rules state. In addition, no items controlled for Significant Items (SI) reasons may be exported, reexported, or transferred (in-country) under ICT.

### Annual Reports

Exporters authorized to use license exception ICT must file annual reports with BIS, which will be required to include:

- information on all foreign nationals who have been given access to controlled technology under the exception;
- information on foreign nationals whose employment has been terminated; and
- a signed certification by a company officer that all eligible participants are in compliance with the terms of the approved ICT. (This certification must include the results of the self-evaluation that the approved ICT exporter has agreed to conduct as part of its approval.)

### The ICT Control Plan

As part of the application to BIS for ICT status, exporters will be required to submit evidence that they have established an ICT control plan that will assure that items on the Commerce Control List will not be exported, reexported, or transferred in violation of this license exception. "Within the ICT control plan, eligible applicants must describe how certain mandatory elements will be met. These mandatory elements, which are listed in new Section 740.19(d)(1) [of the Export Administration Regulations], include corporate commitment to export compliance, a physical security plan, an information security plan, personnel screening procedures, a training and awareness program, a self-evaluation program, a letter of assurance for software and technology, non-disclosure agreements, and end-user review lists."

### Conclusion

While the new rules will assist exporters with multinational operations to streamline their intra-company licensing issues (including deemed export issues), the rules also will require that companies get their export-management-system-compliance house in order before attempting to apply for approval to rely on license exception ICT.

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For further information or assistance with license exception ICT and other export issues, contact an attorney listed below or another member of your Mintz Levin service team.

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