

The Export PractitionerTM

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Timely News and Analysis of Export Regulations

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Cyber Controls**

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BIS Implements Wassenaar Cyber Intrusion Controls

The devil will be in the details. Or perhaps, good things come to those who wait. After eight years of industry comments and agency pushback, the Bureau of Industry and Security (BIS) Oct. 20, 2021, finally implemented changes to controversial cyber intrusion software controls that Wassenaar Arrangement (WA) members agreed to at their December 2017 plenary, publishing an interim final rule.

In October 2018, BIS implemented dozens of other changes WA members agreed to at that plenary (see *The Export Practitioner*, November 2018, page 12). A separate rule on the cybersecurity controls has been in the works since then.

Most notable in the December 2017 changes was new language carving out certain software and technology from controls on so-called intrusion software, the end result of a four-year fight by the security industry. BIS proposed a rule in May 2015 implementing the controls that were first agreed at the 2013 plenary. That proposal met with more than 250 comments, almost universally negative.

While the changes weren't everything industry wanted, sources said they were reasonably satisfied with changes to the technology controls. This is probably more than just chipping away at their concerns, but it certainly does not address all of them, one industry expert told *The Export Practitioner* at the time.

Other WA members implemented the 2017 changes in a timely fashion. The argument had been that most of the cybersecurity companies were located in the U.S.; that is no longer the case, as can be seen in recent Entity List designations.

"Now for the detail: how will decisions on software and clients be made, and how will the huge private U.S. cybersecurity industry respond?" Jan Lemnitzer, a Copenhagen Business School professor, tweeted.

While the changes weren't everything industry wanted, sources said they were reasonably satisfied.

Rule Creates New ECCNs, Adds Definitions

Specifically, the new rule creates new Export Control Classification Numbers (ECCNs) 4A005 and 4D004, as well as a new paragraph 4E001.c and makes conforming changes to other ECCNs in refer to the new language. The most recent rule has a 45-day comment period and a 90-day delayed effective date. Comments are due Dec. 6; the rule will take effect Jan. 19, 2022.

In addition, the rule adds Paragraph .j to ECCN 5A001, covering IP network communications surveillance systems or equipment, and "specially designed" components; amends License Exception GOV to exclude cybersecurity items; and adds the WA definitions for "cyber incident response" and "vulnerability disclosure."

The new ECCNs include the 2017 WA notes: "An exclusion Note in 4D004 for software specially designed and limited to providing basic updates and upgrades and an exclusion Note for 4E001.c (as well as existing 4E001.a) for 'vulnerability disclosure' or 'cyber incident response.'"

The latest rule also creates a new License Exception Authorized Cybersecurity Exports (ACE) that authorizes exports of cybersecurity items and certain IP network surveillance products to most destinations, except those listed in Country Groups E:1 and E:2.

"These items warrant controls because these tools could be used for surveillance, espionage, or other actions that disrupt, deny or degrade the network or devices on it," the Federal Register notice said.

The license exception "starts with a definition section that defines cybersecurity items, digital artifacts, favorable treatment cybersecurity end user, and government end user (for the purpose of § 740.22 only)," BIS said.

‘Cybersecurity Items’ are defined as ECCNs 4A005, 4D001.a (for 4A005 or 4D004), 4D004, 4E001.a (for 4A005, 4D001.a (for 4A005 or 4D004) or 4D004), 4E001.c, 5A001.j, 5B001.a (for 5A001.j), 5D001.a (for 5A001.j), 5D001.c (for 5A001.j or 5B001.a (for 5A001.j)), and 5E001.a (for 5A001.j or 5D001.a (for 5A001.j)).

In the rule, BIS also addressed the industry comments on the previous proposal, which focused on three main issues. “First, many commenters asserted that the entries were overly broad, captured more than was intended, and, as a technical matter, failed to accurately describe the items intended for control,” the agency said.

“Second, many commenters asserted that the rule as written imposed a heavy and unnecessary licensing burden on legitimate transactions that contribute to cybersecurity. Third, many commenters suggested that the proposed rule’s control on technology for the ‘development’ of ‘intrusion software’ could cripple legitimate cybersecurity research,” it added.

Impact Could Reach Beyond Targets

Administration officials took pains to emphasize the narrow, targeted nature of the final rule. Despite the claim, more companies than intended could be affected by the changes.

“Because of the limited scope of this rule, BIS believes the impact would be minimal. However, to ensure full consideration of the potential impact of this rule, BIS seeks public comment on this interim final rule, including comments on the potential cost of complying with this rule, and any impacts this rule has on legitimate cybersecurity activities,” the agency said.

The U.S. “is committed to working with our multilateral partners to deter the spread of certain technologies that can be used for malicious activities that threaten cybersecurity and human rights,” Commerce Secretary Gina Raimondo said in a statement. The rule is “an appropriately tailored approach that protects America’s national security against malicious cyber actors while ensuring legitimate cybersecurity activities,” she added.

The latest rule also creates a new License Exception Authorized Cybersecurity Exports (ACE) that authorizes exports to most destinations.

Legal observers note that although officials claim the rule is narrowly targeted, its impact could reach far and wide. These could include “network infrastructure manufacturers, cybersecurity software and service providers, IT forensics firms, bug bounty programs, and those engaged in vulnerability testing and research,” attorneys from Fenwick & West wrote in a client alert.

Companies “should evaluate the impact of these controls to their business operations, whether there are more effective ways to draw lines around controlled products and whether

they can propose more accurate definitions,” they wrote.

Attorneys from Steptoe law firm also pointed out that the rule “imposes compliance obligations and costs even when activities ultimately are not restricted. At least in this sense, the rule will impact the entire cyber-

security sector,” they wrote on the firm’s website.

“The publication by BIS of the interim final rule shows the U.S. government’s willingness to move forward with these export controls on cybersecurity items following the active debate around these policies over the past several years. The narrower scope of the rule compared to its predecessors demonstrates the challenge the government faces in striking the appropriate policy balance,” the Steptoe attorneys added.

“While it seems likely that export controls in some form will be enacted in this space, by publishing this as an interim final rule, BIS has signaled that there is still time for these regulations to be made more clear and potentially even more narrowly tailored to hone in only on the targeted malicious or otherwise controversial uses of these tools without imposing undue burdens on the cybersecurity community,” they wrote.

Industry Urged to Submit Comments

Security experts welcomed the exceptions for emergency responses. “The modifications will allow for vulnerability disclosure and incident response to take place freely without having to apply for an export license, so that is very important,” said Katie Moussouris, founder and CEO of Luta Security, in a blog post.

"In the explanation from the Commerce Department for this proposed rule, it's very clear to me that... they are honoring the hard-won agreement for those defensive exemptions for [vulnerability] disclosure and for incident response," she said.

Moussouris urged companies to submit comments on the changes. "It's very important, if folks want to have something to say about the proposed rule, to get the written comments in as soon as pos-

sible," she said. "The devil is in the details of the wording, so if anyone is unclear about the wording now would be a time to propose specific wording changes."

If the past is any prologue, industry and security experts will not be shy in submitting comments. By delaying the effective date, BIS is expecting a deluge and hoping the comments are more positive than the last round.

The rule "imposes compliance obligations and costs even when activities ultimately are not restricted."

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Iranian National Sentenced in Electrical Export Scheme

An Iranian national living in Canada was sentenced Oct. 14, 2021, in Detroit U.S. District Court to time served and deported for his role in a conspiracy to export nine electrical discharge boards, a CPU board, two servo motors, and two railroad crankshafts to Iran via the United Arab Emirates (UAE) between January 2015 and February 2017 without the required licenses.

Arash Yousefi Jam pleaded guilty in July (see *The Export Practitioner*, August 2021, page 10). The indictment against Jam, his brother Amin Yousefi Jam, an Iranian national also living in Canada, and Abdollah Momeni Roustani, an Iranian national believed to be living in Iran, was unsealed in January.

Arash Jam was arrested by U.S. authorities in December 2020. Canadian law enforcement provisionally arrested Amin in January 2021, and the government is currently seeking his extradition.

“Arash provided substantial assistance by convincing his brother and co-defendant, Amin, to waive his extradition from Canada—which the government acknowledges is a lengthy process—and voluntarily come to the United States to resolve his case,” Justice argued in a sentencing memo.

“In total, the conspirators purchased more than \$100,000 in goods—railroad crankshafts, servo motors, and electric discharge machining (EDM) technology—from three U.S. companies and shipped these goods to Iran.”

“Specifically, Arash and his codefendants successfully deceived at least three U.S. companies by, among other things: (1) representing that the purchased goods were destined for and intended to be used in Iraq or the UAE when, in fact, the final destination all along was Iran; (2) facilitating the transactions using foreign bank accounts located in, among other places, the UAE, Uganda, Hong Kong, and Turkey; and (3) obscuring the intended end destination by using different shipping companies to segregate the U.S. leg of the shipment from the Iranian leg,” the sentencing memo noted.

“Arash and his coconspirators were well aware of the legal requirements for shipments to Iran that required OFAC licenses, but procured the goods and

shipped them to Iran nonetheless. For example, when Arash emailed an EDM company for a quote on parts for a machine located in Iran, the company refused to provide the quote because the machine was ‘in a prohibited Country,’” it added.

Former Braskem CEO Sent to Prison on FCPA Charges

Jose Carlos Grubisich, the former CEO of Brazilian petrochemical company Braskem S.A., was sentenced Oct. 12, 2021, in Brooklyn U.S. District Court to 20 months in prison and a \$1 million fine for conspiracy to violate the Foreign Corrupt Practices Act (FCPA).

“As the top executive at Braskem, the defendant agreed to create an off-the-books slush fund [Caixa 2].”

He pleaded guilty in April (see *The Export Practitioner*, May 2021, page 11). Grubisich “knowingly and willfully participated in a conspiracy to divert hundreds of millions of dollars from Braskem into a secret illegal slush fund and to pay bribes to government officials, political parties, and others in Brazil to obtain and retain business,” a Justice sentencing memo noted.

Braskem and its parent company Odebrecht agreed in December 2016 to pay a combined penalty of \$3.5 billion to settle FCPA charges with U.S., Brazilian and Swiss authorities related to schemes to pay hundreds of millions of dollars in bribes to government officials in 12 countries.

“Specifically, as the top executive at Braskem, the defendant agreed to create an off-the-books slush fund [Caixa 2] to divert funds from Braskem, to hide the existence of that slush fund through the use of offshore shell companies, to falsify Braskem’s books and records in connection with payments into the slush fund, to pay bribes to Brazilian officials, and to provide false certifications to shareholders and regulators that concealed the bribery and fraud schemes,” it added.

“Those fraudulent payments were subsequently transferred from the Caixa 2 Entities’ bank accounts to bank accounts controlled by the Division of Structured Operations (DSO), a department within Odebrecht that was created and operated for the purpose of carrying out corrupt and other improper transactions in order to assist Odebrecht and Braskem in their efforts to obtain and retain business and economic benefits around the world,” the memo said.

CEO Approved Bribes, Retained Petrobras Contract

Grubisich approved a total of \$4.3 million in bribe payments to two foreign officials and their affiliated political party. “As a result of those bribe payments, the majority of which were made while Grubisich was still CEO, Braskem retained” the contract with Petrobras, Brazil’s state-owned and state-controlled oil company, it added.

Grubisich left Braskem leadership in May 2008 to take over as CEO for ETH Bioenergia S.A., a company that “consolidates Odebrecht investments in the sugar and alcohol sector,” according to a Braskem press release at the time.

“After the defendant stepped down as CEO of Braskem in 2008, his successors continued using the Caixa 2 system that the defendant helped create until approximately 2014. The defendant was aware that Braskem and Odebrecht continued to use Caixa 2 during this period, and received emails from the DSO about Caixa 2’s operations while he was CEO of ETH and as a member of Braskem’s Board of Directors,” the sentencing memo noted.

Calif. Firm Settles BIS Export Charges

Lesson 32: Don’t lie to federal export agencies. VTA Telecom Corporation (VTA) in Milpitas, Calif., a subsidiary of a Vietnamese state-owned telecom company, agreed Oct. 12, 2021, to pay the Bureau of Industry and Security (BIS) a \$1,869,372 civil penalty to settle six charges of violating export regulations

between July 2015 and continuing through October 2016.

Charges include evasion and false statements to BIS and other government officials, in connection with the export of power amplifiers/JFET transistors, actuators and a mass properties instrument and related equipment. “VTA, through its now-former executive officers, was aware that some of its exports were intended to support a defense program,” the agency order noted.

“Specifically, VTA would provide plausible false civil end-uses for the products, which were in reality intended for defense-related end-uses, to disguise and conceal from the U.S. government the true purpose of VTA’s exports,” the BIS order noted. Of the penalty, \$200,000 will be suspended for two years and then waived if VTA dissolves its business operations or commits no further violations.

“On the basis of VTA’s application to BIS containing false statements regarding the items’ end-use, BIS granted VTA a license to export 100 transistors and 2 development tools worth \$59,100 to Vietnam,” the agency order said. Separately, “VTA provided a U.S. vendor with an end-user statement and other information containing false statements as to the end-use of the items, which the vendor transmitted to BIS,” it added.

The transistors were controlled under Export Control Classification Number (ECCN) 3A001.b.3.b for national security (NS), regional stability (RS) and anti-terrorism (AT) reasons and required an export license to Vietnam.

The actuators were valued at \$235,000 and controlled under ECCN 9A610.x for NS, RS, Missile Technology (MT) and AT reasons. The mass properties instrument and related equipment was valued at \$624,373 and controlled under ECCN 9B604.c for NS, RS, AT and UN Embargo (UN) reasons.

Credit Suisse Pays \$475 Million for Mozambique Bond Scheme

Swiss firm Credit Suisse Group AG (CSAG) agreed Oct. 19, 2021, to pay \$475 million to U.S. and

United Kingdom (UK) authorities, including nearly \$100 million to the Securities and Exchange Commission (SEC), for violating the Foreign Corrupt Practices Act (FCPA) and other charges in a scheme involving three interconnected transactions involving UK-based Credit Suisse entities and state-owned entities in Mozambique from 2013 to 2016.

CSAG and its Hong Kong-based subsidiary, Credit Suisse (Hong Kong) Limited (CSHK), previously agreed in July 2018 to pay Justice and the SEC \$77 million to settle FCPA charges for its role in a scheme to corruptly win investment banking business by hiring more than 100 friends and family of Chinese officials (see *The Export Practitioner*, August 2018, page 8).

“The transactions include a syndicated loan and two securities offerings by Mozambican state-owned entities, the first of which Credit Suisse underwrote, structured, marketed and distributed, and the second of which Credit Suisse underwrote, structured, marketed and distributed as a joint lead manager with another international investment bank, VTB Capital plc (VTB),” the latest SEC order noted.

Through the actions of three former bankers, Credit Suisse knew that the two newly formed state-owned entities -- ProIndicus and EMATUM-- had no prior business operations. “The ProIndicus and EMATUM projects were vehicles through which the CS Bankers and intermediaries received kickbacks and corrupt Mozambique government officials obtained bribes, which were paid by the intermediaries,” the SEC said.

“The CS Bankers, who hid the corruption scheme and their kickbacks from other members of management, received kickbacks totaling at least \$50 million. Together with Mozambican government officials, the improper payments and kickbacks totaled at least \$200 million,” it added.

Bankers Previously Pleaded Guilty

Three bankers who worked for Credit Suisse Securities (Europe) Limited (CSSEL), its UK subsidiary, previously pleaded guilty to in Brooklyn U.S. District Court to related charges. In July 2019, Andrew Pearce, a former managing director of CSSEL, pleaded guilty

to conspiracy to commit wire fraud.

In September 2019, Surjan Singh, a former managing director of CSSEL, pleaded guilty to conspiracy to commit money laundering, and in May 2019, Detelina Subeva, a former vice president of CSSEL, also pleaded guilty to conspiracy to commit money laundering.

Under the global settlement, Credit Suisse agreed to pay \$34 million in disgorgement and interest and a \$65 million penalty to the SEC. Justice imposed a \$247 million criminal fine under a three-year deferred prosecution agreement (DPA), with Credit Su-

“Together with Mozambican government officials, the improper payments and kickbacks totaled at least \$200 million.”

isse paying, after crediting, \$175 million, and Credit Suisse also agreed to pay over \$200 million in a penalty to UK authorities.

VTB Capital, a London-based subsidiary of Russian bank VTB, separately agreed to pay more than \$6 million to settle SEC charges related to its role in misleading investors in the second 2016 bond offering.

“Credit Suisse is satisfied with the completion of the proceedings by U.S., UK and Swiss regulatory authorities into the bank’s arrangement of loan financing for Mozambique state enterprises and can now draw a line under the observation matter,” the company said in a statement.

“The bank also regrets that it initially failed to ensure all relevant information was readily available and hence provided to the regulator in a complete manner,” it added.

Executive Admits to Exporting Computer Equipment to Pakistan

A Chicago business owner pleaded guilty to charges of illegally exporting computer equipment to blocked entity Pakistan Atomic Energy Commission (PAEC) without the required Bureau of Industry and

Security (BIS) licenses from 2006 to 2015.

Obaidullah Syed, owner of Pakistan-based Business System International Pvt. LTD., and Chicago-based BSI USA, entered the plea Oct. 26, 2021, in Chicago U.S. District Court. The indictment was unsealed in September 2020 (see *The Export Practitioner*, October 2020, page 12). BIS added PAEC to the Entity List in November 1998.

Syed and others conspired “to knowingly submit and cause the submission of false and misleading export information through the Shippers Export Declaration and Automated Export System,” the plea agreement noted. Sentencing is set for Feb. 23, 2022.

“Syed knew at the time that these submissions to Computer Company C were false because the true end-user of the transceivers was the PAEC and that the delivery of those transceivers to the PAEC would be contrary to the representations made to Computer Company C and contrary to U.S. Export Administration Regulations,” it added. Syed was arrested the day before the indictment was unsealed.

Shipped items included a C-Brick with L1 controller and fans; two PCA 2 x 500 MHz IP35 PIMMs (R14K 8MB); an AC/DC 3100WDC power supply for Onyx2 Rack; a Seagate 146Gb 15K FC disk drive; and six Finisar TXRX OPT 1G/10G 850nm transceivers.

Maduro Associate Extradited for Laundering Scheme

Alex Nain Saab Moran (Saab), a Colombian national and associate of Venezuelan President Maduro, was extradited Oct. 17, 2021, from Cabo Verde to face charges in Miami U.S. District Court for his alleged role in laundering the proceeds of Foreign Corrupt Practices Act (FCPA) violations in connection with a scheme to take advantage of Venezuela’s government-controlled exchange rate.

Three days after Saab’s extradition, a new indictment against three Colombian nationals and two Venezuelan nationals, including his business partner Alvaro Pulido Vargas (Pulido), was unsealed in Miami federal court on related charges. The next day, State announced a reward of up to \$10 million for

information leading to Pulido’s arrest and/or conviction.

Saab and Pulido were indicted in July 2019 (see *The Export Practitioner*, August 2019, page 15). The defendants and others conspired “to unlawfully enrich themselves by making bribe payments to Venezuelan foreign officials, in order to obtain improper business advantages, including the approval of false and fraudulent documents related to the importation of construction goods and materials,” the indictment noted.

In addition, they conspired “to access Venezuela’s government-controlled foreign currency exchange system, controlled by the CADIVI [currency exchange division], to ensure payments were made in United States dollars based on false and fraudulent invoices and documents for goods that were never imported into Venezuela,” it added.

At the same time, Treasury’s Office of Foreign Assets Control (OFAC) designated 10 individuals, including Saab and Pulido, and 13 entities involved in “a vast corruption network that has enabled [Maduro] regime to significantly profit from food imports and distribution in Venezuela,” the agency noted at the time.

“Through a sophisticated network of shell companies, business partners, and family members, Saab laundered hundreds of millions of dollars in corruption proceeds around the world,” it added. Designated individuals also included Maduro’s three stepsons, “to whom Saab funneled money in exchange for access to contracts,” including the food subsidy program, OFAC said.

In September 2019, OFAC designated Saab’s two brothers, Amir Luis Saab Moran and Luis Alberto Saab Moran, and Pulido’s son, David Enrique Rubio Gonzalez.

Fla. Diving Company Owner Convicted for Libya Exports

Peter Sotis of Delray Beach, Fla., the owner and principal of Add Helium LLC, and Emilie Voissem of Sunrise were convicted Oct. 21, 2021, in Miami U.S.

District Court after a six-day trial on charges of exporting dual-use goods, including four rebreathers, to Libya without the required Commerce license in 2016.

Rebreathers, an apparatus that absorbs carbon dioxide out of scuba diver's exhaled breath, are classified under Export Control Classification Number (ECCN) 8A002.

Sotis was arrested in October 2019 and released on \$250,000 bond (see *The Export Practitioner*, November 2019, page 11). Sentencing is set for Jan. 6, 2022.

"After being instructed by a Department of Commerce special agent that the rebreathers could not be exported to Libya while a license determination was pending, the coconspirators attempted to evade the export restriction by having an intermediary com-

pany, U.S. Company 1, arrange to pick up and export the controlled items to Libya without a license," the indictment noted.

"The co-conspirators concealed from U.S. Company 1 that a Department of Commerce special agent had instructed Add Helium not to export the rebreathers," it said.

"During a follow-up conversation with the Department of Commerce special agent after the co-conspirators had arranged for the transfer of the rebreathers to a shipping company for exportation, the co-conspirators concealed from the Department of Commerce special agent that the rebreathers had already been picked up and shipped out of the country," the indictment added.

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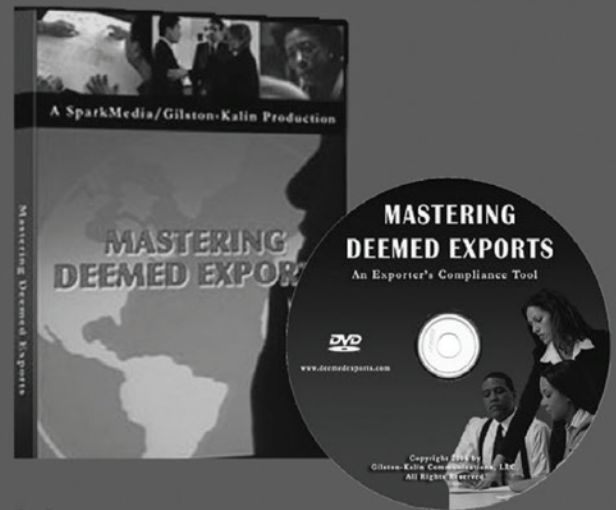
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BIS Finalizes Controls on Emerging Biotech Software

In one of the first controls on emerging technology, the Bureau of Industry and Security (BIS) Oct. 5, 2021, finalized controls on “software” for the operation of nucleic acid assemblers and synthesizers controlled under Export Control Classification Number (ECCN) 2B352 that “is capable of designing and building functional genetic elements from digital sequence data,” the agency said.

In the final rule, BIS added new ECCN 2D352 to control such “software” and amended ECCN 2E001 to indicate that “technology” for the “development” of “software” controlled by new ECCN 2D352 is controlled for chemical and biological weapons (CB) reasons and anti-terrorism (AT) reasons.

“While this software has substantial beneficial civilian applications, it can be misused for biological weapons purposes,” the Federal Register notice said.

BIS proposed the controls in November 2020 (see *The Export Practitioner*, December 2020, page 10). The controls were finalized by the multilateral Australia Group (AG) in August 2021. The agency received comments from four respondents to its proposed rule.

In April 2018, BIS added the assemblers and synthesizers themselves to ECCN 2B352, implementing recommendations from the February 2017 AG inter-sessional and June 2017 AG plenary implementation meetings.

“This ‘software’ generally does not require a license for export, reexport or transfer (in-country) to destinations located in AG-participating countries. That being the case, the controls that apply to this ‘software’ under new ECCN 2D352 should not impair the ability of the United States to trade in intermediate goods with most of its allies or to collaborate on R&D with such countries,” BIS said in response to one of the comments.

Legal observers note that the “new controls also will impact future Committee on Foreign Investment in the United States (CFIUS) reviews of foreign investment in or acquisitions of U.S. biotech companies with genetic editing software or technology, potentially triggering a mandatory filing requirement,” ac-

cording to attorneys from Fenwick & West law firm.

“Going forward, biotech companies involved in critical technologies in the U.S. should closely analyze future foreign investment or transactions opportunities with these CFIUS implications in mind,” they wrote in a blog post.

Export Regulations Reflect Previous Policy Changes

In the Federal Register Oct. 5, 2021, the Bureau of Industry and Security (BIS) made “targeted editorial corrections and clarifications” to its Export Administration Regulations (EAR). The updates reflect more than 15 years of previous edits and changes to its regulations, in addition to the move from postal mail to online submission of its license applications and advisory opinion requests.

“These changes are minor editorial revisions that either reflect [BIS] policies that were previously published in the Federal Register and added to the EAR or reflect the modernization of procedures implemented by BIS. These revisions do not change the substance of the EAR,” BIS said.

“The errors addressed by this rule were inadvertent and these corrections will provide clarity and facilitate understanding of the regulations. This rule ensures that the language and policies already set forth in the EAR remain consistent throughout,” it added.

For example, three sections “are being updated to reflect BIS’ use of the Simplified Network Application Process—Redesign (SNAP-R) system by eliminating or rewording parts of the sections that are no longer relevant given the online nature of the system.”

“The SNAP-R system has been in place since October of 2006 and has largely replaced the previous system that involved the submission of paper license applications, but the EAR has not been fully updated to reflect that change,” it said.

In all, the rule updated 11 parts of the EAR, specifically parts 732, 734, 736, 738, 740, 744, 748, 750, 770, 772 and 774, “such that most-recent language elsewhere in the EAR is consistent with the language in these parts,” the agency noted.

Other changes reflect policy changes to Cyprus and Mexico, the removal of License Exception Civil End Users (CIV), and revisions to the definitions of “foreign-produced direct product,” “U.S. person” and “release.”

Stronger Controls Proposed for Certain Coating Technology

Based on ten years of department review of coating technology, the Bureau of Industry and Security (BIS) Oct. 22, 2021, proposed changes to “clarify and expand restrictions on the availability” of License Exception Strategic Trade Authorization (STA). Comments are due Dec. 6.

Specifically, the agency proposed expanded restrictions on certain coating technology under Export Control Classification Number (ECCN) 2E003.f, as well as on certain technology in ECCN 1E001 that has applications in the “development” and “production” of hot section gas turbine parts and components as well as advanced military composite structures.

The original June 2011 rule creating License Exception STA previewed this review. “The June 16 rule informed the public that BIS would undertake further review regarding whether technology controlled under ECCN 2E003.f related to the application of certain coatings is, in whole or in part, appropriate for exclusion from License Exception STA,” BIS noted in the latest rule.

“Recognizing that the scope of 2E003.f coating technology includes technology with sensitive industrial applications, this proposed rule would expand restrictions on the use of License Exception STA for ECCN 2E003.f technology, when the technology is used for the application of inorganic overlay coatings on gas turbine engine combustors, or turbine blades, vanes or ‘tip shrouds,’” the Federal Register notice said.

For ECCN 1E001, BIS proposed to exclude License Exception STA eligibility to all destinations for technology for the “development” or “production” of equipment and materials specified by ECCNs 1A002, 1C001, 1C007.c, 1C008.a.1, 1C009.b, and 1C010.b, .c or .d.

“This rule also proposes to correct the inconsistencies between License Exceptions STA and TSR [Technology and Software Under Restriction] and to exclude these same technologies from eligibility for License Exception TSR,” it said.

In addition, the rule proposes to clarify the “Special Conditions for STA” paragraphs included under ECCNs 9D001, 9D002, 9D004, 9E001, 9E002 and 9E003 in order to reduce the possibility of confusion. “The clarified text, which does not change license requirements or restrictions, would direct exporters, reexporters, and in-country transferors to the Category 9 limitations on the use of STA,” the notice said.

BIS Requests Comments on Brain-Computer Interface

The Bureau of Industry and Security (BIS) started chipping away at the task of identifying potential emerging technologies. In the Federal Register Oct. 26, 2021, the agency requested comments on the potential uses of brain-computer interface (BCI) technology and whether export controls on this technology would be effective and appropriate. Comments are due Dec. 10.

In a November 2018 advance notice of proposed rulemaking (ANPRM), the agency identified BCI technology as part of a representative list of specific categories for evaluation as a potential emerging technology (see *The Export Practitioner*, December 2018, page 4). BCI technology includes neural-controlled interfaces, mind-machine interfaces, direct neural interfaces and brain-machine interfaces, the agency noted.

“Fundamentally, BCIs provide a direct communication pathway between an enhanced or wired brain and an external device, with bidirectional information flow. BCIs frequently involve a process in which brain signals are acquired, analyzed and then translated into commands that are: (1) Used to control machines; (2) potentially transferred to other humans; or (3) used for human assessment or enhancement,” BIS explained.

In response to its 2018 ANPRM, BIS received 13 comments related to BCI technology. One respondent

noted that the technology, “although still in the early stages of development, is currently available in Wassenaar Arrangement participating countries (including the United States), as well as in other countries,” the agency said in the latest notice.

Other warned that “overly broad export controls on such technology could hinder research” in such sectors as human health care and assistive technologies, automotive development, artificial intelligence, advanced materials development, human-machine interfaces and robotics.

In its latest notice, the agency listed the types of specific comments requested, including: international standards on the technology; foreign availability; potential impact of export controls on U.S. development; ethical or policy issues; types of BCI technologies that are significantly more vulnerable than others to cybersecurity threats; and potential for transmitted BCI data to be hacked.

New FAQ Clarifies BIS Foreign Direct Product Rule

In a new Frequently Asked Question (FAQ) published Oct. 28, 2021, the Bureau of Industry and Security (BIS) clarified a tangible example of the Foreign-Produced Direct Product (FDP) Rule, whether a company may export a non-U.S. product to a designated entity without confirmation that a license was obtained authorizing the incorporation of the components.

Specifically, the hypothetical product is destined for Huawei or one of its non-U.S. affiliates that are listed on the Entity List under footnote 1. “Company X must have received a license or have confirmation that a license was obtained by the manufacturer of the foreign produced component(s) subject to the EAR under footnote 1,” the FAQ noted.

The only Entity List entries tagged with the “footnote 1” designation are Huawei and each of its blocked non-U.S. affiliates. In August 2020, BIS added 38 more Huawei affiliates to its Entity List, broadened controls under the FDP rule and expanded controls on blocked firms (see *The Export Practitioner*, September 2020, page 4).

Failure by the company to either confirm that the component supplier has obtained an export license or obtain an export license itself “implicates General Prohibition 10 [which] prohibits proceeding with transactions with knowledge that a violation has occurred or is about to occur,” the agency explained.

“Specifically, absent an applicable license, Company X or its subcontractors ‘may not sell, transfer, export, reexport, finance, order, buy, remove, conceal, store, use, loan, dispose of, transport, forward, or otherwise service, in whole or in part’ the components for incorporation into or use in the ‘production’ or ‘development’ of any ‘part,’ ‘component,’ or ‘equipment’ produced, purchased, or ordered by a footnote 1 entity or where a footnote 1 entity is a party to the transaction without authorization,” the FAQ noted.

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Treasury Review Targets Sanctions Impact, Evasion

As promised from the first days of the administration, Treasury Oct. 19, 2021, released its “top to bottom” review of U.S. economic and financial sanctions. Facing a combative Congress and ever-changing threats in cyberspace and crypto currency, department officials outlined the administration’s approach to target countries’ attempts to evade sanctions.

Deputy Treasury Secretary Wally Adeyemo began the review in April with a meeting of former lawmakers, government officials and academics (see *The Export Practitioner*, May 2021, page 16). At that meeting, participants confirmed the role of sanctions as a key instrument of U.S. national security and foreign policy.

“American adversaries ... are already reducing their use of the U.S. dollar and their exposure to the U.S. financial system.”

During a Senate Banking Committee hearing Oct. 19 on the sanctions review, Adeyemo outlined the five initiatives that emerged from the review: adopting the use of a structured policy framework; expanding sanctions exceptions to support the flow of legitimate humanitarian assistance; reviewing sanctions programs and authorities on a regular basis; communicating and coordinating more effectively with stakeholders; and modernizing the department’s operational capabilities to take on growing threats like ransomware and other cybercrime.

“These changes are also needed to keep pace with the evolution of the global financial architecture, which has a profound impact on the efficacy of

U.S. financial sanctions. American adversaries—and some allies—are already reducing their use of the U.S. dollar and their exposure to the U.S. financial system more broadly in cross-border transactions. While such changes have multiple causes beyond U.S. financial sanctions, we must be mindful of the risk that these trends could erode the effectiveness of our sanctions,” Treasury’s review noted.

While the review highlighted a few success stories in the use of sanctions, such as in Iran, Colombia and Libya, the department took pains to note it was “neither an assessment of each of the 37 existing sanctions programs administered and enforced by the Office of Foreign Assets Controls (OFAC), and the over 12,000 OFAC designations and nearly 3,000 OFAC delistings, nor a full examination of all economic statecraft tools,” the report noted.

At the Banking hearing, Sen. Pat Toomey (R-Pa.) repeated his opposition to the administration’s waiver on Nord Stream 2 sanctions: “The administration has also chosen to ignore a law requiring sanctions for Russia’s Nord Stream II pipeline. The pipeline’s project manager has been using sanctioned Russian entities to construct and finance Nord Stream 2 – meaning the manager’s integral role in the pipeline is predicated on a massive sanctions evasion campaign,” he said in his opening statement.

Industry groups, including the National Foreign Trade Council (NFTC), welcomed Treasury’s review. “Too often, the United States has used sanctions as a blunt instrument,” NFTC President Jake Colvin said in a statement. The group commended Treasury for “a thoughtful analysis of the benefits, limits and best practices that ought to govern U.S. sanctions,” he added.

“If implemented, Treasury’s recommendations would substantially de-politicize sanctions and clarify their place in the conduct of U.S. foreign policy,” Richard Sawaya, USA*Engage VP, added.



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Classification



贵公司是否出于中国出口管制的目的对你们的产品进行分类？

☐ Yes ☐ No ☐ I don't know ☐ N/A

guì gōng sī shì fǒu chū yú zhōng guó chū kǒu guǎn zhì de mù
dì duì nǐ men de chǎn pǐn jìn xíng fēn lèi?

Does your company classify your products for Chinese
export control purposes?

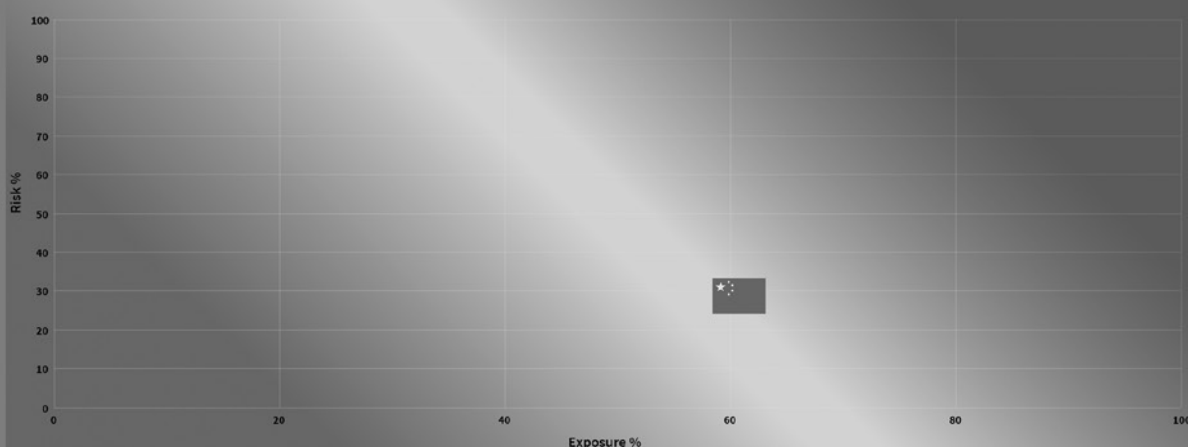
是否有中国出口控制下的关于出口分类的企业政策文件？

☐ Yes ☐ No ☐ I don't know ☐ N/A

shì fǒu yǒu zhōng guó chū kǒu guǎn zhì xià de guān yú chū
kǒu fēn lèi de qǐ yè zhèng cè?

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Commerce Will Need to Focus on Enforcement, IG Says

One of Commerce's top management and performance challenges in fiscal year (FY) 2022 is enforcing trade agreements and export controls, putting a spotlight on the Bureau of Industry and Security (BIS) resources, according to the department Inspector General's report (OIG-22-001) published Oct. 14, 2021.

“BIS must ensure it enforces the [Export Administration Regulations] and pursues action against violators.”

“OIG's FY 2022 top management and performance challenges include these priority areas related to trade enforcement: combating unfair trade practices by effectively resolving trade barriers and enforcing U.S. trade agreements; [and] protecting national security through effective enforcement of export controls,” the report said.

The FY 2022 report cited the transfer of thousands of items from the U.S. Munitions List (USML) to the Commerce Control List (CCL). BIS' licensing workload increased from 33,615 applications processed in FY 2016 to 37,895 applications in FY 2020, a 12.7 percent increase. Of the licenses processed in FY 2020, 12,400 (32.7 percent) were for items transferred from the USML to the CCL.

“To be effective, export controls must be enforced, and companies or individuals who illegally export EAR-controlled items, including through evasion and circumvention, must be detected and prosecuted accordingly. With greater responsibilities overseeing many more items under its jurisdiction, BIS must ensure it enforces the EAR [Export Administration Regulations] and pursues action against violators,” the OIG noted.

Trading Partners End Export Support for Coal Power Projects

What a difference seven years makes. Under the

auspices of the Organization for Economic Cooperation and Development (OECD), 11 Participants to the Arrangement on Officially Supported Export Credit, including the U.S., agreed Oct. 22, 2021, to end support for unabated coal-fired plants in the form of export credits.

“Specifically, the ban will apply to officially supported export credits and tied aid for: new coal fired power plants without operational carbon capture, utilization and storage (CCUS) facilities; and existing coal-fired power plants, unless the purpose of the equipment supplied is pollution or CO2 abatement and such equipment does not extend the useful lifetime or capacity of the plant, or unless it is for retrofitting to install CCUS,” the OECD said.

Treasury Climate Counselor John Morton welcomed the decision. “We have worked closely with partners to achieve this agreement because actions like these are vital to tackling climate change and reaching the goal of net-zero emissions by 2050. The department will continue to work with countries throughout the world as they transition towards cleaner and greener sources of energy,” he said in a statement.

The agreement took effect Nov. 1, once all participants complete their internal agreement processes. In addition to the U.S., participants are Australia, Canada, the European Union (EU), Japan, Korea, New Zealand, Norway, Switzerland, Turkey and the United Kingdom.

In 2014, there was bipartisan support in both the House and Senate of members from coal-producing states for provisions that would prevent the Export-Import (Ex-Im) Bank from implementing its policy of not funding the export of coal-fired power plants (see *The Export Practitioner*, August 2014, page 22).

At that time, Sen. Joe Manchin (D-W.Va.) introduced the Senate version of a bill to reauthorize the bank for five years with an increased portfolio cap of \$160 billion. The Senate briefly took up the bill (S. 2709) in July 2014 but put it aside after an objection was raised to further consideration of the measure.

The bill addressed home-state complaints in West Virginia about Ex-Im policies against funding coal-burning power plants as part of Obama administration environment policy. The bill would have

barred the bank from enforcing “any rule, regulation, policy, or guideline implemented pursuant to the Supplemental Guidelines for High Carbon Intensity Projects approved by the Bank on December 12, 2013,” if that enforcement would block any coal-fired or other power-generation project that provides affordable electricity in certain countries or increases exports.

Congress Passes Bill That Bans Huawei from Networks

By unanimous consent, the Senate Oct. 28, 2021, passed Secure Equipment Act of 2021 (S. 1790/H.R. 3919), a bill that would direct the Federal Communications Commission (FCC) to clarify that it will no longer review or issue new equipment licenses to companies that pose a national security threat.

The bill passed the House eight days earlier in a 420-4 vote. The FCC in March initiated revocation proceedings against three Chinese telecom companies and published a final list of covered telecom producers, including Huawei and ZTE (see *The Export Practitioner*, April 2021, page 20).

“In today’s increasingly connected world, we must animate our technology with our values,” Sen. Ed Markey (D-Mass), one of the bill’s co-sponsors, said in a statement. “That’s why our bipartisan legislation will keep compromised equipment out of U.S. telecommunications networks and ensure our technology is safe for consumers and secure for the United States,” he added.

FCC officials welcomed the bill. “Once signed, this important legislation will give the FCC crucial authority to protect American networks from untrustworthy equipment that can serve as footholds for China and other foreign powers to infiltrate U.S. telecommunications networks and threaten our national security,” FCC Commissioner Nathan Simington said in a statement.

“But this legislation does not complete the work of protecting our digital sovereignty. In the current digital security landscape, inadvertent flaws in wireless edge devices are as much a threat as intention-

ally created backdoors. The FCC must continue to engage with industry and other parts of government to identify and eliminate weaknesses that can be exploited by our adversaries,” he added.

Justice Strengthens Policies on Individual Conduct, Monitors

In policies that will directly impact prosecutions on Foreign Corrupt Practices Act (FCPA), export controls and sanctions, Deputy Attorney General Lisa Monaco Oct. 28, 2021, returned to the policies of the previous Democratic administration, rescinding or updating guidance on individual misconduct and the use of monitors in corporate cases.

“I am directing the department to restore prior guidance making clear that to be eligible for any cooperation credit, companies must provide the department with all non-privileged information about individuals involved in or responsible for the misconduct at issue. To be clear, a company must identify all individuals involved in the misconduct, regardless of their position, status or seniority,” Monaco told the American Bar Association (ABA).

In November 2015, Justice announced changes to its staff guidance on all criminal and civil prosecutions, specifically on voluntary disclosures and individual responsibility (see *The Export Practitioner*, December 2015, page 13).

The revised factors “now emphasize the primacy in any corporate case of holding individual wrongdoers accountable and list a variety of steps that prosecutors are expected to take to maximize the opportunity to achieve that goal,” then-Deputy Attorney General Sally Yates said in a speech the same day.

Prosecutors Will Take Wider View

Monaco also announced a change related to historical misconduct. “The department is making clear that all prior misconduct needs to be evaluated when it comes to decisions about the proper resolution with a company, whether or not that misconduct is similar to the conduct at issue in a particular inves-

tigation. That record of misconduct speaks directly to a company's overall commitment to compliance programs and the appropriate culture to disincentivize criminal activity," she said.

She specifically called out as FCPA prosecutions as an example. "Going forward, prosecutors can and should consider the full range of prior misconduct, not just a narrower subset of similar misconduct — for instance, only the past FCPA investigations in an FCPA case, or only the tax offenses in a Tax Division matter," Monaco noted.

"A prosecutor in the FCPA unit needs to take a department-wide view of misconduct: Has this company run afoul of the Tax Division, the Environment and Natural Resources Division, the money laundering sections, the U.S. Attorney's Offices, and so on?" she added.

Finally, Monaco rescinded previous Justice guidance that suggested that monitorships were the exception. "Instead, I am making clear that the department is free to require the imposition of independent monitors whenever it is appropriate to do so in order to satisfy our prosecutors that a company is living up to its compliance and disclosure obligations" under a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA), she added.

Ex-Im Bank Nominee Will Juggle Multiple Priorities

At her Senate Banking Committee confirmation hearing Oct. 26, 2021, Reta Jo Lewis, who was nominated to be Export-Import (Ex-Im) Bank president, defended the bank's policies, explained how it must compete against China and other foreign export credit agencies, and committed to ongoing outreach efforts to minority, women-owned and small businesses.

Lewis, who would be the first Black woman Ex-Im Bank president, is currently senior fellow and director of congressional affairs at the German Marshall Fund of the U.S. (GMF).

At their confirmation hearing in September, Judith Pryor, nominee to be Ex-Im Bank first VP, and Owen Herrstadt, a nominee for the Ex-Im board,

also explained statutory constraints on lending and the four-year gap in lending prior to reauthorization in 2019 (see *The Export Practitioner*, October 2021, page 24). The committee approved all three nominees for full Senate consideration by voice vote Nov. 3.

If confirmed, I will "work with all of you to fully implement the provisions of Ex-Im's 2019 reauthorization, with a special focus on transformational export areas, renewable energy, energy efficiency, and energy storage exports, strategic competition with China, and increasing support for historically underserved businesses," Lewis said.

She added that her mission will be to "very intentional" in paying attention to the intersection between economic security and national security. Lewis also endorsed a "whole of government approach" to educate women-owned and minority-owned businesses about the bank's programs.

The nominee also said she supported an increase in the default cap to 4 percent from 2 percent. In response to a question about large firms getting public financing despite the mandate to avoid competition with private financing, Lewis said the bank has to pay attention to how other countries finance their exports.

The hearing reflected long-time party divisions over the bank's very existence. "If we want to promote domestic manufacturing and increase competitiveness of U.S. exports, we need to create a favorable climate by maintaining low taxes, provide regulatory certainty, and cut red tape to attract capital formation. To claim that Ex-Im is needed to achieve these goals defies the facts. The vast majority of American exports get done without Ex-Im support," Sen. Pat Toomey (R-Pa.) said in his opening statement.

In contrast, Sen. Sherrod Brown (D-Ohio) argued that it is necessary to compete with China. "China's export finance activity is larger than all of the export credit provided by the G7 countries combined, and we can expect China to continue using export credit as a weapon to win manufacturing business in critical sectors," he said in his opening statement.

BIS Nominee Commits to Aggressive Enforcement

At a shared 90-minute Senate Banking Committee hearing Oct. 7, 2021, Bureau of Industry and Security (BIS) assistant secretary for export enforcement nominee Matthew Axelrod, a former Justice official, answered just two questions: one on how his experience will inform his potential new job and does he support President Biden's campaign promise to return firearms and ammunition to State jurisdiction.

The committee approved Axelrod's nomination for full Senate consideration by voice vote Nov. 3. Biden sent his nomination to the Senate in September (see *The Export Practitioner*, September 2021, page 15).

"My past work at the intersection of criminal enforcement and national security would enable me to lead the agents and analysts of BIS effectively and with credibility and focused clearly on our most pressing threats," Axelrod responded to the first question.

"I'm confident that my established relationships within federal law enforcement [would] allow me to help build partnerships and raise the profile of export enforcement which in turn could help to increase deterrence and incentivize compliance," he added.

In response to the question about firearms jurisdiction, Axelrod noted, "I don't know enough about the policy issue to have a view on [it]." He added, "In the enforcement side I don't have a view on where those authorities should lie, but I will commit to you that until they are returned to the Munitions List, I would make sure that we enforce aggressively."

"When it comes to information, I do believe it's important of course for committees of jurisdiction to get the information they need to fulfill their oversight responsibilities, and I will work with you and with the Department of Commerce to make sure you have the information necessary to do your job," Axelrod said.

END NOTES

ETHIOPIA: As promised, DDTC Nov. 1 published rule amending International Traffic in Arms Regulations (ITAR) § 126.1 to codify export policy for Ethiopia and Eritrea. "The policy of denial applies to licenses or other approvals for exports of defense articles or defense services to or for the armed forces, police, intelligence, or other internal security forces of either Ethiopia or Eritrea," Federal Register notice said. Biden administration in September imposed open-ended sanctions on persons involved with humanitarian crisis in country (see *The Export Practitioner*, October 2021, page 17).

IRAN: OFAC Oct. 29 designated two companies and four individuals that provided critical support to Unmanned Aerial Vehicle (UAV) programs of Iran's Islamic Revolutionary Guard Corps (IRGC) and its expeditionary unit, the IRGC Qods Force (IRGC-QF). Designations include Saeed Aghajani, commander of IRGC Aerospace Force (IRGC ASF) UAV Command; Abdollah Mehrabi, chief of IRGC ASF Research; Kimia Part Sivan Company (KIPAS) and Mohammad Ebrahim Zargar Tehrani; Oje Parvaz Mado Nafar Company (Mado Company) and its managing director Yousef Aboutalebi.

ARMS EXPORTS: Reps. Gregory W. Meeks (D-N.Y.), Abigail Spanberger (D-Va.) and Susan Wild (D-Pa.) Oct. 20 introduced Safeguarding Human Rights in Arms Exports (SAFEGUARD) Act of 2021 (H.R. 5629) that would prohibit arms sales to countries committing genocide or war crimes and elevate protection of human rights in export control of defense articles and defense services. Sen. Bob Menendez (D-N.J.) and six cosponsors introduced parallel Senate bill in April (S.1473). "Our bill would make sure fundamental questions of national security and human rights are addressed during the official process of reviewing, exporting, and monitoring weapons and military equipment transfers," Spanberger said in statement.

MORE ARMS EXPORTS: After meeting between President Biden and French President Emmanuel Macron Oct. 29, two leaders announced joint effort to improve cooperation on arms exports. “The presidents intend to launch a U.S.-France defense trade strategic dialogue to foster a shared view on defense market access and export issues. In this context, the two governments will identify steps to improve the efficiency and effectiveness of defense export authorizations,” joint statement noted.

DEUTERIUM: Got any deuterium lying around? Responsibility for licensing of exports of deuterium for non-nuclear end use will move to BIS effective Dec. 6, agency announced Oct. 6. Exports of deuterium for nuclear end-use will remain under Nuclear Regulatory Commission (NRC) jurisdiction. Deuterium will join nuclear grade graphite under ECCN 1C298 and will be controlled for nuclear proliferation (NP). Graphite moved to BIS jurisdiction in July 2005 (see *The Export Practitioner*, August 2005, page 21).

NOMINATIONS: President Biden Oct. 20 resurrected Coordinator for Sanctions Policy office at State by nominating James O’Brien to role. O’Brien is current-

ly principal of international advisory firm Albright Stonebridge Group. Daniel Fried previously held role from January 2013 through February 2017. Former Secretary of State Rex Tillerson eliminated office in October 2017.

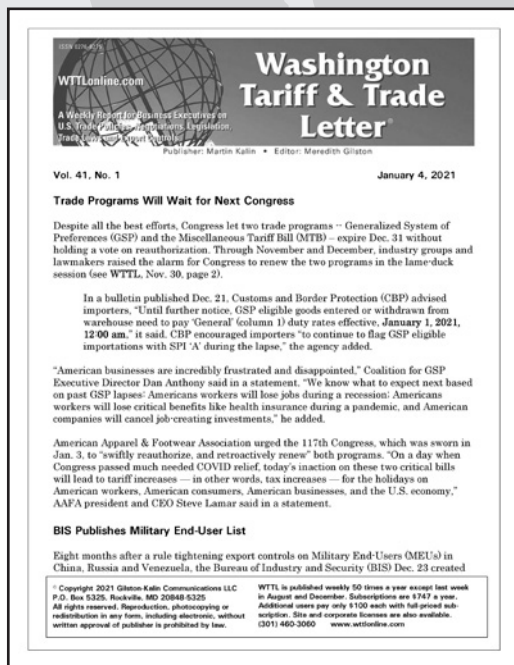
REVOLVING DOOR: Heidi Grant, director of U.S. Defense Security Cooperation Agency (DSCA), will lead Boeing’s defense, space and government services sales teams, firm announced Oct. 14. She will join company Nov. 8 as vice president of business development, day after leaving federal service. “Excited about this new opportunity to continue to add value using my expertise in national and global security,” Grant posted on LinkedIn. Art Shulman, previously acting DDTC compliance chief, joined Boeing as director of global trade controls in December 2017 (see *The Export Practitioner*, January 2018, page 4). His predecessor and boss at DDTC Sue Gainor joined Boeing as vice president of global trade controls that August. Both left Boeing in 2020.

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