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## BIS Adds Controls on Geospatial Imagery Software

In the first of what could be several upcoming rules on emerging technologies, Bureau of Industry and Security (BIS) Jan. 6 added “software specially designed to automate the analysis of geospatial imagery” to its “holding” Export Control Classification Number (ECCNs) 0Y521 series, specifically under ECCN 0D521.

Karen Nies-Vogel, director of the BIS Office of Exporter Services, told the agency’s Regulations and Procedures Technical Advisory Committee (RAPTAC) in September that potential proposed rules on emerging technologies could follow two different tracks: one, adding new technologies to the holding ECCN as a stopgap measure, the other via the traditional rulemaking process, either by creating new ECCNs or adding new items to existing controls (see **WTTL**, Sept. 23, page 1).

Specifically, ECCN 0D521 now controls: “geospatial imagery ‘software’ ‘specially designed’ for training a Deep Convolutional Neural Network to automate the analysis of geospatial imagery and point clouds,” the Federal Register notice said. The transfer is effective immediately and will be valid for a year or until the item is re-classified under a different ECCN, under an EAR99 designation, or the 0Y521 classification is extended. Comments on the interim final rule are due in 60 days.

In August 2016, BIS added certain targets “specially designed” for production of tritium and related “development” and “production” technology to ECCNs 0A521 and 0E521 (see **WTTL**, Aug. 8, 2016, page 6). The agency established the 0Y521 series of ECCNs in April 2012. Items are controlled for regional stability (RS) Column 1 reasons, with a case-by-case license review policy for all destinations except Canada.

## District Court Vacates Exxon Russia Penalty

Citing the lack of “fair notice” that the conduct was prohibited, a federal judge Dec. 31 vacated a civil penalty Treasury’s Office of Foreign Assets Control (OFAC) imposed on

ExxonMobil in 2017 over the company's supposed violation of Ukraine sanctions through contracts with Russian oil company Rosneft and its president and chairman, Igor Sechin. Exxon challenged the \$2 million penalty the same day it was announced, citing administration guidance and prior Supreme Court rulings (see **WTTL**, July 24, 2017, page 1). Charges involved the signing of eight legal documents related to oil and gas projects in Russia in May 2014. Sechin was added to OFAC's Specially Designated Nationals (SDN) list in April 2014 under Executive Order (EO) 13661.

Legal observers note that the most important point is the holding: "Thus, the Court holds that, under the circumstances, 'a regulated party acting in good faith' would not 'be able to identify, with 'ascertainable certainty,' the standards with which [OFAC] expects parties to conform . . . ' Accordingly, OFAC's penalty notice violates the Due Process Clause of the Fifth Amendment by depriving Exxon of fair notice," Judge Jane Boyle wrote.

"Namely, public statements leading up to the Regulations were equivocal with respect to Exxon's conduct. Yet despite these equivocal statements, OFAC issued the Regulations with broad language that fails to delineate their boundaries," she said.

"Further, after penalizing Exxon, OFAC provided guidance clarifying that conduct like Exxon's was prohibited. To ignore these circumstances and find fair notice based on Exxon's failure to inquire is to shift the fair-notice burden entirely. Indeed, 'a regulation cannot be construed to mean what an agency intended but did not adequately express,'" Boyle added.

Exxon challenged OFAC's penalty on "three independent grounds: (1) the Regulations do not prohibit Exxon's conduct, and OFAC's interpretation of the Regulations is not entitled to deference; (2) OFAC drew arbitrary and capricious distinctions by imposing the penalty; and (3) OFAC failed to provide fair notice of its interpretation of the Regulations in violation of due process."

## **Lawmakers Question Details of China Trade Deal**

As the president prepares to sign the recently completed "phase one" trade deal with China, lawmakers are wondering just what he will be signing. While the administration released broad contours, the details of the deal, including any future tariff cuts, are unknown, leaving observers skeptical.

At the same time, manufacturing economic activity contracted in December, registering the lowest Purchasing Managers' Index (PMI) since June 2009, according to an Institute for Supply Management (ISM) report released Jan. 3. "Global trade remains the most significant cross-industry issue, but there are signs that several industry sectors will improve as a result of the phase-one trade agreement between the U.S. and China," ISM survey chair Timothy Fiore said in a statement.

After months of missteps and false starts, hope sprung eternal Dec. 12 when U.S. officials announced a “phase one” deal to avoid additional 15% tariffs that were scheduled to begin three days later (see **WTTL**, Dec. 16, page 1). The Federal Register notice formally lifting the tariffs was published Dec. 18.

“I was pleased to hear reports that the Phase One deal will include a critically important commitment from the U.S. to cut tariffs on many goods. As you finalize the agreement, I ask you to ensure the deal covers both section 301 and retaliatory tariff relief for Pennsylvania importers and exporters,” Sen Pat Toomey (R-Pa.) wrote to U.S. Trade Representative (USTR) Robert Lighthizer Jan. 2.

“If reports are accurate, you are to be commended if China has agreed to implement structural reforms in the areas of intellectual property, forced technology transfer, and access to the Chinese market for American financial firms. Although more work remains to be done, such progress will strengthen our economy and combat China’s malevolent mercantilist behavior,” Toomey wrote.

The president announced his intention to sign the deal himself, which is unusual, as the USTR traditionally signs such agreements. “I will be signing our very large and comprehensive Phase One Trade Deal with China on January 15. The ceremony will take place at the White House. High level representatives of China will be present. At a later date I will be going to Beijing where talks will begin on Phase Two!” the president tweeted Dec. 31.

## **Santa Claus Delivers New ITAR Definitions**

In either a genius PR move or the holiday equivalent of a Friday night news dump, State’s Directorate of Defense Trade Controls (DDTC) Dec. 26 clarified the carveout for encrypted data transmissions. While exporters were busy boxing up decorations, the agency released an interim final rule with long-awaited definitions of “activities that are not exports, reexports, retransfers, or temporary imports.”

“The activities included in the new definition are: Launching items into space, providing technical data to U.S. persons within the United States or within a single country abroad, and moving a defense article between the states, possessions, and territories of the United States,” the Federal Register notice said. “The definition also clarifies that the electronic transmission and storage of properly secured unclassified technical data via foreign communications infrastructure does not constitute an export,” it added.

In a nutshell, the latest ITAR update “incentivizes industry to better protect sensitive information while facilitating the use of state of the art cloud technologies,” State’s Political-Military (PM) Bureau tweeted Dec. 26. Public comments are due Jan. 27, and the rule goes into effect March 25.

DDTC has been talking about these rules since export control reform wound down. Most recently, Rob Hart, acting regulatory & multilateral affairs division chief in DDTC’s Office

of Defense Trade Controls Policy, previewed the rules at the Bureau of Industry and Security (BIS) annual conference in July (see **WTTL**, July 15, page 4). BIS and DDTC first issued parallel proposals for harmonized definitions in June 2015. In response to certain of the definitions, including prior restraint, DDTC heard from 12,000 gun owners and several senators. A year to the day after those proposals, BIS and DDTC published a final, but only partial list in June 2016, while punting the controversial ones down the road.

“This interim final rulemaking addresses certain of the remaining amendments from the 2015 proposed rule, and the Department continues to reserve the remaining amendments for consideration in separate rulemakings,” the latest rule noted.

In addition to the export carveout, DDTC created a definition of “access information” and revised the definition of “release” to address the provision of access information to an unauthorized foreign person. “Access information allows access to encrypted technical data in an unencrypted form, such as decryption keys, network access codes, and passwords. An authorization is required to release technical data through access information to the same extent that an authorization is required to export the technical data when it is unsecured by encryption,” the rule noted.

## **Tariffs Hurt Employment, Prices, Federal Reserve Says**

While using tariffs as trade leverage is a favorite tool of the administration, certain manufacturing sectors experience reduced employment and increased prices, which do not offset the small positive effect of import protection, according to a Federal Reserve Board report released Dec. 23.

“Tariff increases enacted in 2018 are associated with relative reductions in manufacturing employment and relative increases in producer prices. In terms of manufacturing employment, rising input costs and retaliatory tariffs each contribute to the negative relationship, and the contribution from these channels more than offsets a small positive effect from import protection,” the report noted.

The paper looked at the short term effects of three tranches of tariffs: The first in February 2018 against large residential washing machines and solar panels/ modules; second, on steel and aluminum imports beginning in March 2018 and the follow-on retaliatory tariffs; and finally the Section 301 tariffs on U.S. imports from China.

Specifically, “shifting an industry from the 25th percentile to the 75th percentile in terms of exposure to each of the three channels of tariffs is associated with a reduction in manufacturing employment of 1.4%, with the positive contribution from the import protection effect of tariffs (0.3%) more than offset by the negative effects associated with rising input costs (-1.1%) and retaliatory tariffs (-0.7%),” the Fed explained.

“While the longer-term effects of the tariffs may differ from those that we estimate here, the results indicate that the tariffs, thus far, have not led to increased activity in the U.S.

manufacturing sector. In addition, our results suggest that the traditional use of trade policy as a tool for the protection and promotion of domestic manufacturing is complicated by the presence of globally interconnected supply chains,” it concluded.

\* \* \* **Briefs** \* \* \*

**HAPPY NEW YEAR:** New collection format for Commodity Jurisdiction form DS-4076 is now available on DECCS portal, DDTC announced Dec. 23. Changes “address additional sources of jurisdiction considerations and refinements to the supporting information,” agency said. New electronic CJ application launched in May (see **WTTL**, May 13, page 5). For questions regarding these changes, contact DDTC Help Desk: [dtradehelpdesk@state.gov](mailto:dtradehelpdesk@state.gov)

**EX-IM BANK:** President Dec. 20 signed end-of year spending bill (H.R. 1865) that included seven-year reauthorization of Ex-Im Bank, day after the Senate passed bill in 71-23 vote (see **WTTL**, Dec. 23, page 1). House approval arrived two days earlier in 297-120 vote.

**MALI:** OFAC Dec. 20 designated four Malian individuals for “threatening the peace, security, or stability of Mali” and one individual for “obstructing humanitarian assistance.” U.S., acting in coordination with UN, “is targeting militia leaders, extremist supporters, and traffickers,” said Deputy Treasury Secretary Justin Muzinich in statement.

**WASHING MACHINES:** President will modify safeguard measure on imported large residential washing machines by “allocating annual tariff-rate quota of 1.2 million units by quarter beginning in February 2020,” USTR announced Dec. 20. In October 2018, WTO DSB agreed to establish dispute panel on safeguard measure (see **WTTL**, Oct. 1, 2018, page 6).

**RIBBONS:** CIT Dec. 30 remanded Commerce determination in countervailing duty proceeding on narrow woven ribbons with woven selvedge from China in *Yama Ribbons and Bows Co. v. U.S.* (slip op. 19-173). “Commerce imposed a countervailing duty on exports of Yama’s merchandise without reaching a finding of fact that a benefit from the EBCP [Export Buyer’s Credit Program] actually was conferred upon Yama through participation the EBCP by Yama or its customers. Instead... Commerce inferred participation in the EBCP, and the conferring of a benefit therefrom, as ‘facts otherwise available’ with an ‘adverse inference,’” Chief Judge Timothy Stanceu wrote.

**AGOA:** President Dec. 26 determined that Niger, Central African Republic, and The Gambia “have not established effective visa systems and related customs procedures” required for preferential treatment under AGOA section 112(a). At same time, White House determined that Guinea-Bissau and Niger satisfy criterion for treatment under AGOA section 112(c). President formally terminated Cameroon’s designation as AGOA beneficiary as of Jan. 1, due to human rights violations, White House previously announced in October (see **WTTL**, Nov. 4, page 9).

**TRADE PEOPLE:** President Jan. 3 announced intent to nominate C.J. Mahoney to be State legal adviser. Senate confirmed Mahoney in March 2018 as deputy USTR in charge of investment, services, environment, Africa, China and Western Hemisphere (see **WTTL**, March 5, 2018, page 3). He was previously partner at Williams & Connolly LLP. Prior to joining law firm, Mahoney clerked for Supreme Court Justice Anthony Kennedy.

**CIT:** President Jan. 3 renominated Stephen Vaden to be CIT judge. He currently serves as Agriculture general counsel. Before joining department in 2017, Vaden was appellate litigator in private practice. Previous nomination was sent to Senate in October (see **WTTL**, Oct. 17, page 7).