

## BIS Effectively Embargoes North Korea

Under the mantle of U.N. Security Council Resolution 1718, the Bureau of Industry and Security of the U.S. Department of Commerce ("BIS"), effective January 26, 2007, has (i) imposed new restrictions on all exports and reexports of items subject to the Export Administration Regulations ("EAR"), excluding food<sup>1</sup> and medicines<sup>2</sup> but including luxury goods, to the Democratic People's Republic of Korea ("North Korea"), (ii) reaffirmed existing restrictions relating to nuclear or missile-related items, and (iii) rendered inapplicable for North Korea most of the license exceptions set forth in Part 740 of the EAR.<sup>3</sup> See 72 Fed. Reg. 3722 (Jan. 26, 2007). While the luxury goods ban was widely anticipated, BIS unexpectedly reinstated the licensing requirement for EAR 99 items (*i.e.*, items subject to the EAR, but not specifically listed on the Commerce Control List ("CCL")). As a result, all EAR 99 items other than food and medicines<sup>4</sup> now require a license to be exported or reexported to North Korea. This change in policy effectively reverses the steps taken by the U.S. in 2000 to ease economic sanctions against North Korea and results in a *de facto* U.S. trade embargo of North Korea.

### Approvals Largely Limited to Humanitarian Exports

Under the new restrictions, applications to export or reexport EAR 99 items (other than luxury goods) generally will be reviewed on a case-by-case basis. However, BIS will review under a general policy of approval license applications for the export or reexport of humanitarian items (*e.g.*, blankets, medical supplies, heating oil, and other items meeting subsistence needs) intended for the benefit of the North Korean people. The general policy of approval also extends to agricultural commodities (as defined in Section 102 of the Agricultural Trade Act of 1978 ) and medical devices (as defined in Section 201 of the Federal Food, Drug and Cosmetic Act) if BIS determines after consulting with the interagency license review community that these items are not luxury goods. Please note that the Department of Agriculture maintains a list of the products considered to be agricultural commodities under the Agricultural Trade Act. This list, which is also utilized by BIS in connection with the implementation of the Trade Sanctions Reform and Export Enhancement Act of 2000, includes food as well as a wide variety of other products. As noted above, food may be exported or reexported to North Korea without a license, but applications must be submitted for all other listed agricultural commodities, some of which may be considered by BIS to be luxury goods.

<sup>1</sup> Specific to exports to North Korea, Section 772.1 of the EAR defines food as "items that are consumed by and provide nutrition to humans and animals, and seeds, with the exception of castor bean seeds, that germinate into items that will be consumed by and provide nutrition to humans and animals. (Food does not include alcoholic beverages.)"

<sup>2</sup> For purposes of the EAR, medicines means "drug" as defined in section 201 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 321 *et seq.*) and includes prescription and over the counter medicines for humans and animals.

<sup>3</sup> In addition to the BIS restrictions, the Office of Foreign Assets Control of the U.S. Department of the Treasury ("OFAC") has amended its regulations effective February 2, 2007 to prohibit U.S. persons from registering vessels in North Korea or from otherwise obtaining authorization for a vessel to fly the North Korean flag. See 72 Fed. Reg. 4960 (Feb. 2, 2007). The OFAC regulations already prohibit U.S. persons from owning, leasing, operating, or insuring any North Korean-flagged vessel.

<sup>4</sup> We note that certain medicines, such as vaccines and immunotoxins, are specifically identified on the CCL.

### General Denial for Exports of “Luxury Goods”

Applications to export or reexport luxury goods to North Korea will be reviewed by BIS under a general policy of denial. While the term "luxury goods" is not defined by BIS, an illustrative list of such products appears in Supplement No. 1 to new Section 746.4(c) of the EAR and includes, for example: luxury automobiles; yachts; gems; jewelry; cosmetics; perfumes; furs; designer clothing; luxury watches; rugs and tapestries; electronic entertainment software and equipment; recreational sports equipment; tobacco; wine and other alcoholic beverages; musical instruments; art; and antiques and collectibles. BIS will determine whether an item is a luxury good on a case-by-case basis and will take into account the end use and end user. For example, a laptop computer proposed to be exported to an organization legitimately involved in humanitarian relief efforts likely would be treated differently than if the intended recipient were a North Korean government official or a family member of such an official.

### CCL-Controlled Items Will Find Denial Too

Consistent with U.N. Security Council Resolution 1718 and existing U.S. export control policy, BIS will continue to review license applications for arms and related materiel controlled on the CCL and items controlled on the multilateral export regime control lists (the Missile Technology Control Regime, the Nuclear Suppliers Group, the Australia Group, and the Wassenaar Arrangement) under a general policy of denial. In addition, BIS also generally will deny applications to export and reexport items that the U.N. Security Council or Sanctions Committee has determined could contribute to North Korea's nuclear-related, ballistic-missile-related or other weapons of mass destruction-related programs. Furthermore, applications to export or reexport items controlled on the CCL for Nuclear Proliferation (NP) or Missile Technology (MT) reasons (except ECCN 7A103 items) will be reviewed under a general policy of denial. Applications to export or reexport all other items on the CCL will be reviewed in accordance with the licensing policy set forth in Section 742.19 of the EAR (Antiterrorism: North Korea).

Finally, BIS has limited the available license exceptions for exports to North Korea to: TMP; GOV; GFT; TSU; BAG; and AVS (and for the available exceptions has limited the circumstances under which the exceptions may be utilized).

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The de facto reinstatement of the U.S. trade embargo may not have a tremendous impact on U.S. exporters as current U.S. trade with North Korea is minimal. However, the ramifications of the change in policy may be more significant for non-U.S. companies that routinely conduct business with North Korea. Although not specifically stated in the BIS final rule, the change in the control status of U.S. origin items classified as EAR 99 may impact the outcome of *de minimis* rule calculations for foreign-manufactured commodities incorporating U.S. content. Under the *de minimis* rule, a foreign-manufactured commodity is not subject to the EAR if controlled U.S. content accounts for 10 percent or less of the value of the foreign-manufactured commodity. Prior to January 26, 2007 (but after June 19, 2000), the value of a U.S. origin item classified as EAR 99 was not required to be counted for purposes of complying with the *de minimis* rule because EAR 99 items were not controlled for export to North Korea (*i.e.*, EAR 99 items did not require a license from BIS to be exported to North Korea). U.S. origin items classified as EAR 99 now are controlled for export to North Korea. Accordingly, the value of such items when incorporated into foreign-manufactured commodities now must be counted for *de minimis* calculation purposes.

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