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Timely News and Analysis of Export Regulations

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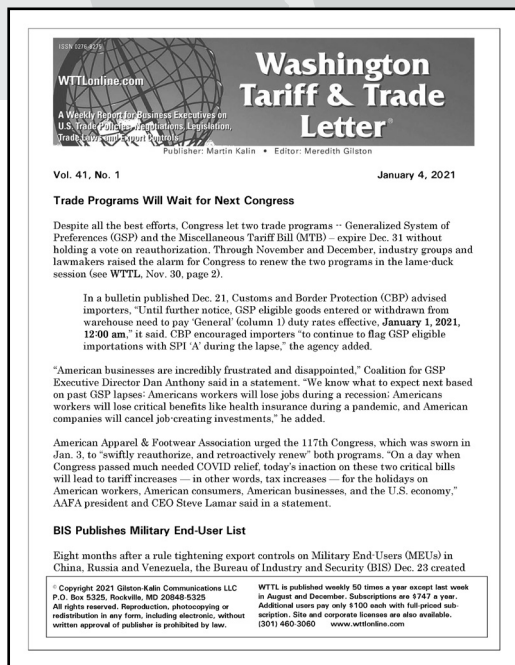
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BIS Under Fire



Estevez Cites National Security, Looking at “Other Areas”

Six months into his tenure, the new chief of the Bureau of Industry and Security has been adamant that his department’s goal is to defend US warfighters’ qualitative advantage. When the opponent is Red China, the conversation gets complicated.

Undersecretary of Commerce Alan Estevez shared his perspective on export controls in National Security, and the allies’ reaction to the Department’s Commerce wide-ranging export controls related to semiconductors announced earlier this month at the Center for a New American Security October 27. Mr. Estevez reflected on his mission, multilateralism, and what to expect from his organization *[remarks edited for brevity, [video here](#)]*:

“We put out an interesting rule on October 7th. Frankly, from my perspective, that is just business as usual at BIS, the Bureau of Industry and Security. That is what we’re supposed to

be doing. I announced during my testimony in July before both the Senate and the House that I was doing a China review. This is part of that review.

“I also keep getting asked when will that China review be done? That China review will be done when the Chinese change their behavior. **So we are going to continue to look at not just what we did in semiconductors, but other areas that the Chinese are using to threaten the United States and its allies.**

“**We put a restriction on US persons** that facilitate those lines, those advanced lines, so that no one can go in calibrate the tool that is the US person and we’re working through some some additional clarification and guidance on that. I think the US persons thing surprised a lot of people and we’re working in FAQ around that so that people see exactly clarification. It was not trying to go after the billing clerk.

“**I want to just quickly cover a couple of myths about the way we operate.** I’ve heard that we approve, you know, 95% of the licenses to China. The reality is closer to 67%. And that also means a couple of things in that. One, companies do not come in for a license because it’s a waste of their time and a waste of our time. It’s really a waste of their corporate time to come in for a license that they know they’re going to be denied. So if they have clarity and we try to give them clarity that this is not going to be allowed, they are not going to come in for a license for that. So that’s not even in those numbers.

And then many times we send licenses back and say we have lots of questions about this. When you see those 90% numbers that “send back” is not included in that. Usually when we send back, we don’t get anything back from them, which essentially ends it. So, you know, the numbers are not as clear as one would say when they say we’re approving 97% of the licenses.

My final clarification is around national security and foreign policy issues. It is not, despite the some of the views out there, about economic destruction of China. This is about national security. Our actions are purely about national security.

I’ll also say we do not balance trade with national security. When I see an action that needs to be taken for national security, I have top-down coverage to go take care of that regardless of the impact. No one has ever come to me and said go balance this with our trade requirements.

It is not, despite the some of the views out there, about economic destruction of China. This is about national security

My job is not to change their behavior. I'm not here as a diplomat. I'm here as the Chief Technology Protection Officer of the United States, and my job is to protect national security. And where we see national security threats from use of Western technology against us, we're going to try to close those gaps. Coming from my background as being the chief logistician of the Department of Defense, and the number two weapons buyer for the Department of Defense, letting a foreign adversary use US technology or allied technology just goes against the grain for me.

Enforcement, we will use our full gamut of capability of both civil and criminal, depending on the nature of the violation to enforce our rules. We'll do that on any export control regardless of it's the

October 7th rule, what we've done for Russia. One of the reasons that Secretary Raimondo asked me to come and take this job is because I came in with this kind of mentality, looking at it from a national security perspective. I'm not an export control lawyer.

Trade and the New National Security Strategy

The Administration's new National Security Strategy calls for a new model of trade. "The strategy indicates that we have to turn the page on the traditional formula for trade and adopt a new model of economics, investment, and trade that is fit for purpose for the coming decades of the 21st century on everything that has been laid bare in the last few years – supply chains, the energy transition, new standards for labor, the environment, as well as the increasing role of technology and digitization in the global economy," **White House National Security Advisor Jake Sullivan** told reporters October 12.

In addition to a framework for managing trade agreements, **the Strategy calls for a more aggressive defense of industrial advantage:** "We must ensure strategic competitors cannot exploit foundational American and allied technologies, know-how, or data to undermine American and allied security. We are therefore modernizing and strengthening our export control and investment screening mechanisms, and also pursuing targeted new approaches, such as screening of outbound investment, to prevent strategic competitors from exploiting investments and expertise in ways that threaten our national security, while also protecting the integrity of allied technological ecosystems and markets.

"They've never had any real oversight," Mr. McCaul commented. "We are literally aiding and abetting the Chinese war machine."

Republicans Call for Even Sterner BIS, Move to State

House Foreign Affairs Committee ranking Republican Michael McCaul (Texas) plans to take a "hard look" at export controls if he becomes chairman of the panel in the next Congress. Looking at export controls also means looking at the agency in charge – the Commerce Department's Bureau of Industry and Security, he told a program sponsored by the Atlantic Council.

BIS has been ignored by Congress for too long, Mr. McCaul said. "I'm going to be looking under the hood of this relatively unknown agency." If

he chairs Foreign Affairs next year, the congressman said he will implement a 90-day review of BIS, including having the bureau's top officials testify before the committee, in order to understand how export controls are being enforced.

"They've never had any real oversight," Mr. McCaul commented. "BIS has denied less than 1 percent of export licenses requests, approving exports to Chinese companies, like Huawei and semiconductor manufacturers SMIC," he said, contending the low number of denials reflects the Commerce Department's focus on supporting industry over national security. "We are literally aiding and abetting the Chinese war machine."

Given Commerce's business-friendly focus, Congress should take a look at whether BIS should be moved to the State Department, Mr. McCaul said. **McCaul's sentiments are echoed by Rep Jim Banks (R-Indiana)** who most recently proposed stripping the Commerce Department of Export Control Authority, transferring responsibility to the Department of Defense, and banning the recruitment of senior BIS personnel by the DoD. Banks' bill, the Prioritizing National Security in Export Controls Act of 2022 (HR 9241), while in part election-year showboating, reflects the popular interest in Export Controls.

Axelrod Issues Report Card on Academic Outreach

In a presentation at Oregon State University October 26, Assistant Secretary for Export Enforcement Matt Axelrod shared what he called a "mid-semester evaluation" of the Office of Export Enforcement's Academic Outreach Initiative of prioritized engagement, briefings and training announced last Summer.

First, OEE prioritized engagement with twenty academic research institutions whose work gives them an elevated risk

profile. These are institutions that: (1) possess ties to foreign universities that are on the Entity List; (2) are involved in R&D for the Department of Defense; or (3) are conducting research in sensitive technologies subject to the Export Administration Regulations (EAR) - for example, laboratories conducting applied research on emerging or foundational technologies.

Second, an individual outreach agent has been to each of the twenty prioritized universities. These “outreach agents” serve as a dedicated point of contact for the university to help answer questions, build long-term relationships, and help prevent unauthorized exports of technology or source code

Third, OEE will offer background briefings on known national security risks associated with specific foreign entities or efforts by foreign adversaries to acquire specific technologies that are directly relevant to that particular university.

Finally, training activities will include a centralized briefing to the 20 partner universities on identifying red flags and mitigating risks, followed by a webinar on conducting open-source research. The centralized briefing is offered twice this fall, with the first one

scheduled for October 27. In December, OEE will provide the additional training session on how to best conduct open-source research.

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Oh Glencore.

A London court last month fined notorious commodity trader and conflict miner Glencore 281 million pounds, or about \$320 million, for paying bribes to West African officials of state-owned oil companies. This follows on the firm's guilty pleas in May and payment of over \$1.1 billion to resolve US investigations into violations of the Foreign Corrupt Practices Act (FCPA) and a commodity price manipulation scheme. The U.S. Settlement includes an agreement for an independent compliance monitor for three years.

In the U.K. investigation, Glencore admitted to five counts of bribery and two counts of failure to prevent bribery, centered on bribes that Glencore employees and agents paid to state-owned oil companies in West African countries including Nigeria and Ivory Coast to secure contracts for oil. Glencore paid about \$29 million in bribes between 2011 and 2016. Court observers were titillated with tales of UK and Swiss "cash desks" where executives would stuff duffels to fly into host countries for "office expenses," according to the *Financial Times*.

Nigeria had unsuccessfully asked the court to order compensation alongside any fine levied against Glencore, with counsel asserting corruption is "grievously immoral and causes untold damage", adding that resource-rich countries were "where you see companies like Glencore sucking the lifeblood out of the economy".

Crusader Health, a South African employee health provider, was the victim of other bribes a Glencore affiliate paid in the Democratic Republic of Congo, according to the motion filed in Manhattan Federal Court. Crusader's claims are based on the U.S. Mandatory Victims Restitution Act of 1996, the *WSJ* reports. After a dispute over terminated the agreements, the Glencore affiliate paid a bribe to secure a favorable ruling in a contract-dispute lawsuit in Congo in 2010.

The FT Reports Zambia's Anti-Corruption Commission has opened an investigation into \$3mn paid to a political party in 2016 by Glencore International. In 2021 the firm sold the 90 year old Mopani Copper Mines to local owners for \$1.5 billion, the debt for which the mine has been unable to service, according to *Reuters*.

Earlier in the month more than a dozen global investors sued Glencore in London's High Court, prompted by the company's conviction of bribery earlier this year, according to the FT. Glencore had reserved \$1.5 billion for settlements, or roughly eight percent of the firm's first-half earnings of \$18.9 billion.

Chinese Magnet Indictments

Kentucky-based managers of a U.S. subsidiary of China's Forsee Group are charged with wire fraud, violations of the Arms Export Control Act, and smuggling of goods for their roles in an illegal scheme to send export-controlled defense-related technical data to China and to unlawfully supply U.S. Department of Defense (DOD) with Chinese-origin rare earth magnets for aviation systems and military items.

Phil Pascoe, his wife Monica, and Scott Tubbs of Quadrant Magnetics LLC face up to 20 years in prison for sending approximately 70 drawings containing export-controlled technical data to an affiliated company in China without a license from the U.S. government, in violation of the Arms Export Control Act and the International Traffic in Arms Regulations. The technical data drawings were the property of two U.S. companies and related to end-use items for aviation, submarine, radar, tank, mortars, missiles, infrared and thermal imaging targeting systems, and fire control systems for DOD.

The indictment further alleges that Quadrant Magnetics imported rare earth magnets that were smelted and magnetized in China. Quadrant then sold these magnets to two U.S. companies which included them in components sold to DOD for use in the F-16, the F-18, and other defense assets in violation of the Defense Acquisition Regulations System (DFARS).

Under the DFARS specialty metal clause, rare earth magnets sold to DOD must be produced and magnetized in the United States or an approved country. China is not an approved country.

Justice hits Trifecta: PVDSA, Dual-Use, Oligarch

"Criminal enablers for oligarchs, orchestrating a complex scheme to unlawfully obtain U.S. military technology and Venezuelan sanctioned oil through a myriad of transactions involving shell companies and cryptocurrency," is how US Attorney Breon Peace of the Eastern District of New York described NDA GmbH, an industrial equipment and commodity trading company located in Hamburg, Germany and its principals, Yury Orekhov, and Artem Uss, both Russian Nationals.

Orekhov and associates sourced and purchased sensitive military and dual-use technologies from U.S. manufacturers, including advanced semiconductors and microprocessors used in fighter aircraft, missile systems, smart munitions, radar, satellites, and other space-based military applications. These items were shipped to Russian end users, including sanctioned companies that serviced Russia's military.

Some of the types of electronic components obtained through the criminal scheme have been found in Russian

weapons platforms seized on the battlefield in Ukraine. As alleged, in 2019, Orekhov travelled to the United States to source parts used in the Russian-made Sukhoi fighter aircraft and the American-made F-22 Raptor stealth fighter aircraft.

Also charged are Juan Fernando Serrano Ponce, and Juan Carlos Soto, who allegedly brokered illicit oil deals for Petroleos de Venezuela S.A. (PDVSA), the Venezuelan state-owned oil company, as part of the scheme.

Orekhov and Uss also allegedly used NDA GmbH as a front to smuggle hundreds of millions of barrels of oil from Venezuela to Russian and Chinese purchasers, including a Russian aluminum company controlled by a sanctioned oligarch and the world's largest oil refining, gas and petrochemical conglomerate based in Beijing.

Serrano Ponce and Soto brokered deals worth millions of dollars between PDVSA and NDA GmbH, which were routed through a complex group of shell companies and bank accounts to disguise the transactions. In one communication with Serrano Ponce, Orekhov openly admitted that he was acting on behalf of a sanctioned Russian oligarch, saying "He [the oligarch] is under sanctions as well. That's why we [are] acting from this company [NDA GmbH]. As fronting." The scheme also involved falsified shipping documents and supertankers that deactivated their GPS navigation systems to obscure the Venezuelan origin of their oil.

Payment for NDA GmbH's illicit activities was often consummated in U.S. dollars routed through U.S. financial institutions and correspondent bank accounts. To facilitate these transactions, Orekhov and his co-conspirators used fictitious companies, falsified "know your customer" documentation and bank accounts in high-risk jurisdictions, causing U.S. banks to process tens of millions of dollars in violation of U.S. sanctions and other criminal laws.

In one conversation with Soto, Orekhov bragged that "there were no worries...this is the shittiest bank in the Emirates...they pay to everything." The scheme also utilized bulk cash drops with couriers in Russia and Latin America, as well as cryptocurrency transfers worth millions of dollars, to effectuate these transactions and launder the proceeds.

The defendants are charged with conspiracy to defraud the United States; with conspiracy to violate the International Emergency Economic Powers Act (IEEPA); bank fraud conspiracy for the oil smuggling scheme; and money laundering conspiracy for the oil smuggling and IEEPA scheme.

Jig is Up for Baltic Machine Tool Scheme

Two Latvians conspired with a Ukrainian resident of Estonia and others to violate U.S. export law and smuggle a high-precision grinding machine system made in Connecticut to Russia.

A jig grinder does not require a license to export to European Union countries, but does require a license for export

and reexport to Russia because of its potential application in nuclear proliferation and defense programs. At no time did the defendants apply for, receive or possess a license of authorization from the U.S. Department of Commerce to export or reexport the jig grinder to Russia, as required by the Export Control Reform Act of 2018 and the Export Administration Regulations ("EAR"), which restrict the export of items that could make a significant contribution to the military potential of other nations or that could be detrimental to U.S. foreign policy and national security.

U.S. authorities, working with Latvian authorities, intercepted the equipment in Riga, Latvia, before it was to be shipped to Russia. The four defendants are currently detained and the U.S. is seeking their extradition.

"The indictment alleges that these defendants attempted to smuggle a high-precision export-controlled item to Russia where it could have been used in nuclear proliferation and Russian defense programs," said U.S. Attorney Vanessa Roberts Avery. "The danger created by such conduct is profound."

Rogue Instrument Trader Pays Fine, Agrees to Monitor

Intertech Trading Corporation, the New Hampshire-based distributor for Thermo-Fisher Scientific in Russia and the former Soviet Union, was sentenced in federal court after pleading guilty to 14 felony counts of failure to file export information on shipments to Russia and Ukraine. Judge Paul Barbadoro ordered that Intertech pay the maximum allowable fine of \$10,000 per count, for a total of \$140,000, and be subject to a two-year term of corporate probation and monitoring.

According to court documents and statements made in court, between 2015 and 2019, Intertech exported laboratory equipment to Russia, Ukraine, and elsewhere, falsely describing the nature and value of the exported items on commercial invoices and shipping forms. In its plea agreement, Intertech admitted that it used false, innocuous descriptions such as "lamp for aquarium" or "spares for welding system," rather than accurately identifying the sophisticated scientific equipment actually contained in the shipments.

Intertech admitted that it drastically undervalued the shipments, thereby evading the requirement to file Electronic Export Information, which would have been reported to the Departments of Commerce and Homeland Security.

Several Intertech affiliates in Russia have been named in recent sanctions and are on the entity list. By routing the sales through Intertech, Thermo-Fisher appears to have avoided any consequences for the illicit trade, which included four shipments totaling \$40 million sent to Russian Federal Security Service, or FSB, successor to the KGB, according to court filings.

Chinese Spycraft Targeted

In three separate cases in the U.S. Attorneys' Offices for the Eastern District of New York and the District of New Jersey, the Justice Department has charged 13 individuals, including members of the People's Republic of China (PRC) security and intelligence apparatus and their agents, for alleged efforts to unlawfully exert influence in the United States for the benefit of the government of the PRC.

In the Eastern District of New York, an eight-count indictment was unsealed on Oct. 20 charging seven PRC nationals – two of whom were arrested on Oct. 20 in New York – with participating in a scheme to cause the forced repatriation of a PRC national residing in the United States. The defendants are accused of conducting surveillance of and **engaging in a campaign to harass and coerce a U.S. resident to return to the PRC** as part of an international extralegal repatriation effort known as “Operation Fox Hunt.”

A criminal complaint was unsealed today in federal court in Brooklyn charging two People's PRC intelligence officers with **attempting to obstruct a criminal prosecution of a global telecommunications company (Huawei)**. The defendants, who remain at large are alleged to have paid a \$41,000 Bitcoin bribe to a U.S. government employee who the defendants believed had been recruited to work for the PRC, but who in fact was a double agent working on behalf of the FBI.

In the District of New Jersey, an indictment was unsealed today charging four Chinese nationals, including three Ministry of State Security (MSS) intelligence officers, in connection with a long-running intelligence campaign **targeting individuals in the United States to act as agents of the PRC**. One targeted individual, a former federal law enforcement officer and state homeland security official and a professor at an American university was requested to sign a contract for purported consulting services with a Chinese company whose “core value” was the “national interest and national security” of China, with an objective to “protect the national interest and Chinese enterprises’ overseas interest[s]” and to “build sources and channels to collect security information.” Recognizing his handlers as Chinese intelligence officers, the individual refused these requests and reported them to law enforcement.

More Buckeyes Pinched for Research Fraud

The **Ohio State University** (OSU) has paid \$875,689 to resolve civil allegations that it failed to disclose an OSU professor's affiliations with and support from a foreign government in connection with federal research funding.

This settlement relates to **Army, NASA, and National Science Foundation (NSF)** grants and research support agreements that provided funding to OSU from November 2012 to August 2020. In the funding application process, the Army, NASA the NSF require disclosures of, among other things, foreign government support received by any principal investigator (PI) or co-PI on the grant or agreement.

The settlement resolves allegations that an OSU professor failed to disclose funding that he was receiving from a foreign government in connection with: (1) employment at a foreign public university; (2) participation in a foreign talent plan, a program established by the foreign government to recruit individuals with knowledge or access to foreign technology intellectual property; and (3) a grant from the foreign government's natural science foundation. As part of its settlement, OSU has agreed to cooperate with the United States government's investigation of others involved in the alleged violations of law.

“Universities, institutions and researchers are required to make certain disclosures when applying for federal grants so that the government can assess whether to fund their research and development,” said Principal Deputy Assistant Attorney General Brian M. Boynton, head of the Justice Department's Civil Division. “The department will hold accountable applicants who undermine the integrity of the grant process by knowingly failing to submit complete and truthful applications.”

The announcement appears unrelated to the November 2020 guilty plea of Ohio State Rheumatology professor Song Guo Zheng who admitted he lied on applications in order to use approximately \$4.1 million in grants from the National Institutes of Health (NIH) to develop China's expertise in the areas of rheumatology and immunology. Zheng was sentenced to 37 months in prison and ordered to pay more than \$3.7 million in restitution to the NIH and \$413,000 to the University.

The Trump Administration's “China Initiative,” along with the Covid pandemic have had a chilling impact on Sino-American academic collaboration. Nature reports that Caroline Wagner at the Ohio State University in and Xiaojing Cai at Yangzhou University published a study showing that US-China co-authored papers were falling as a share of world publications, whereas papers with co-authors from China and the European Union were not.

CFIUS Gets Serious

For the first time, the Treasury Department has released **enforcement and penalty guidelines** for use by the inter-agency Committee on Foreign Investment in the United States. Treasury leads CFIUS, which is tasked with identifying and mitigating possible national security risks raised by foreign investments in the United States.

At the same time, CFIUS is expected to maintain US openness to foreign investment, which often requires the Committee to enter into agreements or impose conditions on transaction parties to mitigate risks to national security that arise from a transaction. The new guidelines will provide the public with information about how the Committee assesses violations of the laws and regulations that govern transaction parties, including potential breaches of CFIUS mitigation agreements.

The new guidelines will provide information about how the Committee assesses violations of the laws and regulations.

They also offer important information about how CFIUS will assess whether and in what amount to impose a penalty or take some other enforcement action for a violation of a party's obligation, and factors that CFIUS may consider in making such a determination, including aggravating and mitigating factors, according to Treasury. The Guidelines are available here: [CFIUS Enforcement and Penalty Guidelines](#).

"Today's announcement sends a clear message: Compliance with CFIUS mitigation agreements is not optional, and the Committee will not hesitate to use all of its tools and take enforcement action to ensure prompt compliance and remediation, including through the use of civil monetary penalties and other remedies," Treasury **Assistant Secretary for Investment Security Paul Rosen** said.

Forbes reports that Tik-Tok is reportedly close to signing a contract with CFIUS, which has been investigating whether the company's Chinese ownership could enable the Chinese government to access personal information about U.S. TikTok users. TikTok material reviewed by Forbes indicates that ByteDance's Internal Audit team was planning to use location information to surveil individual American citizens

On September 15, 2022, President Biden signed Executive Order 14083, which provides guidance on how the Com-

mittee on Foreign Investment in the United States (CFIUS) and transaction parties should examine national security risks associated with any given transaction

White House Signs onto EU Data Privacy

President Biden signed an Executive Order October 7 directing the steps that the United States will take to implement the U.S. commitments under the European Union-U.S. Data Privacy Framework (EUU. S. DPF) announced by President Biden and European Commission President von der Leyen in March of 2022.

The E.O. creates a multi-layer mechanism for individuals from qualifying states and regional economic integration organizations, to obtain independent and binding review and redress of claims that their personal information collected through U.S. signals intelligence was collected or handled by the United States in violation of applicable U.S. law, including the enhanced safeguards in the E.O.

Under the first layer, the Civil Liberties Protection Officer in the Office of the Director of National Intelligence (CLPO) will conduct an initial investigation of qualifying complaints received to determine whether the E.O.'s enhanced safeguards or other applicable U.S. law were violated and, if so, to determine the appropriate remediation. The E.O. builds up the existing statutory CLPO functions by establishing that the CLPO's decision will be binding on the Intelligence Community, subject to the second layer of review, and provides protections to ensure the independence of the CLPO's investigations and determinations.

As a second layer of review, the E.O. authorizes and directs the Attorney General to establish a Data Protection Review Court ("DPRC") to provide independent and binding review of the CLPO's decisions, upon an application from the individual or an element of the Intelligence Community. Judges on the DPRC will be appointed from outside the U.S. Government, have relevant experience in the fields of data privacy and national security, review cases independently, and enjoy protections against removal. Decisions of the DPRC regarding whether there was a violation of applicable U.S. law and, if so, what remediation is to be implemented will be binding.

UK-US Launch Dialogue on Technology and Data

Secretary of Commerce Gina Raimondo and UK Secretary of State for Digital, Culture, Media and Sport, The Rt Hon Michelle Donelan MP announced the launch of a new senior-level Comprehensive Dialogue on Technology and

Data. The program for the coming year will focus on three work strands: Data, Critical and Emerging Technologies; and Secure and Resilient Digital Infrastructure. The UK welcomed the EO “Enhancing Safeguards for US Signals Intelligence Activities,” (see “White House” above).

FATF - Money Laundering Standards Move Forward.

The Financial Action Task Force the international anti-money laundering and countering the financing of terrorism (AML/CFT) standard-setting body concluded its plenary with a commitment to:

- Full public consultation for draft guidance on Recommendation 24, which concerns beneficial ownership transparency for legal persons;
- An assessment of Citizenship by Investment and Residency by Investment schemes, often known as “golden passports”;
- Reviewing members’ implementation of the UN Convention on Corruption; and
- Evaluating members’ compliance with the FATF Recommendations related to nonfinancial gatekeepers and professionals.

The FATF adopted a report on money laundering associated with the financing of the **illicit trafficking of fentanyl and other synthetic opioids** around the world. This is the first FATF report on illicit finance associated with the global drug market since 2014. The group is also working to finalize a report on money laundering and terrorist financing risks related to **the trade in high-value arts, antiquities, and cultural objects**. [[Outcomes Document](#)].

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US, UK Team on Sanctions Implementation

The United States and United Kingdom announced yesterday a new cooperation partnership on sanctions. Treasury Department Office of Foreign Assets Control Director Andrea Gacki and UK Treasury Office of Financial Sanctions Implementation Director Giles Thompson said they have decided to deepen their agencies' cooperation "to enhance both our own capabilities and the support we provide to those at the forefront of effective sanctions implementation."

Taking a multilateral approach also reduces unintended consequences and eases the burden of compliance.

The two officials said that financial sanctions have the most impact when they are multilateral. Taking a multilateral approach also reduces unintended consequences and eases the burden of compliance for business, they said.

"But we also recognize that the growing scale of sanctions has increased the complexities of their

implementation," the two officials said. "We will of course continue, in close co-ordination with one another, to assist stakeholders via our outreach, by maintaining and updating sanctions-related products to provide useful information and guidance, and by making timely decisions regarding licenses. "

UK – OFSI General license for Legal Fees

Payment for legal services to a designated person under an asset freeze has until now required an [OFSI licence](#). General Licence INT/2022/2252300 means that a UK legal firm or UK Counsel who has provided legal advice to a person designated under either the Russia or Belarus regime, will not have to wait for an OFSI specific licence before they can receive payment from that designated person, provided that the terms of the general licence are met. [\[OFSI Post\]](#)

OFAC / Nicaragua Actions

Setting aside concerns about exacerbating the flow of migrants from the Central American country, the Administration imposed further sanctions on Nicaraguan officials and entities. Adding to the June 2022 leadership sanctions and elimination of the Sugar Import Allotment, new measures introduced October 24 impose visa restrictions on over 500 Nicaraguan individuals and their family members pursuant to Presidential Proclamation 10309. Treasury's Office of Foreign Assets Control imposed sanctions on Nicaraguan mining authority General Directorate of Mines, an office in the Ministry of Energy and Mines, and Reinaldo Gregorio Lenin Cerna Juarez, a close confidante of Nicaraguan President Ortega, pursuant to E.O. 13851. [\[White House and Treasury releases.\]](#)

By value, mining chamber Caminic said previously it expects gold exports to rise to \$1 Billion this year, with further growth in 2023-24. Exports reached US\$561mn in January-July compared to US\$877mn in full-year 2021, with gold being Nicaragua's second highest export product so far this year after coffee. For the fiscal year that ended in September, U.S. border agents encountered Nicaraguans nearly 164,000 times at the southwest border — more than triple the level for the previous year.

Europeans Impose Eighth Package of Sanctions against Russia.

This package introduces new EU import bans worth €7 billion to curb Russia's revenues, as well as export restrictions. The package also lays the basis for the required legal framework to implement the oil price cap envisaged by the G7. The package includes New Export Restrictions, banning the export of coal including coking coal, specific electronic components, technical items used in the aviation sector, as well as certain

First FAQs on Chips Action Published

October 28, BIS published the first set of Frequently Asked Questions [\[link\]](#) related to the The Advanced Computing and Semiconductor Manufacturing Equipment (Advanced Computing) rule issued earlier in the month. The advanced computing rule was published as an interim final rule with a request for comments. This means that the advanced computing rule went into effect on the dates indicated, but that the Bureau of Industry and Security (BIS) will continue to accept public comments on the rule and, after reviewing those comments, will publish a final rule that will respond to the comments at a future date.

The FAQs include clarification that while Hong Kong has the same license requirements as China, Macau is treated differently. Exporters and reexporters are encouraged to conduct due diligence and be aware of red flags when shipping to Macau.

Other areas of clarification include the implications for Deemed Exports and US Persons. While Regional Security rules do not apply to deemed exports under the EAR, anti-terrorism considerations remain.

Section 772.1 of the EAR applies a different definition for the term “U.S. person” depending upon the section of the EAR in which the term is used: For purposes of § 744.6(c) of the EAR, the term U.S. person includes:

- Any individual who is a citizen of the United States, a permanent resident alien of the United States, or a protected individual as defined by 8 U.S.C. 1324b(a)(3);
- Any juridical person organized under the laws of the United States or any jurisdiction within the United States, including foreign branches; and
- Any person in the United States.

Also note the definition of “person” in § 772.1 of the EAR: “A natural person, including a citizen or national of the United States or of any foreign country; any firm; any government, government agency, government department, or government commission; any labor union; any fraternal or social organization; and any other association or organi-

zation whether or not organized for profit.

The **U.S. persons control** in § 744.6(c)(2) applies to persons who:

1. Authorize the shipment, transmittal, or in-country transfer (in-country) of items not subject to the EAR used in the “development” or “production” of integrated circuits to fabrication facilities in the PRC that fabricate integrated circuits meeting the criteria specified in § 744.6(c)(2)(i)(A)-(C) of the EAR;
2. Conduct the delivery, by shipment, transmittal, or transfer in-country, of items not subject to the EAR used in the “development” or “production” of integrated circuits to a fabrication “facility” in the PRC that fabricate integrated circuits meeting the criteria specified in § 744.6(c)(2)(i)(A)-(C) of the EAR; or
3. Service, including maintaining, repairing, overhauling, or refurbishing items not subject to the EAR used in the “development” or “production” of integrated circuits at a semiconductor fabrication “facility” located in the PRC that fabricate integrated circuits meeting the criteria specified in § 744.6(c)(2)(i)(A)-(C) of the EAR.

Previously issued EAR license authorizations for items that are now captured under the parameters of one of the new ECCNs previously issued for such items are valid until their expiration dates absent license-specific action by BIS to suspend, revoke, or impose additional conditions on the previously issued licenses.

End Items subject to the EAR with **encryption functionality** (i.e., 5A992.c), but also meets or exceeds the parameters in 3A090 or 4A090, are subject to the license requirement and review policy for 3A090 and 4A090 items (see §742.6(a)(9)), in addition to being subject to restrictions or requirements in Category 5 Part 2 (i.e., classification, licensing, and reporting requirements). In addition, computers, integrated circuits, “electronic assemblies” or “components” not specified in § 740.2(a)(9)(i)1 that meet or exceed the parameters of 3A090 or 4A090 are subject to license exception restrictions in § 740.2(a)(9)(ii) of the EAR, i.e., may not be

exported, reexported, transferred (in-country) using License Exception ENC.

Comments on the rule may be submitted until December 12, 2022, at www.regulations.gov, under docket # BIS-2022-0025; please refer to RIN 0694-AI94 in all comments.

Axelrod Beats Antiboycott Drum

Assistant Secretary for Export Enforcement Matt Axelrod unveiled October 6 an anticipated enhancement of Antiboycott Rules, aligning them with current export enforcement practices.

1. **Enhanced Penalties.** Penalty amounts imposed will reflect the seriousness of the violation and will be commensurate with the harm caused. For the most serious violations – Category A violations will be subject to the maximum. Penalties for Category B, and Category C violations will also be increased.
2. **Reprioritized Violation Categories** in a manner that reflects our current view of their relative seriousness.
3. **Admissions of Misconduct.** In the past, we have allowed companies to pay a reduced penalty without admitting misconduct. In other enforcement

contexts, including in our administrative export enforcement cases, companies must admit their conduct in order to obtain a resolution.

4. **Focus on Foreign Subsidiaries of U.S. Companies.** Commerce will be more aggressive in exploring ways to deter foreign parties from issuing or making boycott requests of U.S. persons.

“We will bring a renewed focus to our enforcement efforts against controlled foreign subsidiaries of U.S. parent companies when they act in violation of our antiboycott regulations.”

“Antisemitism too often manifests itself in attempts to delegitimize Israel through conspiracy theories and through discourse that dehumanizes Jewish people,” Axelrod told members of the American Jewish Council while announcing the action. “Given the remaining anti-Israel holdout, as well as the serious rise in antisemitism, I want to ensure that we in the Commerce Department are doing what we can to have the strongest possible anti-boycott enforcement program.”

The text of the rule released today is available on the Federal Register [87 FR 60890]. The policy memo regarding the implementation of the rule is available on the BIS Export Enforcement website [here](#).

BIS – Publishes New *Don't Let This Happen to You* In a refresh of an ever popular collection, Commerce's Office of Export Enforcement published their guidebook to export compliance and enforcement actions, with special chapters for China, Russia and Iran, as well as Antiboycott Enforcement cases. [[Download](#)]

BIS – Semiconductor Survey Underway. The U.S. Department of Commerce's Bureau of Industry and Security (BIS), Office of Technology Evaluation (OTE) is conducting a comprehensive assessment of the U.S. microelectronics industrial base (MEIB). If your organization was contacted by OTE, your organization is required by federal law (50 U.S.C. § 4555) to complete the Microelectronics Industrial Base survey. If your organization was not contacted by OTE, but is interested in voluntary participation in this assessment, written comments, data, analyses, or information pertinent to this request can be submitted to OTE no later than December 20th, 2022.

Details: <https://www.bis.doc.gov/index.php/survey-documents-and-submission-details>

FATF – Myanmar Blacklist The global standards setter for combating financial crime has moved Myanmar onto its list of high-risk jurisdictions, alongside North Korea and Iran, because the country has not fully acted on a plan for tackling anti-money laundering failings. "Given the continued lack of progress and the majority of its action items still not addressed after a year beyond the action plan deadline, the FATF decided that further action was necessary," the organization [announced](#)

Aluminum - EU Sanctions Concerns. Five European industry associations said last week they had urged European authorities to prevent sanctions, tariffs or boycotts against Russian aluminum that they said could put thousands of companies out of business, according to [Reuters](#). In a joint statement, the associations said they sent a letter to EU authorities and "requested the urgent intervention of the European Commission and of EU member states against threats of bans, high tariffs or sanctions on Russian aluminum which represent an imminent and vital threat to the European aluminum industry."

OFAC – Moldova Sanctions Treasury's Office of Foreign Assets Control (OFAC) imposed sanctions on nine individuals and 12 entities, designating former Moldovan government official Vladimir Plahotniuc, a former Moldovan Member of Parliament, Ilan Mironovich Shor, a Moldovan politician previously arrested on money laundering and embezzlement charges related to the 2014 theft of \$1 billion from Moldovan banks. Shor's wife is the Russian pop singer Sara Lvovna

Shor, who was decorated by Putin as an honored artist of Russia. Also sanctioned is Igor Yuryevich Chayka, the son of Yuriy Chayka, a member of Russia's Security Council who was designated pursuant to E.O. 14024 on April 6, 2022. Chayka used his father's connections and influence to amass and secure his business empire. Although its efforts to influence Moldova's 2020 and 2021 elections failed, the Kremlin continues to organize efforts to return a pro-Russian government to power. [[Release](#)]

Ukraine – Moldova Rail Development The European Commission together with the European Investment Bank (EIB) launched a pre-feasibility study to assess how to better connect the Ukrainian and Moldovan railway networks with the Trans-European Transport Network (TEN-T). The rail gauge used in most of the EU is different to the one in Eastern Europe, which makes it difficult to ship goods in both directions. The study is one of the medium- to long-term measures set out in the [Solidarity Lanes action plan](#) and is also closely linked to the Commission's [July 2022 proposal](#) on the extension of the TEN-T to Ukraine and Moldova.

OFAC – More Iran Actions. OFAC continued its response to the crackdown on protest in Iran with sanctions imposed on leaders of the Revolutionary Guards (IRGC), officials of Sistan and Baluchistan, an eastern province which has seen brutal repression, and wardens and directors of prisons in Iran. [[Release](#)].

OFAC / Rhino Horn, Ivory, and Pangolins formed the core of a wildlife trafficking enterprise cited in an OFAC Action against Malaysian national Teo Boon Ching and his company SunriseGreenland Sdn. Bhd. The endangered and threatened wildlife and parts were shipped from Africa, through Malaysia and Lao, to consumers in Vietnam and China.

BIS / Russian Aviation Sanctions Extended Temporary Denial Orders for Azur Air, Aeroflot, and UTair Aviation. Effective February 24, 2022, BIS imposed expansive controls on aviation-related (e.g., Commerce Control List Categories 7 and 9) items to Russia, including a license requirement for the export, reexport or transfer (in-country) to Russia of any aircraft or aircraft parts specified in Export Control Classification Number (ECCN) 9A991 (section 746.8(a)(1) of the EAR). Over 500 Western-origin aircraft are in Russia and require parts.

BIS / More Russian Entity List Adds Including the Russian Institute of Radio Navigation and Time, technical organizations related to the development of quantum computing technologies, which would further enable Russia's malicious cyber activities, or are otherwise important to Russia in

developing advanced production and development capabilities, along with the Sevastopol Naval Plant, in the Crimean region of Ukraine.

OFAC / More Iran Sanctions, designating additional leaders within Iran's government and security apparatus for the shutdown of Iran's Internet access and the continued violence against protesters. The action follows OFAC's September 22 designation of Iran's Morality Police, its senior leadership, and other senior leaders of Iran's security organizations.

OFAC / Burmese Arms Dealers designating three individuals and one entity connected to Burma's military regime pursuant to Executive Order (E.O.) 14014. Aung Moe Myint was sanctioned by the European Union on February 21, 2022, and by the United Kingdom on March 25, 2022. Dynasty International Company Limited is a Burmese company that was founded by Aung Moe Myint and has been used to facilitate arms deals on behalf of the Burmese military, to include the import of aircraft parts.

OFAC / DPRK Fuel Procurement Network designating individuals and entities for activities related to the exportation of petroleum to the Democratic People's Republic of Korea (DPRK). OFAC's actions target Singapore-based Kwek Kee Seng, Taiwan-based Chen Shih Huan, and Marshall Islands-registered company New Eastern Shipping Co Ltd, which were involved in the ownership or management of the *Courageous*, a vessel that has participated in several deliveries of refined petroleum to the DPRK. The *Courageous*, known as the *Sea Prima* during much of its illicit activity, conducted UN-prohibited STS transfers with the DPRK vessels and at least one direct delivery at Nampo, DPRK.

OFAC / Western Balkans designating two individuals and one business entity in Bosnia and Herzegovina (BiH) pursuant to Executive Order (E.O.) 14033. These designations follow OFAC's September 26 designation of a corrupt state prosecutor in BiH and build on other recent sanctions imposed on individuals and entities in the region. Per the 1995 Dayton Peace Agreement, BiH consists of two entities: the Federation of Bosnia and Herzegovina and the Republika Srpska, home to most Bosnian Serbs. According to Foreign Policy Bosnian Serb leader Milorad Dodik has emerged as the most pro-Russian politician in the Balkans.

State Dept / Bureau of International Security and Non-proliferation imposition of measures pursuant to section 3 of the Iran, North Korea, and Syria Nonproliferation Act: Beijing J&A Industry & Trade Co. Ltd. (People's Republic of China); Linda Zhai (PRC individual); Synnat Pharma Pvt Ltd (India); OTOBOT Project Group (Turkey). [87 FR 62484]

Australia Boosts Missile Industry. "The lessons from the Ukraine war are that we use missile stocks or all munitions, but particularly guided weapons, very fast in a conflict. And quite frankly we need more missiles in Australia, both as a stock and also the ability to maintain, repair and upgrade those missiles," Australian Defense Industry Minister Pat Conroy said at the G'Day USA Defence Industry Dialogue in Washington DC October 13th.

The goal is to "supplement (not supplant) US industrial capacity; to expand our alliance beyond the battlefield and into the factories". **Lockheed Martin and Raytheon Australia are "working with Defence to identify initial options to manufacture guided weapons and their critical components in Australia"**. The firms are strategic partners on the federal government's \$1 billion Sovereign Guided Weapons and Explosive Ordnance Enterprise, notes *The Financial Review*



Jen Fernandez of Sidley & Austin

EP - Do you see anything out there that that you think the practitioner should be mindful of because everybody's got their eye on other balls?

JF - Do you mean with respect to the distraction of all of the the new regulations coming out on Russia, what are we forgetting about in other areas ? Yeah, sure.

So this is not going to be surprising, I think Russia has been sort of a momentary distraction from from China, which is the intense focus of every part of the government. And again it's not a secret, not going to be shocking and surprising, but I do think that with what's happening in Russia, a lot of compliance groups and different folks have been consumed with all of the compliance requirements related to that and have really not really focused on what's going on behind the scenes with respect to China regulation. The agencies continue to March on. You know the BIS issued some pretty complex export controls on semiconductors related to China. They're definitely looking at biotech and AI, maybe more semiconductors.

And I think beyond that, as much as industry is balking at the fast pace of BIS controls, there are those in government that are very unhappy with how slow it's been. There's a lot of noise that Congress about things that probably will never come to pass, things as extreme as taking away export control authority oversight from BIS and giving it to the DoD,

for example, or making sure that BIS regularly reports to Congress about what it's approving to China. And I do think that there's going to be a lot more intense pressure on BIS to issue rules faster. So I think we're going to see a lot more.

EP - Everything seems fringy until it becomes reality.

JF - Exactly! So it's something we're keeping an eye on, definitely counseling our clients about. Maybe this is part two to the question you first had about what people are not paying attention to. I think that the Semiconductor Rule is sort of a first step, signaling how serious BIS is.

We've heard from a lot of our clients saying, "Oh, this doesn't affect me." That may or may not be true. Obviously, people directly in the semiconductor space are likely impacted. But it also has impacted some other, maybe less obvious industries that supply, non-semiconductor related items that ultimately support semiconductor manufacturing in China, then of course the downstream effect of not being able to get chips out of China will ultimately impact a lot of people.

But even if you are not directly impacted beyond sort of the general supply chain interruptions that may occur in the future, more is coming. So, we've been working with a number of clients to prepare for that, both for normal export controls, and also in the catastrophic event that a Russia type situation happens in China - if the government were to invade Taiwan or whatnot.

We don't have a crystal ball. It's hard to predict what that would actually look like because obviously the entanglements that US companies have in China are significantly greater than those we ever had with Russia,

Where we were very careful with Russia to impose restrictions that would hurt Russia more than would hurt the US, that would be very difficult with China.

We have been working with people to try to at least do a risk assessment on what are your pain points in China? How quickly could you get out? Could you get alternate sources? Can you get money out if banks were to be sanctioned? That is what's happening in Russia and Belarus now, where companies have money they can't touch.

So there's there's a lot of prep work, strategic thinking with our clients because of what's happening with incremental export control that are signaling the US's desire to decouple as much as possible from China.

EP - It seems that everything is dual use these days. Do you see that as an emerging trend? That everybody's trying to dodge ITAR?

Not as much as it used to be. After Export Control Reform in 2013, so much transferred from the ITAR to the EAR, I don't see the ITAR dodge as much as I used to. What I have

seen over the last few years is a similar trend with respect to dual-use items, with the increase particularly of the entity list being used against major corporations as opposed to just fringe organizations or research institutes.

We've seen a lot of offshoring occurring. I'm sure it's in part for other financial reasons, you want to be closer to your customer base in Asia, for example, or cost reasons, or technical skills, whatever it might be. But there is this element of avoiding unpredictable or overly stringent restrictions as well, that prevent you from sending a US pencil to an entity list company.

There are a lot of companies that take the position, and I'm not thinking about anybody in particular, where you're not really supplying something that is high tech or controversial in and of itself. It's perfectly legal to set up an offshore production facility and to supply things to parties from there that you couldn't supply from the US.

Now the latest semiconductor controls try to close that supposed loophole in a number of ways, with US person restrictions, on item is not subject to the EAR, with expanding our foreign direct product rule - that one has gotten incredibly complicated. When clients come and ask, do I need to worry about US Export Controls, it's really hard to answer.

We start off with three or four versions of the foreign direct product rule that no one ever talks about, and now

we have nine different versions. It's the shiny new tool in BIS's toolbox. And once they discovered the entity list, with "sanctions lite," they decided to use that aggressively. Once they discovered that they could extend their jurisdiction, they start doing that more aggressively. I think we'll be seeing as seeing a lot more of that.

Thank you Jen.

JEN FERNANDEZ is a member of the Global Arbitration, Trade and Advocacy group of Sidley & Austin. She focuses her practice on counseling clients in a wide range of industries with compliance advice on a variety of international trade laws and regulations, including the Export Administration Regulations (EAR), International Traffic in Arms Regulations (ITAR), regulations administered by the Office of Foreign Assets Control (OFAC), and the anti-boycott requirements administered by the U.S. Department of Commerce, as well as complex cross-border transactional and counseling matters that touch U.S. national security and foreign investment, including reviews before the Committee on Foreign Investment in the United States (CFIUS). Jen also represents clients on foreign ownership, control, or influence (FOCI) mitigation matters before the U.S. Department of Defense.

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