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## USML Firearms Rules See Light of Publication

Long-awaited firearms rules transferring items from U.S. Munitions List (USML) categories I (firearms), II (guns and armament) and III (ammunition) to Commerce jurisdiction were signed and delivered to the Federal Register Jan. 10, sources told WTTL. At press time, State officials did not reply to a request for comment, and the rules were not yet available for public inspection.

Just days before the deadline on the 30-day formal 38(f) notice from State, Sen. Bob Menendez (D-N.J.) renewed his unofficial “hold” on the final rules in December (see **WTTL**, Dec. 16, page 2). At the same time, the official conference report of the 2020 National Defense Authorization Act (NDAA) did not include a House amendment prohibiting the transfers.

Export control agencies sent the final rules to Congress in November. Specifically, the Bureau of Industry and Security (BIS) revised the final rules to address the publication of technology for 3D printing firearms, while State made no changes from the previous proposed rules.

The rules, which bring the 10-year-long list review under export control reform to a close, were ready to be proposed in December 2012, but were held back after the Sandy Hook school shooting. It’s been a winding road through two administrations since then.

## Administration to End Charter Flights to Cuban Cities

Following its ban on scheduled, commercial air service between the U.S. and eight Cuban airports, the administration Jan. 10 took the restrictions a step further, requesting a suspension of all public charter flights to those airports, except Havana’s Jose Martí Airport, and a cap on charter flights to Havana itself. Operators will have a 60-day

wind-down period to discontinue all affected flights, State noted. Secretary of State Mike Pompeo in October asked Transportation Secretary Elaine Chao to suspend commercial flights between the U.S. and eight Cuban airports (see WTTL, Oct. 28, page 1). That rule went into effect Dec. 10.

“Today’s action will further restrict the Cuban regime’s ability to obtain revenue, which it uses to finance its ongoing repression of the Cuban people and its unconscionable support for dictator Nicolas Maduro in Venezuela,” Pompeo said in a statement. “In suspending public charter flights to these nine Cuban airports, the United States further impedes the Cuban regime from gaining access to hard currency from U.S. travelers,” he added.

Lawmakers and advocacy groups quickly denounced the measure. “Who will be harmed by this? Families, mothers, fathers, sisters, brothers, sons, daughters. Trump admin is hurting Florida and Cuban-American families ... again.” Rep. Kathy Castor (D-Fla.) tweeted. At the same time, Ricardo Herrero, executive director of Cuba Study Group, called it “another desperate move by an administration that is clearly frustrated with the impotency of its maximum pressure policy to usher regime change in Cuba or Venezuela.”

Reps. Jim McGovern (D-Mass.) and Tom Emmer (R-Minn.) and Sen. Patrick Leahy (D-Vt.) in July introduced the Freedom for Americans to Travel to Cuba Act of 2019 (H.R. 3960/S. 2303), which removes current travel restrictions to the island.

## **U.S. Imposes Further Sanctions on Iran**

In the latest escalation in response to a retaliation, the administration Jan. 10 announced additional sanctions against Iran, covering four major sectors of the Iranian economy, as well as specific metals producers and mining companies, and senior Iranian officials who were involved in the ballistic missile strike on two Iraqi air bases two days earlier.

While many Middle East observers were relieved the administration did not pursue further military action, the president issued an Executive Order (EO) authorizing the imposition of sanctions against individuals or entities operating in the construction, manufacturing, textiles or mining sectors of the Iranian economy or anyone assisting those who engage in sanctioned conduct. The EO also authorizes secondary sanctions on foreign financial institutions.

At the same time, Treasury’s Office of Foreign Assets Control (OFAC) designated 17 Iranian metals producers and mining companies; a network of three China- and Seychelles-based entities; and Hong Xun, a vessel “involved in the purchase, sale, and transfer of Iranian metals products, as well as in the provision of critical metals production components to Iranian metal producers.”

One of the designated firms was the aptly named Oman-based Reputable Trading Source LLC, which “was incorporated to provide and supply the spare parts, equipment, and raw material that is required by steel companies, and further engages in marketing and exporting steel products from Iran,” OFAC said. State and OFAC also sanctioned eight

senior Iranian leaders, including the secretary of the Supreme National Security Council, the deputy chief of staff of Iranian armed forces, the commander of the Basij militia of the Islamic Revolutionary Guard Corps (IRGC), and five other senior officials for being appointed by, or acting for or on behalf of, the Supreme Leader.

OFAC previously designated a network of businesses providing financial support to Basij, including Mobarakeh Steel Company, in October 2018 under a counter-terrorism authority, for providing material support to Mehr Eqtesad Iranian Investment Company, an IRGC-affiliated entity (see **WTTL**, Oct. 22, 2018, page 6).

The administration used the latest escalation as an opportunity to defend its existing sanctions policy in response to critics. “We have 100% confidence, and we are consistent in our view that the economic sanctions are working; that if we didn’t have these sanctions in place, literally Iran would have tens of billions of dollars. They would be using that for terrorist activities throughout the region and to enable them to do more bad things. And there’s no question, by cutting off the economics to the region, we are having an impact,” Treasury Secretary Steven Mnuchin said in a joint press conference with Secretary of State Mike Pompeo.

Legal observers question whether the sanctions, especially the EO, will have their intended impact. “These sanctions will certainly create a compliance headache for foreign and U.S. financial institutions because certain activities with Iran, such as humanitarian donations, largely will continue to be allowed but such activities will not be allowed with respect to individuals and entities targeted under these new sanctions,” Lawrence Ward, a partner at Dorsey & Whitney, said in a statement.

“Whether or not these sanctions will have their intended impact will, of course, depend on the U.S. government actually and strategically using them to target certain individuals and entities. Even more importantly, [it] will depend on foreign financial institutions taking them seriously and restricting access to targeted Iranian companies. In the past, some financial institutions in Asia and Europe either have not had – or not been concerned with losing – access to a U.S. correspondent account,” Ward added.

## **Senate Finance Committee Approves USMCA, Waits in Line**

If anyone was holding her breath waiting for a Senate vote on the U.S.-Mexico-Canada Agreement (USMCA) implementing legislation, she will just have to be patient, perhaps until the impeachment trial is over. The Senate Finance Committee approved the bill (H.R. 5430) in a 25-3 vote Jan. 7, but four other Senate committees subsequently scheduled executive sessions to consider the legislation.

The House passed the bill in a 385-41 vote in December (see **WTTL**, Dec. 23, page 1). Before the bill gets anywhere near the full Senate, the Budget Committee will meet Jan. 14; the Committee on Commerce, Science, and Transportation will convene an executive session Jan. 15; the Health, Education, Labor and Pensions Committee Jan. 15; and the Foreign Relations Committee in a business meeting Jan. 16.

In a statement Jan. 10, Sen. Chuck Grassley (R-Iowa) blamed House Speaker Nancy Pelosi for the delay. “After House Democrats delayed passing the [USMCA] for nearly a year, the speaker’s indecision on impeachment will now keep the trade deal from being ratified for even longer. Farmers, ranchers, manufacturers and all American workers will pay the price,” he said.

The three “no” votes were Sens. Sheldon Whitehouse (D-R.I.), Pat Toomey (R-Pa.) and Bill Cassidy (R-La.). In an opening statement, Whitehouse singled out his environmental concerns. “The progress that’s been made on environmental issues started from an embarrassingly, really disgracefully low bar, [a] nonexistent bar. So this agreement does not reflect a sense of urgency about what I feel is an appropriate sense of dread about the climate calamities that are unfolding.”

Toomey took issue with the process of approving the bill under Trade Promotion Authority (TPA), as well as negative changes from the original NAFTA. “I think it’s useful to think about USMCA as consisting of NAFTA with primarily two categories of changes: One is a category of changes that modernizes it...the second category are the changes that are meant to diminish trade and investment. This my colleagues is what I think is wrong with this agreement: it’s the first time we’re ever going to go backwards on a trade agreement,” he said at the Finance markup.

## **DDTC Offers Guidance on Defense Services for Foreign Employers**

In an attempt to clarify registration and authorization requirements for U.S. persons providing defense services abroad, State’s Directorate of Defense Trade controls (DDTC) Jan. 6 published 14 new Frequently Asked Questions (FAQs). The guidance comes more than four years after the agency proposed changes to the rules.

“The guidance is based on existing content in the ITAR [the International Traffic in Arms Regulations], rather than the 2015 proposed rule that was not adopted,” DDTC noted. In May 2015, the agency proposed ITAR changes to clarify licensing and registration requirements for U.S. persons providing defense services while employed by foreign persons (see **WTTL**, May 25, 2015, page 5).

While the proposed rule was never finalized and has no regulatory effect, DDTC clarified that “to the extent that exporters or foreign employers undertook a good faith effort to guide their actions based on the provisions of the proposed rule, DDTC will generally view any controlled activity in that light,” the agency said.

DDTC also addressed whether ITAR authorizations can be submitted for multiple potential employees at one time. “Similar applications may be grouped and their submission facilitated by a prospective employer. However, the individual U.S. person employees are responsible for ensuring compliance with the ITAR as the exporters of a defense service and DDTC Licensing will issue individual authorizations to each U.S. person, not to the foreign employer,” the agency said.

DDTC clarified whether the prospective foreign employer's customers affect registration and licensing requirements. "The nationalities of the prospective foreign employer's customers do not affect the registration or authorization requirements applicable to a U.S. person. However, such factors may be assessed by DDTC in determining whether to issue an authorization," it said.

Legal observers welcomed the clarification. The new FAQs "make clear that U.S. persons, including individuals and companies, who perform defense services for a foreign person require authorization from DDTC regardless of where they are located," attorneys from Akin Gump noted in a client alert.

"They also confirm that non-U.S. companies can hire U.S. persons into their defense businesses with a clearly identifiable path toward ensuring that individual's role is authorized, and without concern that the ITAR will cause their foreign-made items made from foreign-origin technical data to be subject to the ITAR," the lawyers noted.

## **Industry Rejects Commerce Plan to Protect Supply Chain**

When government agencies request public comments, they must be prepared for the worst. In this case, Commerce might feel it escaped relatively unscathed. At press time, the department received nine comments to its proposed rules implementing a May Executive Order (EO) 13873, which was intended to secure the information and communications technology and services (ICTS) supply chain.

Without naming any specific companies or countries, Commerce proposed the rules in November (see **WTTL**, Dec. 2, page 5). In its comment, IBM reflected the general consensus of the comments, arguing that the proposed rule is "massively overboard and, if enacted in its current form, would harm the U.S. economy, fail to enhance U.S. national security, and violate principles of due process."

Commerce "should go back to the drawing board to write an entirely different proposed regulation that clearly informs the public of what would be proscribed, provides a mechanism for advanced rulings, and creates market incentives for ICTS users to adopt approved supply chain standards," the company wrote.

A coalition of taxpayer and consumer advocacy groups, including National Taxpayers Union, American Legislative Exchange Council (ALEC), Niskanen Center and R Street Institute, agreed. "The proposed rule would grant the Secretary of Commerce broad, significant, and undefined powers over small and large American businesses, and could have the unintended effect of harming domestic and global commerce as well as technological innovation," the coalition commented.

The group said the concern was not hypothetical, citing the "far-fetched" allegation in the latest Section 232 investigation that "U.S.-built cars manufactured in foreign-owned factories are a threat to American national security." The department's goal "should be to

encourage commerce, not to impose sweeping regulations that would strangle it,” the joint comment noted. “Collectively and individually, the present proposal’s defects would leave industry in an inescapable quandary. It would be impossible for companies to create responsive compliance programs or to conduct business with a predictable and reliable understanding of the risks,” BSA | The Software Alliance wrote.

“The proposed rules are overly – indeed, staggeringly – broad. As written, they would permit the Secretary to launch a review of virtually any ‘transaction’ involving almost any form of commercial technology, regardless of whether it has a clear nexus to national security or to a foreign adversary,” BSA added.

Express Association of America (EAA) wondered whether logistics providers would be subject to the rule. “The lack of a requirement for advance information reporting to the Government suggests that the provisions of the rule would not apply to the logistics entities involved in the border clearance process for goods being imported. Further, the private sector only knows that a shipment is subject to the rule when they are so informed following the Government’s evaluation, which further suggests this process is not related to the border clearance process,” the EAA wrote.

The Chamber of Commerce raised three major concerns, echoing other industry groups. “The rulemaking would provide the department with nearly unlimited authority to interfere in virtually any commercial transaction that covers a substantial portion of the U.S. economy,” it said. In addition, “the rulemaking does not include substantive measures to provide accountability and transparency,” and “the proposal fails to recognize other national security programs,” the Chamber wrote.

Further, it urged the department to provide more detail on how it proposes to: (1) narrow the scope of covered transactions; (2) ensure accountability and interagency collaboration; (3) provide notice, pre-clearance mechanisms, and reject private party reviews; (4) protect confidentiality in the review process; and (5) define more robust procedures for waivers, appeals, and mitigation.

## **Allies Respond to U.S., Iran Escalation**

As they have done since President Trump came to power and withdrew the U.S. from the Joint Comprehensive Plan of Action (JCPOA), or the Iran nuclear deal, European allies are again playing a pivotal behind-the-scenes role to avert a full-blown war between the U.S. and Iran. A NATO team met with U.S. officials in Washington and the North Atlantic Council convened in emergency session in Brussels to come up with helpful next steps.

With regards to the new U.S. sanctions imposed on Iran Jan. 10, as well as secondary sanctions, the question is: what will be their impact on European allies who continue to do business with the Iranians? And what will be the effect on the INSTEX barter mechanism that was set up by a number of European countries to avoid U.S. sanctions and continue to do business without using the U.S. dollar?

In a joint press conference with Secretary of State Mike Pompeo announcing the latest sanctions, Treasury Secretary Steven Mnuchin said, “As it relates to the Europeans, both the Secretary [Pompeo] and I have spoken to our counterparts in Europe several times over the last few days. We’ve emphasized the impact and the issue of — Iran has announced that they are no longer part of the JCPOA. And we’ve had very direct conversations with our counterparts about that.”

Addressing the issue of INSTEX, Mnuchin warned, “As we’ve made clear, we are working on a Swiss channel that we have approved for humanitarian transactions. We’ll continue to allow humanitarian transactions. We’ve warned INSTEX and others that they will most likely be subject to secondary sanctions, depending on how they use that. So that’s absolutely the case.”

In his remarks two days earlier, President Trump said, “The very defective JCPOA expires shortly anyway and gives Iran a clear and quick path to nuclear breakout. Iran must abandon its nuclear ambitions and end its support for terrorism.” As if a warning to those whom he seemed to imply were “appeasers” of Iran, he added: “The time has come for the United Kingdom, Germany, France, Russia and China to recognize this reality. They must now break away from the remnants of the Iran deal ... and we must all work together toward making a deal with Iran that makes the world a safer and more peaceful place.”

Trump then turned his attention to NATO. He said that the U.S. is “now the number-one producer of oil and natural gas anywhere in the world” and does not need Middle East oil. “Today, I am going to ask NATO to become much more involved in the Middle East process. Over the last three years, under my leadership, our economy is stronger than ever before, and America has achieved energy independence. These historic accomplishments changed our strategic priorities. These are accomplishments that nobody thought were possible. And options in the Middle East became available,” Trump argued.

Several NATO members called Canadian Prime Minister Justin Trudeau to express condolences for the 63 Canadians who lost their lives in the downed Ukrainian airline. For one, Trudeau and French President Macron discussed “the need to avoid escalation and for all parties to work toward peace and stability,” according to a Canadian readout of the conversation.

After a North American Council meeting in Brussels Jan. 6, after the killing of General Soleimani but before the Iranian attack on Iraqi air bases, NATO Secretary-General Jens Stoltenberg urged restraint. “The important thing now is to really try to de-escalate and to avoid further increase . . . increased tensions in the region. And I think that if I start to speculate on how we will react, this will not help to de-escalate, it will actually do the opposite. So we call on . . . on responsible behavior. We believe in the importance of de-escalation and restraint. And that was a clear message from all Allies in the meeting today.”

## CAFC Offers Mixed Ruling on Solar Modules

In an en banc rehearing of the administration's appeal, the Court of Appeals for the Federal Circuit (CAFC) Jan. 7 affirmed-in-part and reversed-in-part its previous ruling on whether a company's solar modules are covered by the scope of antidumping and countervailing duty (AD/CVD) orders on certain solar cells from China.

In May, the court affirmed a Court of International Trade (CIT) ruling that "Commerce cannot continue a suspension of liquidation that Customs lacked authority to implement in the first place," Circuit Judge Raymond Clevenger wrote for the three-judge panel in *Sunprime Inc. v. U.S.* (see **WTTL**, May 20, page 8). Chief Judge Sharon Prost dissented in part.

The U.S. petitioned for en banc rehearing of its cross-appeal. "We now grant that petition to resolve whether it is within Customs' authority to preliminarily suspend liquidation of goods based on an ambiguous antidumping or countervailing duty order, such that the suspension may be continued following a scope inquiry by Commerce. We conclude that it is," Prost wrote in the most recent ruling.

"We affirm the CIT's conclusion that Commerce's final scope ruling placing Sunprime's solar products within the ambit of the Orders is supported by substantial evidence. We reverse, however, the CIT's determination that Commerce's instructions to Customs are invalid to the extent that they require continuation of suspension of liquidation and collection of cash deposits on Sunprime's solar modules entered or withdrawn from warehouse for consumption before Commerce initiated its scope inquiry on December 30, 2015. Commerce's liquidation instructions are reinstated in full," Prost wrote.

### \* \* \* Briefs \* \* \*

**TRADE FIGURES:** Merchandise exports in November dropped 1.4% from year ago to \$137.2 billion, Commerce reported Jan. 7. Services exports gained 3.8% to \$71.5 billion from November 2018. Goods imports dropped 5.7% from November 2018 to \$204.1 billion, as services imports jumped 4.7% to \$50.7 billion.

**FCPA:** Juan Jose Hernandez Comerma of Weston, Fla., was sentenced Jan. 8 in Houston U.S. District Court to 48 months in prison and \$127,000 fine for his role in scheme to bribe purchasing officials from Venezuela's state-owned energy company, Petroleos de Venezuela S.A. (PDVSA). Hernandez pleaded guilty in January 2017 to conspiracy to violate Foreign Corrupt Practices Act (FCPA) and violating FCPA. Hernandez is sixth defendant to be sentenced in Houston court and 19<sup>th</sup> to plead guilty in larger investigation. Most recently Jose Manuel Gonzalez Testino of Miami, dual U.S.-Venezuelan citizen, pleaded guilty May 29 for his role in scheme (see **WTTL**, June 3, page 6).

**STEEL ROD:** In 5-0 final vote Jan. 10, ITC found U.S. industry is materially injured by dumped imports of carbon and alloy steel threaded rod from Taiwan.

USTR: Sen. Robert Menendez (D-N.J.) is preparing bill to establish inspector general for U.S. Trade Representative's (USTR) office, he announced at Senate Finance Committee USMCA hearing Jan. 7. "Nearly every other cabinet level agency has a statutory inspector general to increase transparency, make government more accountable, and crack down on waste, fraud, and abuse. It's time USTR had one as well," Menendez said in his opening statement.

NOMINATIONS: President Jan. 6 sent Senate nominations of Jessie Liu, currently U.S. attorney for D.C., to be Treasury under secretary for terrorism and financial crimes and Deputy USTR C.J. Mahoney to be State legal adviser.

VENEZUELA: OFAC Jan. 7 issued amended Venezuela-related General License (GL) 6A extending authorization of maintenance or wind-down of transactions involving Venezuelan television station Globovision Tele CA and its subsidiaries until Jan. 21. OFAC issued original GL in January 2019 (see WTTL, Jan. 14, 2019, page 3).

WOOD FLOORING: CAFC Jan. 10 affirmed CIT decision on Commerce's treatment of two subsets of separate-rate firms in antidumping order on multilayered wood flooring from China. Trade court affirmed in part and reversed in part. Specifically, CIT "affirmed inclusion of appellants in the order, but it held that Commerce had not justified inclusion of the voluntary-review firms in the order," Circuit Judge Richard Taranto wrote for three-judge panel in *Changzhou Hawd Flooring Co. v. U.S.* "What is disputed is Commerce's decision not to free the non-individually investigated separate-rate firms from all obligations accompanying issuance of the order," he noted.

TRADE PEOPLE: Arancha Gonzalez, executive director at International Trade Center, was appointed Spain's foreign minister Jan. 10. She previously served as chief of staff to World Trade Organization (WTO) Director-General Pascal Lamy and as European Commission spokesperson. Jennifer Hillman, Georgetown University Law School professor and former WTO judge, in tweet same day called Gonzalez "one of the most dynamic and effective women in the international trade arena."...Mari Elka Pangestu, former Indonesian trade minister, was named World Bank managing director, development policy and partnerships, Jan. 9. Pangestu is currently senior fellow at Columbia School of International and Public Affairs, as well as professor of international economics at University of Indonesia. She will take new role March 1.

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