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## Administration Rolls Out Export Control Initiatives

More than a year of talk about the Obama administration's plans for export control reforms has turned into a rush of Federal Register proposals and requests for public comments on specific changes to export control lists and export licensing policies (see stories below and on page 2). State's Directorate of Defense Trade Controls (DDTC) asked for comments Dec. 10 on its proposed "tiering" of items in Category VII of the U.S. Munitions List (USML) and its criteria for converting 18 USML categories into positive lists (see **WTTL**, Dec. 6, page 1).

The Bureau of Industry and Security (BIS) published a notice of inquiry Dec. 9 on tiering the Commerce Control List (CCL) and a proposal for a new License Exception Strategic Trade Authorization (STA). The promised consolidation of denied party lists, 22,296 names, which was to be published on the BIS website, was published instead on [www.export.gov](http://www.export.gov), with the BIS website having a link to that site. President Obama's picture on the website has to be clicked to find it.

"We've also been working to reform our export control system with high-tech companies like some of yours in mind, so that American firms that make products with national security implications can stay competitive even as we better protect our national security interests," Obama told the President's Export Council Dec. 9. "When this council met in September, some of you asked that we make it easier for businesses to participate in these reform efforts. So today, I'm pleased to announce that we're publishing a first set of guidelines for what products should be controlled going forward, and the licensing policies that will apply to them," he said.

Administration officials working on the export control effort had been getting sensitive about complaints from some in the exporting community that nothing had been formally produced from their work. Those officials now promise a steady stream of proposals in the coming weeks and months to implement phases one and two of the reform plan and say most of the reform plan can be implemented through administrative actions that don't require legislation.

## Russia Excluded from Eligible License-Free Destinations

The BIS proposal in the Dec. 9 Federal Register to create a License Exception Strategic Trade Authorization (STA) for nearly 164 countries conspicuously omits Russia from any of the lists of countries eligible for license-free trade. Also excluded is Malaysia. The STA exception would permit license-free "transactions involving certain items subject to the Export Administration Regulations (EAR) to certain destinations." There will be three different groups of



eligible destinations. The proposed rules would require exporters to obtain assurances from their consignees that they will not reexport to non-listed countries or prohibited end-users and to maintain and provide BIS with export records. Commerce Secretary Gary Locke first raised prospects for a license-free zone in 2009 (see **WTTL**, Aug. 2, page 1).

The most liberal treatment would be for exports to 37 countries that belong to all four of the major export control regimes or to NATO and at least three of the groups. STA could be used to export to them products controlled for “national security (NS); chemical or biological weapons (CB); nuclear nonproliferation (NP); regional stability (RS); encryption items (EI); crime control (CC), but not ECCNs 0A981, 0A982, 0A983, 0A985 or 0E982; and/or significant items (SI).”

A second list comprising Albania and Israel is eligible for STA exports of NS items only. A third list of 125 countries would be eligible to receive items controlled only for NS reasons for civil end-uses only. Among those 125 are India, Hong Kong, Malta and Saudi Arabia. Among those missing from all the lists are Pakistan, Egypt, Indonesia and United Arab Emirates.

Russia’s exclusion from any of the lists reopens questions about why it was allowed to join Wassenaar in the first place and its adherence to the regime’s goals. Russia has reportedly become the largest exporter of defense goods to China and worked on Iran’s nuclear program. “Russia clearly produces conventional weapons; they export conventional weapons; and it’s well known that some of those exports include places [where] we would not make those same exports, if we were doing the exporting,” one U.S. official told **WTTL**. “Therefore, it makes sense that one would want to have some ability to know what will be happening with the items that we send,” he added.

Diversion concerns played a key role in keeping Malaysia off the lists, but Kuala Lumpur’s recent export control reforms might allow it to join later, the U.S. official indicated. “The Malaysians have put in place very good export controls legislation and as that legislation comes into effect and is implemented, as we hope will be the case, and resolves the diversion issues, they could easily be put into the status in the future,” the official stated. “Right now, it is very well known that there are concerns about diversion in Malaysia,” he said. A team of U.S. compliance officials is scheduled to be in Malaysia the week of Dec. 13 to discuss these controls.

## **BIS Asks for Comments on “Tiering” CCL**

As part of the effort to create eventually a single, three-tiered list of controlled defense and dual-use goods and technologies, BIS asked for public comment in the Dec. 9 Federal Register on how the CCL could be amended to fit all Export Control Classification Numbers (ECCNs) into those tiers. Administration officials have said their initial goal is to create two parallel, tiered lists, one for the CCL and one for the USML. Once – and if – legislation is enacted to allow the merging of the two lists, the lists would be combined into a single, positive, three-tier list. The results of the first effort to apply this tiering system to the USML were in a separate proposal that DDTTC published in the Federal Register Dec. 10 (see story page 3).

The BIS proposal describes the three tiers and defines the terms used to determine whether items provide a “critical” (Tier 1), “substantial” (Tier 2) or “significant” (Tier 3) advantage to U.S. military or intelligence capabilities. The agency also asks for advice on how each ECCN should fit under each of these tiers.

Part of the criteria that will determine an item’s tier will be its foreign availability outside a list of countries that belong to current multilateral export control regimes. The notice says: “BIS also seeks public comments on whether items with the capabilities and characteristics described on the CCL, and controlled for other than solely anti-terrorism (AT) reasons or Crime Control (CC) reasons, are indigenously developed, produced, or enhanced (a) almost exclusively in the United States or (b) in destinations other than Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany,

Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Turkey, Ukraine, or the United Kingdom.” Although the CCL is already a “positive” list, BIS wants advice on how the list could be improved further.

“The Administration wants the lists of items controlled pursuant to export control laws and regulations to be sufficiently ‘positive,’ clear, and precise so that persons, including persons who are not knowledgeable about U.S. export controls, who understand the technical parameters, characteristics, and capabilities of an item ordinarily will be able to determine its export control classification and jurisdictional status without needing to consult the government for an interpretation,” the agency explains. “For these reasons, BIS seeks public comment on how to improve the descriptions of items on the CCL that are unclear or that use vague, open-ended, or subjective criteria,” it states.

## **DDTC Proposes Conversion of Category VII and Tiering Criteria**

Few defense articles now subject to export controls under Category VII of the USML would face the most stringent export licensing controls under a DDTC proposal published in the Dec. 10 Federal Register to convert the category into a “positive,” three-tiered list. A limited number of articles would be in so-called Tier 1, which is supposed to protect the “crown jewels” of U.S. defense and intelligence capabilities. Most articles, parts, components, materials and technology would be placed in less stringent controls in Tiers 2 and 3. In a separate Federal Register notice, DDTC also asks for public comment on the criteria and methodology an interagency committee used to convert the category into a model for the Obama administration’s export control reform plan (see **WTTL**, Dec. 6, page 1).

Administration officials report that 18 interagency groups have been formed to review other categories on the USML and 12 of them have already started their work. No changes are planned for classified articles and technical data under Category XVII or miscellaneous items under Category XXI. No changes will be made for controls involving low-observable stealth technology, they say.

Category VII controls tanks and other military vehicles. Among vehicles that are proposed for Tier 1 are: vehicles “specially designed” for deploying “weapons of mass destruction” or “specially designed” to mount or contain any system designated as Tier 1 from any other category. Also proposed for Tier 1 are “Developmental armor components or parts” and materials for “Developmental armor for the vehicles controlled in this Category.” “Design or manufacturing technology ‘required’ for the articles controlled in this Category” and defense services providing “assistance in the design, development, production or depot level maintenance on any defense article designated as Tier 1 in this Category” also are proposed for Tier 1.

An example of how the proposal fleshes out the generalities of the current USML into a positive list can be seen in the proposed treatment of tanks and vehicles. The current USML wording controls: “Military tanks, combat vehicles, half-tracks and gun carriers.” The proposed version would control: “Tanks manufactured after 1955 with any of the following: (1) 120 mm or larger gun; (2) A weapon designated as a Tier 2 defense article; (3) A fire control system or sensors designated as a Tier 2 defense article; (4) Armored components or materials designated as Tier 2 defense articles; (5) An autoloader or similar assisted loading/round selection; (6) A hybrid electric propulsion drive system; or (7) Countermeasures (e.g., radar jamming, infrared tailored smoke, electromagnetic pulse generator) designated as Tier 2 defense articles.”

## **ITA Must Issue Antidumping Order after Final ITC Ruling**

The International Trade Administration (ITA) doesn’t have the discretion to delay issuing an antidumping order to Customs and Border Protection (CBP) to collect cash deposits on goods

subject to a final International Trade Commission (ITC) ruling even if litigation is still pending, the Court of Appeals for the Federal Circuit (CAFC) ruled Dec. 9 in *Diamond Sawblades Manufacturers Coalition v. U.S.* ITA has to act after it receives notification from ITC that the commission has made a final remand determination, the court stated.

“This case presents a highly technical issue of statutory construction that is of some significance to the administration of the antidumping laws,” the appellate court declared. The government had argued that “Commerce is not only not required to issue the antidumping duty orders and collect cash deposits during the pendency of that challenge, but that it does not have the authority to do so.” The coalition, which were the appellees in the case, contended Commerce is required to do so absent a stay from the court. “We agree with the Court of International Trade and the appellees,” the CAFC ruled.

The court said its ruling doesn’t change its order in *Timken*, which dealt only with liquidation and did not address the issuance of antidumping duty orders. “Our holding today that Commerce is required to publish antidumping duty orders upon notice of a final affirmative injury determination by the Commission is not affected by, and does not disturb *Timken*,” it declared.

## Enactment of Korean FTA Seen Likely in First Half 2011

With President Obama putting his prestige behind it, the business community set to roll out its traditional full-court lobbying campaign and U.S. unions divided, the U.S.-Korea Free Trade Agreement (FTA) could get congressional approval by the middle of 2011 (see **WTTL**, Dec. 6, page 4). Republicans who will take over the House in January are also pushing to see approval of the pacts with Panama and Colombia in the first half of the year. Lawmakers, however, still have to address several parliamentary issues, including how to deal with the supplemental agreements the U.S. reached with Korea and whether those changes are eligible for “fast-track” treatment along with the original accord. Members are also seeking advice on whether they can bring up the Colombia accord, which President George W. Bush sent Congress before he left office and House Speaker Nancy Pelosi set aside, or whether Obama has to resubmit it.

Incoming Ways and Means trade subcommittee chairman Kevin Brady (R-Texas) told the U.S. Chamber of Commerce Dec. 7 that House Speaker-designate John Boehner and incoming Ways and Means head Dave Camp (R-Mich.) support the three FTAs. “I believe the preference is to move those three pending agreements, our hope, in the first six months of next year,” Brady said. “That is our goal.”

Obama strongly plugged the Korea deal in remarks to reporters Dec. 4 and again in a Dec. 9 meeting with his President’s Export Council. While praising U.S. Trade Representative Ron Kirk’s effort to reach the supplemental agreement, the president also jokingly acknowledged complaints that the administration didn’t do anything on trade for almost two years. “He finally earned his paycheck,” Obama quipped. The president also said trade and competitiveness would again be topics he will highlight in his State of the Union speech in January.

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

**CLOUD COMPUTING:** New guidance on application of export controls to cloud computing for providers and users are on desk of BIS Assistant Secretary Kevin Wolf for decision, Eileen Albanese, director of BIS National Security and Technology Controls Office, told Practising Law Institute Dec. 6. New advisory opinion to update advice in 2009 also coming, she reported (see **WTTL**, March 30, 2009, page 1). Also coming is guidance on complying with new visa application form I-129 requirements to conduct deemed export review of technology to which foreign employees will have access (see **WTTL**, Nov. 22, page 1).

**TRADE FIGURES:** Goods exports in October of \$112.3 billion were up nearly 18% from October 2009 and highest since August 2008. Exports of food, feed and beverages were at record high. Services exports hit record high of \$46.4 billion, up 8.3% from year ago. Goods imports reached \$163.7 billion, 17.6% increase from October 2009. Services imports rose 8% from last year to \$33.7 billion.