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## DDTC Proposes Revising Definitions, Fixing Clerical Errors

Proofreaders will be happy. State's Directorate of Defense Trade Controls (DDTC) Feb. 2 proposed several changes to its International Traffic in Arms Regulations (ITAR), including clarifying definitions, revising license exemptions and correcting administrative errors. Comments on the proposed rule are due April 4.

Specifically, State proposed revising the definitions of export and reexport "to clarify that any release of technical data to a foreign person described within the respective definitions is a release only to any countries in which that foreign person currently holds citizenship or permanent residency," the Federal Register notice said.

In addition, DDTC proposed replacing the term "national" with the ITAR-defined term "person" in the Canadian exemption "to be consistent with how foreign persons are defined in the ITAR," it said. The agency also proposed clarifying ITAR § 126.18(c)(2) "by stating that the screened employee, not the end-user or consignee, must execute a nondisclosure agreement to provide assurances that said employee will not transfer any unclassified defense articles to unauthorized persons," the notice added.

Finally, DDTC fixed administrative errors in the voluntary disclosures section of the ITAR by providing the correct references to exemptions pursuant to the Defense Trade Cooperation Treaties between the U.S. and Australia and the U.S. and the United Kingdom (UK).

## House Passage of Trade Bill Sets Up Senate Fight

When the House passed the America COMPETES Act (H.R. 4521) by a vote of 222-210 Feb. 4, trade observers knew the next step would be a contentious Senate conference fight, given the June U.S. Innovation and Competition Act (S.1260). As part of the larger legislative package to address U.S. competitiveness, House Democrats in January introduced

provisions to again reauthorize or extend several trade programs that have expired or need reform, including Trade Adjustment Assistance (TAA), the Generalized System of Preferences (GSP) and Miscellaneous Tariff Bill (MTB) (see **WTTL**, Jan. 31, page 2).

The House bill would also stop unfairly traded goods from exploiting the de minimis import threshold; empower the U.S. Trade Representative (USTR) to take strategic steps to improve supply chain resiliency; strengthen U.S. antidumping and countervailing duty (AD/CVD) laws; reaffirm the U.S. government's commitment to the WTO; and allow U.S. Customs and Border Protection to update its staffing model to better respond to the challenges of the modern trading system.

Commerce Secretary Gina Raimondo acknowledged that the trade provisions are the “most contentious” part of the bill where there is the “least bipartisan agreement,” she told reporters Feb. 4. “We have to find common ground,” and not let those controversial parts bog down the whole bill, Raimondo added. For example, the Senate bill contains a GSP reauthorization, but not the de minimis provisions.

Rep. Richard Neal (D-Mass.) called the vote “a critical step forward in enhancing America’s global competitiveness, supporting U.S. workers, and strengthening our economy.” Citing the trade provisions, Neal said he looks forward “to advocating for that policy and our other priorities – several of which are bipartisan – when we conference with the Senate.”

Prior to the vote, industry and union groups rallied both for and against the de minimis provisions specifically. “Restrictions on the use of de minimis would impose sweeping costs on American businesses, workers and consumers, add new inflationary pressures on the U.S. economy, and exacerbate ongoing supply chain disruptions at U.S. ports,” National Foreign Trade Council and a dozen other business groups wrote to House leadership.

On the other side, union groups urged Congress to keep the measure. The 2016 increase to the de minimis value “caused a dramatic increase in the volume of shipments making use of de minimis entry procedures. These procedures provide fewer data elements for CBP to use to effectively identify and target high-risk shipments, including for narcotics, counter-proliferation, and health and safety risks. The dramatic increase in shipments has left CBP with less information about a greater number of shipments,” the AFL-CIO and ten other groups wrote.

## **BIS Reorganizes Foreign-Direct Product Provisions**

Just in time, Bureau of Industry and Security is refining its foreign-direct product (FDP) rule that administration officials have signaled they are ready to use. In the Federal Register Feb. 3, BIS clarified, reorganized and made minor corrections to the FDP provisions in its Export Administration Regulations (EAR). If Russia invades Ukraine, U.S. officials are prepared to reuse the FDP rules once again (see **WTTL**, Jan. 31, page 1).

Officials used the FDP rule to sanction Huawei during the previous administration. “Placing the FDP rules in part 734 (Scope of the EAR) clarifies that they are used to determine if a foreign-produced item is subject to, and thus within the scope of, the EAR. To further clarify the FDP rules, this rule moves the license requirement, license review policy, and license exception applicability text for listed entities from the Entity List’s footnote 1 to supplement no. 4 to part 744 to § 744.11(a), where the overall license requirements pertaining to listed entities are located,” BIS’ notice said.

In the new section § 734.9, BIS separated the FDP provisions into four paragraphs: the National Security FDP rule, the 9x515 FDP rule, the “600 series” FDP rule, and the Entity List FDP rule. “While the product scope of the first three FDP rules is relatively similar in format, the country scopes of each rule are different. This reorganization and naming of the FDP rules does not make substantive changes to the FDP rules. Rather, it facilitates reference to and compliance with the rules,” it explained.

In addition, BIS added double quotation marks around terms that are defined in part 772 of the EAR, e.g., direct product, technology, software and equipment. “BIS has received requests for additional guidance about determining the scope of production equipment in relation to the Entity List FDP rule and clarifying that these are defined terms should help the public better understand its obligations,” it said.

## White House Extends Solar Safeguard Tariffs

After hearing from everyone and their mothers, President Biden Feb. 4 extended the contentious Section 201 safeguard tariffs on imported solar panels and cells, as well as the exclusion of bifacial panels, for four years, with annual reductions for four years after that. “I have determined that an extension of this safeguard measure will provide greater economic and social benefits than costs,” Biden said in his proclamation.

Senators from both parties sent two letters to the president in January: one supporting an extension of the tariffs, the other urging an end to the duties when they expire Feb. 7 (see **WTTL**, Jan. 24, page 1). A week earlier, Justice appealed a Court of International Trade (CIT) ruling reinstating the exclusion of imported bifacial solar modules and reducing the tariff rate.

Lawmakers who argued for the tariffs denounced the continued exclusion of bifacial panels. “The administration prioritized China’s anti free-market practices over American jobs,” Sen. Rob Portman (R-Ohio) said in a statement. Excluding bifacial solar panels from the safeguard “will do nothing to incentivize the investments necessary to expand domestic manufacturing of solar panels, and only continues our reliance on China and their forced labor practices for this technology,” he added.

Solar industry groups, disappointed by the extension, tried to find a silver lining. “We are grateful to the Biden administration for clearly considering the range of issues affected by this decision. Administration officials arrived at a balanced solution in upholding the

exclusion for bifacial panels and increasing the tariff rate quota for cells,” Abigail Ross Hopper, president and CEO of the Solar Energy Industries Association (SEIA), said in a statement. George Hershman, CEO of SOLV Energy, also commended the decision to exempt bifacial solar panels. “Every dollar spent on tariffs means less dollars put towards creating jobs and opportunity in communities. The bifacial exclusion will help us greenlight projects and deploy more solar capacity across the country,” he said.

## San Diego Firm Settles DDTC Export Charges

San Diego manufacturer Torrey Pines Logic and its owner and founder Dr. Leonid Volfson agreed Jan. 31 to pay State’s Directorate of Defense Trade Controls (DDTC) an \$840,000 civil penalty under a consent agreement to settle five charges of violating International Traffic in Arms Regulations (ITAR) through unauthorized exports of defense articles to various countries, including proscribed destinations.

The alleged violations involve exports of U.S. Munitions List (USML) Category XII defense articles, including thermal imaging systems, the S30 Sentinel, a hand-held device designed to detect optical systems pointed at the viewer, to Bulgaria, Canada, Estonia, Germany, Russia, Spain, Switzerland, Lebanon and China, both proscribed destinations, and the attempted unauthorized export of USML Category XII defense articles to Singapore.

“Certain alleged violations also involve Respondents engaging in ITAR- regulated activities while ineligible; and failing to maintain and produce export transaction records,” the proposed charging letter noted. “Certain violations involved defense articles designated as Significant Military Equipment (SME),” it added. “Respondents did not voluntarily disclose certain violations; and Respondents did not obtain a license or other approval from the Department for the export of defense articles while a commodity jurisdiction (CJ) request was pending with the Department,” DDTC said.

In November 2018, Respondents attempted to export two thermal imaging systems controlled under USML XII(c)(2)(i) and designated as SME, to Singapore without a State license or other approval. “Dr. Volfson attempted to travel on a commercial airline from an airport in Seattle, Washington to Singapore via Tokyo, Japan with the two thermal imaging systems in his carry-on luggage,” it noted.

In addition, invoices from April to November 2015, while the CJ was pending, demonstrated that Respondents without authorization exported 13 shipments of T10 units, small form-factor thermal imagers, to Bulgaria, Canada, Estonia, Germany, Lebanon, Russia, Spain, Switzerland and China, the charging letter said.

In July 2014, DDTC provided Respondents with a CJ determination finding that the S30 Sentinel was regulated as a defense article under USML Category XII(b) and designated as SME. Despite having received this CJ determination, Respondents, without authori-

zation, exported S30 Sentinel imaging systems to Japan on several occasions between December 2014 and May 2015. Of the civil penalty, \$420,000 will be paid through four installments over the next three years. The remaining \$420,000 is assessed for remedial compliance measures and will be suspended “on the condition that this amount... shall be applied to Consent Agreement-authorized remedial compliance costs,” DDTC noted.

## **Justice Would Not Prosecute Firm for Foreign Payment**

In its second opinion procedure release in six years, Justice Jan. 31 said it would not take any enforcement action under the Foreign Corrupt Practices Act (FCPA) against an unnamed U.S.-based multinational firm for making a \$175,000 cash payment to a third-party intermediary to obtain the release of the company’s vessel, its captain and crew.

“Shortly following the detention of the captain onshore and of the crew onboard the Requestor vessel, a third party purporting to act on behalf of the Country A Navy approached Requestor and demanded a financial payment to release the captain and to permit the crew and the vessel to leave Country A waters,” Justice said in its opinion (No. 22-01).

“Although the Third-Party Intermediary represented the payment to be an official payment to the government of Country A, the nature of the demand and the manner of payment raised concerns for Requestor that the payment was intended for one or more Country A government officials,” it added. “Based on the specific facts presented by Requestor, the proposed payment would not trigger an enforcement action under the anti-bribery provisions of the FCPA because Requestor would not be making the payment ‘corruptly’ or to ‘obtain or retain business,” Justice said.

“Put simply, under the specific facts presented by Requestor, there does not appear to be a sufficient business purpose associated with the payment — and relatedly, there is a lack of a corrupt intent under the FCPA. The situation at hand is thus readily distinguishable from other situations in which a company is threatened with severe economic or financial consequences in the absence of a payment,” it added.

## **U.S., EU Find Pearl in Bilateral Shellfish Deal**

More than a year after the Food and Drug Administration (FDA) and the European Commission gave the go-ahead, the U.S. and the European Union (EU) Feb. 4 celebrated the resumption of trade in live, raw and processed shellfish, including clams, mussels, oysters and scallops, between two U.S. states -- Massachusetts and Washington --and two EU member states, Spain and the Netherlands.

The FDA announced it would allow the trade in September 2020 (see **WTTL**, Sept. 28, 2020, page 8). The two countries’ adoption and implementation of EU’s system of food safety control measures, “along with their application of additional measures specifically



adopted for this purpose, i.e., for export to the United States, provides at least the same level of sanitary protection as comparable food safety measures in the United States and is therefore equivalent,” a notice in the Federal Register said at the time.

“This is good news for food operators and consumers on both sides of the Atlantic. Commerce shall resume shortly, and I look forward to the extension of this opportunity to more EU Member States in the near future,” EU Health Commissioner Stella Kyriakides said in a statement.

“U.S. seafood producers, including many family-owned businesses, are internationally recognized for exporting safe, sustainable and wholesome seafood—a valuable commodity in the global market,” Commerce Secretary Gina Raimondo said. “The resumption of U.S.-EU trade in key shellfish products like oysters, clams, mussels, and scallops highlights the competitiveness of our fishery resources,” she added.

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

R-125: In 4-1 final vote Feb. 2, ITC determined U.S. industry is materially injured by dumped and subsidized imports of pentafluoroethane (R-125) from China. Commissioner David Johanson voted no. Commission also made negative finding on critical circumstances.

BURMA: On anniversary of February 2021 coup, OFAC Jan. 31 designated seven individuals and two entities connected to Burma’s military regime, including union attorney general, chief justice of Burma’s Supreme Court and chairman of Anti-Corruption Commission (ACC). Also designated was KT Services & Logistics Company Limited (KTSL) which has leased TMT Port in Yangon from blocked entity Myanmar Economic Holdings Public Company Limited (MEHL) since 2016. Administration week earlier issued business advisory to “inform the public of the heightened risks associated with doing business in Burma” (see **WTTL**, Jan. 31, page 3).

TRADE PEOPLE: Tiffany Smith joined National Foreign Trade Council (NFTC) as vice president for global trade policy, organization announced Jan. 31. Smith previously served as senior policy advisor in Mayer Brown’s international trade and government relations practices. Prior to that, Tiffany served in USTR’s office, Senate, and Commerce.

MORE TRADE PEOPLE: Industry groups reacted to Jan. 28 death of Cal Cohen, former head of Emergency Committee for American Trade. Cohen “made many substantial contributions to American trade policy over the years, and more than that he was a good man,” Chamber of Commerce Senior VP John Murphy tweeted. “Cal was a consummate professional and a soft spoken-but-tenacious advocate and commercial diplomat,” NFTC President Jake Colvin noted on Twitter.

STILL MORE TRADE PEOPLE: Former NFTC President Rufus Yerxa joined McLarty Associates’ trade practice, joining senior advisor Wendy Cutler, firm announced Jan. 31. He left NFTC in September (see **WTTL**, Sept. 6, 2021, page 5). Prior to NFTC, Yerxa served as deputy USTR and WTO deputy director-general.

SOLAR CELLS: CAFC Jan. 28 affirmed CIT decision that sustained Commerce’s remand redetermination in fourth administrative review of countervailing duty order on certain crystalline

silicon photovoltaic cells from China. “To reach this conclusion, Commerce identified electricity price variation across the different provinces and applied adverse facts available—due to the central government of China’s failure to cooperate in Commerce’s investigation—to conclude that the central government sets variable electricity pricing that is region-specific for development purposes,” Circuit Judge Raymond Chen wrote for three-judge panel in *Canadian Solar, Inc. v. U.S.* Court agreed that both Commerce’s regional specificity findings and Commerce’s adverse inference that government of China subsidized electricity are “supported by substantial evidence,” Chen added.

**FORCED LABOR:** Customs and Border Protection (CBP) Jan. 28 issued withhold release order (WRO) on imports of disposable gloves produced in Malaysia by YTY Industry Holdings “based on information that reasonably indicates the use of forced labor in YTY Group’s manufacturing operations,” agency said. CBP previously issued WRO on imports of disposable gloves produced in Malaysia by Brightway Group for similar reasons (see **WTTL**, Jan. 3, page 6). At same time, CBP determined palm oil and merchandise containing palm oil traceable to Malaysian company Sime Darby Plantation Berhad and seafood harvested by Vanuatu-flagged fishing vessel, Da Wang, using forced labor are being, or are likely to be, imported into U.S. CBP personnel at all U.S. ports of entry will seize both products. Agency issued WROs for seafood in August 2020 and palm oil in December 2020 (see **WTTL**, Jan. 4, 2021, page 8).

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