

To: Our Clients and Friends

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New “Recast” EC Dual-Use Regulation

On 29 May 2009, a “recast” regulation for the control of exports, transfer, brokering and transit of dual-use items was published in the Official Journal of the European Union (Council Regulation (EC) No 428/2009). It will come into effect on 27 August 2009 and will replace the current regulation for the control of exports of dual-use items (Council Regulation (EC) No 1334/2000, as amended).

The European Commission has in the last few years made proposals to change the legal framework for dual-use export controls, some of which proposals face political hurdles that are inherent in the approval structure that exists in the EU. In anticipation of future changes and to implement provisions that have been agreed, particularly with respect to “brokering” and “transit” controls contemplated in UN Security Council Resolution 1540 (2004), the current dual-use regulation has been recast in the interest of clarity. Many provisions of Regulation 1334/2000, as amended, remain the same but have been reorganized and clarified in some instances.

However, new provisions have been added relating to brokering services by persons resident or established in an EU member state in connection with transactions in controlled dual-use items from a third country outside the EU to another third country outside the EU where there is a potential WMD end-use. Brokering services is broadly defined, but does not include certain ancillary services. Among other things, member states may elect to extend brokering controls to items that are not on the EC Control List where there is a potential WMD end-use.

In addition, the new Regulation allows a member state to prohibit or require authorization for the transit through that member state of controlled non-EU dual-use items which are or may be intended for a WMD end-use. Member states may extend these controls to non-controlled items where a potential WMD end-use is involved.

Member states are required to notify the Commission of national measures adopted in connection with control of brokering services and transit items, which measures are intended to be published.

The new Regulation expresses the desire to achieve a uniform and consistent application of controls throughout the EU and to provide a level playing field for EU exporters. This has not always been achieved in the past.

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