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BIS Will Revisit Proposed License Amendments

What was old is new again. The Bureau of Industry and Security (BIS) intends to publish a proposed rule on export license amendments in 2022, Timothy Mooney, senior export policy analyst with the agency's Regulatory Policy Division, told the agency's Regulations and Procedures Technical Advisory Committee (RAPTAC) meeting Dec. 14.

If that sounds familiar, BIS circulated a proposed rule in 2017, but there was lot of interagency concern at the time, Mooney said (see **WTTL**, Oct. 9, 2017, page 2). The earlier proposal was "pretty ambitious," and the new one will have to be more limited in terms of what changes to allow, he told RAPTAC.

Since the original proposal, export licenses are now four years in duration and can include more end-users, which only adds to the complexity. At the same time, the "need has increased," Mooney said. The prior rule would have proposed adopting a license amendment process, including making changes to SNAP-R system to allow for licensees to request certain changes (amendments) to currently valid licenses.

At the time of the 2017 proposal, BIS officials believed that the benefits of adopting the license amendments process would create a more "efficient and transparent" process for requesting changes and reduce the number of new licenses that need to be reviewed.

Canada Moves on Digital Tax Despite OECD Agreement

Despite ample warning, U.S. administration officials and industry groups Dec. 14 denounced Canada's formal tabling of motions in advance of "legislative proposals regarding the Digital Services Tax [DST], on which stakeholder input is invited, Canadian Deputy Prime Minister Chrystia Freeland announced. In October, Freeland confirmed her government would continue with its planned DST in case a deal on a 15% global minimum tax falls through (see **WTTL**, Oct. 11, page 4). Canada was among the more than 130

members of the Organization of Economic Cooperation and Development (OECD) that made the agreement in principle. U.S. Trade Representative (USTR) Spokesperson Adam Hodge warned that the USTR's office "would examine all options, including under our trade agreements and domestic statutes" if Canada adopts a DST. "That [OECD] agreement will help end the race to the bottom over multinational corporate taxation by leveling the corporate tax playing field. Canada's proposed DST would create the possibility of significant retroactive tax liabilities with immediate consequences for U.S. companies," Hodge noted.

Global tech trade association ITI also balked at the announcement. "We strongly encourage Canada to demonstrate its commitment to the multilateral negotiations by withdrawing its unilateral tax proposal and continuing its engagement to develop a consensus-based solution to bring much-needed certainty to businesses and stability to the international tax system," said ITI Director of Tax, Policy and Trade Megan Funkhouser in a statement.

Administration Takes Action on Chinese Firms

In a concerted action, Treasury's Office of Foreign Assets Control (OFAC) and BIS added 45 firms to its respective block lists to address ongoing threats to U.S. national security and foreign policy, both human rights abuses in Xinjiang and support of Iran's military programs.

For its part, OFAC Dec. 16 blocked U.S. investment in eight Chinese technology firms that "actively support the biometric surveillance and tracking of ethnic and religious minorities in China, particularly the predominantly Muslim Uyghur minority in Xinjiang." In the Federal Register the next day, BIS added 37 entities in China, Georgia, Malaysia and Turkey to its Entity List.

The OFAC-designated entities, which are already on the BIS Entity List are: Cloudwalk Technology; Dawning Information Industry; Leon Technology Company Limited; Megvii Technology Limited; Netposa Technologies Limited; drone firm SZ DJI Technology; Xiamen Meiya Pico Information; and Yitu Limited.

BIS added CloudWalk Technology and NetPosa to the Entity List in June 2020 for human rights violations and abuses in Xinjiang (see **WTTL**, May 25, 2020, page 7). Cloudwalk has developed facial recognition software designed to track and surveil members of ethnic minority groups, OFAC noted. Others were added in October 2019.

Chinese Foreign Ministry Spokesperson Zhao Lijian denounced the OFAC move. "China always opposes U.S. moves to overstretch the concept of national security and exert unwarranted suppression on Chinese companies. The Chinese side has already shared the facts and truth on Xinjiang-related issues on many occasions. We will closely follow the relevant situation and firmly safeguard the legitimate rights and interests of Chinese companies," he said in his daily press briefing.

The Academy of Military Medical Sciences (AMMS) in China and eleven of its research institutes “use biotechnology processes to support Chinese military end uses and end users, to include purported brain-control weaponry,” the latest BIS notice said. China Electronics Technology Group Corporation 52nd Research Institute, Shaanxi Reactor Microelectronics, Shanghai AisinoChip Electronics, Hangzhou Hikmicro Sensing Technology, Aerosun Corporation, Changsha Jingjia Microelectronics, Fujian Torch Electron Technology and Inner Mongolia First Machinery Group were added “for their support of China’s military modernization.”

HMN International, Jiangsu Hengtong Marine Cable Systems, Jiangsu Hengtong Optic-Electric, Shanghai Aoshi Control Technology, and Zhongtian Technology Submarine Cable were included “for acquiring and attempting to acquire U.S.-origin items in support of military modernization for the People’s Liberation Army.” Wavelet Electronics, Comtel Technology Limited, and HSJ Electronics “have supplied or attempted to supply U.S.-origin items that could provide material support to Iran’s advanced conventional weapons and missile programs.”

BIS added Chinese firms Hong Kong Cheung Wah Electronics Technology Company Limited, Hyper Systems Union Limited, Shenzhen Rion Technology, and Thundsea Electric Limited; Gensis Engineering in Georgia and Turkey; Integrated Scientific Microwave Technology in China and Malaysia; ROV Solutions in China and Georgia; SAEROS Safety ERO Company in Georgia; and Vangurd Tec Makina Sanyi Ithalat in Turkey.

“Specifically, these entities are a part of a network used to supply or attempt to supply Iran with U.S.-origin items that would ultimately provide material support to Iran’s defense industries, in violation of U.S. export controls.” At the same time, BIS added three additional aliases (HMN Technologies, Huahai Zhihui Technology Co., Ltd., and HMN Tech) to the existing entry for Huawei Technologies.

China “is choosing to use these technologies to pursue control over its people and its repression of members of ethnic and religious minority groups. We cannot allow U.S. commodities, technologies, and software that support medical science and biotechnical innovation to be diverted toward uses contrary to U.S. national security,” said Commerce Secretary Gina Raimondo.

Census Nears Proposal on Puerto Rico Filing Requirement

Census is close to publishing a Federal Register notice in response to comments on removing export filing requirements from shipments from U.S. states to Puerto Rico, Omari Wooden, Census assistant division chief, trade outreach and regulations, told the BIS RAPTAC meeting Dec. 14.

Whether this will be a proposal or an interim final rule has not been determined, but Wooden said the rule is “not going to be the end of the conversation.” Census first pub-

lished its long-promised Advance Notice of Proposed Rulemaking (ANPR) in September 2020, requesting comments on the unique Electronic Export Information (EEI) filing requirements (see **WTTL**, Sept. 21, 2020, page 3).

With the 2020 ANPR, the bureau requested public comments specifically on what impact the change would have and where companies and agencies could get replacement data on exports to the island. “The Census Bureau is exploring options to include Puerto Rico in existing surveys to mitigate the significant loss of information about the economy of Puerto Rico that would result from eliminating the filing requirement. However, using other existing surveys to collect data on the economy of Puerto Rico would not result in the same data set that is currently available,” the notice said.

Census received 60 comments on the rule, including a mix of positive and negative responses. “To our knowledge, this is the only source for such data on shipments to and from Puerto Rico and from the U.S. Virgin Islands. Additionally, EEI data represents the minimum useful trade information, and it is collected through an existing government system that is familiar to our industry. The creation of a new reporting requirement and system would only increase the costs and burdens on shippers, carriers, and end customers,” Atlantic Overseas Express commented.

The National Federation of Independent Business (NFIB) urged Commerce “to eliminate the EEI filing requirement for shipments between a point in one of the fifty States and a point in Puerto Rico or the U.S. Virgin Islands, or between points in the two territories,” it wrote. “Commerce should minimize any governmental paperwork burden (electronic or otherwise) on, and minimize any invasion into the privacy of, U.S. citizens engaged in lawful commercial transactions within the United States,” NFIB commented in 2020.

Security Industry Wants Broader Exceptions to Wassenaar Rule

BIS received 12 comments on its recent rule implementing changes to controversial cyber intrusion software controls that Wassenaar Arrangement (WA) members agreed to at its December 2017 plenary. The comments ranged from security analysts who asked for broader exceptions to the rule, to nonprofits who requested BIS expand the definition to cover other surveillance tools.

BIS in November published 29 new Frequently Asked Questions (FAQs) on the rule (see **WTTL**, Nov. 22, page 6). After eight years of industry comments and agency pushback, BIS finally published its interim final rule in October. The rule, which will go into effect in January, 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.

“The rules use outdated concepts of technology that are rapidly becoming irrelevant in the face of the realities of modern computing environments, software, and the global supply chains supporting these systems. Broad additional exemptions are needed to prevent

significant harms to cybersecurity industry, research, and supply chain crisis recovery,” Sergey Bratus, Ph.D., research associate professor at Dartmouth College, commented. “Any means of control must have clear exceptions for these applications. It is vitally important that these exceptions protect smaller innovative entities, which tend to overwhelmingly lead cybersecurity innovation and create new classes of tools to solve software repair, updating, patching, and sustainability challenges,” Bratus wrote. “The control should also be careful to not hurt some of the very goals which appear to be driving implementation,” he added.

Dave Aitel, partner at Cordyceps Systems, recommended adding one more exception to License Exception ACE: “a restriction on only having to worry about the technology controls if they are part of a commercial transaction,” he wrote. “Tons of effort has clearly gone into ACE to avoid negatively affecting the research community, but because of a lack of clarity, we are going to force everyone in that community to hire an export control lawyer at great expense and stress - and the last thing we need is a dampening effect on our security community right now,” Aitel added.

In contrast, some firms welcomed the rule. “Alleviating licensing burdens will have an immediate, positive impact on U.S. industry as U.S. exporters are able to export commercially available items without a license. U.S. companies and international partners use the cybersecurity items controlled under the Interim Final Rule -- hardware, software, and technology -- in their continuous efforts to deter cyber criminals, and the ability to share these items across borders will strengthen U.S. national security and ensure business continuity,” space technology company Maxar commented.

Citing the complexity of the rule, the Cybersecurity Coalition requested that BIS: Develop clear guidelines on the rule; ensure appropriate opportunities for industry engagement and input on the guidelines; and delay implementation until the guideline production and subsequent engagement with industry have taken place.

For example, the Coalition would like more clarification on what specific categories of cybersecurity products the new controls cover. “The controls included in the interim final rule mirror the WA, but this is the first time these controls would be applied to exports from the United States. Further guidelines would be helpful to ensure that cybersecurity companies are correctly interpreting any nuances that exist between the different controls. The FAQ does address many of the Coalition’s questions regarding the coverage of penetration testing software but does not clearly state which other product categories are covered,” it commented.

CompTIA also requested more clarification and even a decision tree. “BIS should clarify that simply having personal knowledge is not inherently treated as ‘technology.’ As written, the answer may cause cybersecurity researchers to mistakenly believe that they need an export license simply to travel to certain destinations even if they aren't creating discrete pieces of documentation/other forms of ‘technology’ that could be subject to the EAR,” the group commented.

Access Now, an international non-governmental, nonprofit organization, commented that BIS should consider controlling a larger set of surveillance technology items, beyond cybersecurity items, including biometric surveillance technologies; electronic systems or equipment, designed for surveillance and monitoring of the electromagnetic spectrum for military intelligence or security purpose; and unmanned aerial vehicles capable of conducting surveillance.

Akin Gump requested that BIS reopen the public comment period until Jan. 5, 2022, which is two weeks before the rules' effective date. "This additional time will provide us, and other stakeholders of the cybersecurity community, with a more meaningful opportunity to evaluate and comment on the potential impact of these rules before their effective date. BIS has recognized that complex rulemakings sometimes merit additional time for industry and the public to provide thoughtful comments," the law firm wrote.

Census Proposes Adding Country of Origin to Export System

It's December, time for changes to the Automated Export System (AES). Census proposed one AES change and announced another as a done deal, that will add clarity to the agency's record-keeping and will force exporters to keep track of one more data point.

In the Federal Register Dec. 15, Census proposed to "add a conditional data element, country of origin, when Foreign origin is selected in the Foreign/Domestic Origin Indicator field" in the AES. "In addition to the new export reporting requirement, the proposed rule would make remedial changes to the FTR [Foreign Trade Regulations] to improve clarity and to correct errors," the notice said. Comments are due Feb. 14, 2022.

A week earlier, the bureau notified exporters of a change that will go into effect in January. Starting Jan. 13, AES will deploy a new compliance alert for exports filed under License Type C33: No License Required (NLR). "An item may require a BIS export license or license exception and may not be exported under the License Type C33 NLR depending on the reason for control of the ECCN [Export Control Classification Number(s)] and Country of Destination," the Dec. 6 broadcast noted.

"If a filer attempts to file Electronic Export Information (EEI) with an ECCN(s) and Country of Destination combination that is prohibited to be shipped under NLR, pursuant to the EAR, they will now receive" Response Code: 66Q, Census told exporters, who will have six months to correct the record. This is not a change in regulations, BIS officials told the agency's RAPTAC meeting Dec. 14.

Administration Welcomes Passage of Forced Labor Bill

The Senate Dec. 16 unanimously passed the Uyghur Forced Labor Prevention Act (H.R. 6256), two days after the House passed the compromise bill by a voice vote. The bill calls

for sanctions on those responsible for forced labor in Xinjiang or engaged in importing goods produced with forced labor. A week earlier, House passed its version (H.R. 1155) in 428-1 vote (see **WTTL**, Dec. 13, page 6). Rep. Thomas Massie (R-Ky.) voted no. The Senate approved a parallel bill (S. 65) by voice vote in July. The bill now moves to the president's desk for his signature.

"The administration will work closely with Congress to implement this bill to ensure global supply chains are free of forced labor, while simultaneously working to on-shore and third-shore key supply chains, including semiconductors and clean energy," Press Secretary Jen Psaki said in a statement.

"This bill represents our country's commitment to protecting human dignity and leading the fight against forced labor. We have a moral and economic imperative to eliminate this practice from our global supply chains, including those that run through Xinjiang, China, and exploit Uyghurs and other ethnic and religious minorities," USTR Katherine Tai said in a separate statement.

The National Association of Manufacturers (NAM) joined the chorus. "Manufacturers strongly condemn all forms of forced labor and today's passage of the Uyghur Forced Labor Prevention Act will help ensure that goods produced with forced labor do not enter the U.S. We look forward to working on the effective implementation of this legislation," NAM tweeted.

Not surprising, Chinese officials denounced the bill. "China firmly opposes the interference by the US Congress in China's internal affairs under the pretext of Xinjiang-related issues. By cooking up lies and making troubles on such issues, some US politicians are seeking to contain China and hold back China's development through political manipulation and economic bullying in the name of 'human rights,'" Chinese Foreign Ministry Spokesperson Zhao Lijian told reporters.

Commerce Guidance on Tariff Exclusions Needs Updating

Commerce's public guidance on exclusion requests from steel and aluminum tariffs does not reflect the last two years of changes, and the agency has no process to review and update its guidance as needed, the Government Accountability Office (GAO) found in a report released Dec. 13 (GAO-22-104564).

In a September 2020 report, GAO found that companies will continue to encounter delays in obtaining relief from Section 232 steel and aluminum tariffs until Commerce takes additional steps to improve the timeliness of its exclusion request decisions (see **WTTL**, Sept. 21, 2020, page 5).

"For example, the guidance does not state that domestic producers who object to a tariff exclusion request may have more time than previously allowed to supply comparable products. Without regularly updated public guidance, importers and producers may not be

informed of important details about the process, which could lead to challenges and delays for eligible requesters and potential objectors,” the GAO noted in its most recent report. The guidance also does not accurately reflect the department’s processing time.

“Commerce’s public guidance does not reflect the time it takes Commerce to decide many requests. Although Commerce states in its public user guide that most requests will be decided within 90 days, Commerce on average took 143 days to decide requests with objections. Requests without objections were decided in about 45 days, half of the publicly posted time frame,” the report added.

GAO recommended that Commerce “establish policies to regularly update its public guidance to incorporate changes in procedures and reflect its decision-making time frames.” Commerce concurred with the agency’s recommendations.

Congress Approves NDAA Without Sanctions, Firearm Amendments

When the Senate passed the 2022 National Defense Authorization Act (NDAA) in an 88-11 vote Dec. 15, the compromise bill did not include two high-profile amendments: one that would impose mandatory sanctions on Nord Stream 2 AG, and the other that would reinstate congressional notification on certain firearms exports.

Sen. Jim Risch (R-Idaho) and five GOP cosponsors introduced the Nord Stream amendment in November (see **WTTL**, Nov. 15, page 8). “The final bill should have included my amendment to deter Russian aggression against Ukraine by stopping the Nord Stream 2 (NS2) pipeline,” Risch said after the Senate debate. “Stopping NS2, when roughly a third of Russia’s budget comes from oil and gas, would show Putin Congress is serious about consequences for his actions,” he added.

Rep. Michael McCaul (R-Texas) introduced the amendment on the House side, which was removed by Democrats at the request of the White House. “The Nord Stream 2 pipeline is a Russian malign influence project. To remove this bipartisan amendment at a time when Russia is amassing troops on Ukraine’s border sends a dangerous message to Putin and to our adversaries that America is weak,” McCaul said in a separate statement.

The firearms amendment, sponsored by Rep. Norma Torres (D-Calif.), would have reinstated congressional notification before export licenses valued at \$1 million or more could be issued for semi-automatic weapons that had previously been on the U.S. Munitions List (USML). The amendment passed the House in a 215-213 vote in September, but it subsequently was removed from the final bill before being sent over to the Senate (see **WTTL**, Sept. 27, page 4).

EU, U.S. Coordinate Sanctions Threats on Russia

The Biden administration’s push to have the European Union (EU) finalize a broad package of sanctions against Russian banks and energy companies is proving far more

difficult for the 27-member body than expected. A large part of the difficulty is that 40% of Europe's energy needs comes from Russia. But following a Dec. 16 closed-door meeting of the European Council lasting more than two hours, the EU issued its strongest public statement since the crisis started, where Russia has lined up hundreds of thousands of troops on the Ukraine border.

“We would like to be in a situation where relations with Russia are good, but this is very much depending on the choices made by Moscow. Let there be no doubt: If Russia were to move against Ukraine, the Union will be in a position to take sanctions that could extract a massive cost. We have done our work in that respect,” European Commission President Ursula von der Leyen said following the meeting.

The European statement was backed up by a similar echo from the Biden administration's National Security Council (NSC). National Security Advisor Jake Sullivan “affirmed the U.S. commitment to continued close coordination, noting that our unity with Allies and partners is our greatest strength and that we will not make any decisions related to their security without them. All participants emphasized their commitment to Ukraine's sovereignty and territorial integrity in the face of Russian aggression,” NSC spokesperson Emily Horne said Dec. 16.

That statement has great importance because Russian President Vladimir Putin has been attempting to peel off reluctant members of the EU. “We hope that the United States will enter into serious talks with Russia in the near future regarding this matter, which has critical importance for maintaining peace and stability, using the Russian draft treaty and agreement as a starting point,” Russia said in a press release Dec. 17.

But the Biden administration is having none of it. “There're decades of precedent here and having these conversations through a range of formats: during the height of the Cold War and in the post-Cold war era through the NATO-Russia Council, the OSCE [Organization for Security and Cooperation in Europe], and other mechanisms. There's no reason we can't do that moving forward to reduce instability. But we're going to do that in partnership and coordination with our European allies and partners,” White House Spokesperson Jen Psaki said Dec. 17, on Air Force One en route to South Carolina.

*** * * Briefs * * ***

FOREIGN TRADE ZONES: USTR Dec. 14 requested that ITC conduct Section 332 investigation on free trade zones (FTZs). “Commission can be helpful to us in understanding the operation of U.S. FTZs and similar programs in Canada and Mexico, and whether and how policies and practices with respect to those respective FTZs and programs impact employment and the competitiveness of goods produced in FTZs in the United States,” USTR Katherine Tai wrote in request.

POLYMERS: In 5-0 preliminary vote Dec. 15, ITC found U.S. industry may be injured by allegedly dumped imports of superabsorbent polymers from South Korea.

NOMINATIONS: Senate Dec. 14 confirmed Thea Kendler to be BIS assistant secretary by voice vote.

IRAN: Sens. Jim Risch (R-Idaho) and Bob Menendez (D-N.J.) Dec. 16 introduced Senate version of Stop Iranian Drones Act (SIDA). Bill would clarify that U.S. sanctions under Countering America's Adversaries Through Sanctions Act (CAATSA) include supply, sale or transfer to or from Iran of unmanned combat aerial vehicles (UAVs). House Foreign Affairs Committee week earlier approved parallel House version (H.R. 6089) by voice vote (see **WTTL**, Dec. 13, page 6). "Iran's armed drone capability presents a growing threat to the Middle East. This legislation rightly imposes costs on the Iranian drone program and its supporters," Risch said in statement.

EXPORT ENFORCEMENT: Shawn Sabi of Atlanta was sentenced Dec. 13 to 19 months in prison followed by two years' supervised release in Savannah, Ga., U.S. District Court for submitting false or misleading export information. He pleaded guilty in May. In March 2021, Sabi "did knowingly cause freight forwarder Carotrans International to fail to file a Shippers Export Declaration in the Automated Export System by falsely declaring... the contents of the shipment to be only '115 pieces used household goods and personal effects,' when in fact, Sabi knew the shipment... contained his personal firearms, ammunition, and other items," plea agreement noted.

FCPA: Ricardo Alberto Martinelli Linares, dual citizen of Panama and Italy, pleaded guilty Dec. 14 in Brooklyn U.S. District Court to conspiracy to commit money laundering for his role in bribery scheme involving Brazilian construction conglomerate Odebrecht S.A. and high-ranking government official in Panama. He was extradited from Guatemala Dec. 10. Brother Luis Enrique Martinelli Linares pleaded guilty two weeks earlier same day as his own extradition (see **WTTL**, Dec. 6, page 5). Ricardo is scheduled to be sentenced May 13, 2022; Luis one week later. Both were indicted in November. Brothers were charged in criminal complaint in July 2020. Between August 2009 and January 2014, defendants allegedly "established shell companies in foreign jurisdictions; served as the signatories on certain of the shell company bank accounts; and personally sent and caused to be sent wire transfers through the structure of shell company bank accounts to conceal and spend bribery proceeds," complaint noted. Odebrecht pleaded guilty in December 2016 to conspiracy to violate Foreign Corrupt Practices Act (FCPA) for its involvement in scheme.

LINE PIPE: CAFC Dec. 10 affirmed CIT decision that overturned Commerce's determination on administrative review of antidumping duty order on welded line pipe from South Korea. "We agree with the Trade Court that the 2015 amendments to the antidumping statute do not authorize Commerce to use the existence of a PMS [particular market situation] as a basis for adjusting a respondent's costs of production to determine whether a respondent has made home market sales below cost," Circuit Judge William Bryson wrote for three-judge panel in *Hyundai Steel Company v. U.S.* "In light of our decision on the statutory construction issue, it is unnecessary for us to decide whether Commerce's finding of a PMS was supported by substantial evidence," he added.

EDITOR'S NOTE: In keeping with our regular schedule of 50 issues a year, there will be no **Washington Tariff & Trade Letter** issue Dec. 27. Our next issue will be Jan. 3, 2022. As always, we wish all our readers a HAPPY HOLIDAY and a HEALTHY AND PROSPEROUS NEW YEAR.