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## BIS Clarifies Foreign Direct Product Rule

In a new Frequently Asked Question (FAQ) published Oct. 28, the Bureau of Industry and Security (BIS) clarified a real-world example of the Foreign-Produced Direct Product (FDP) Rule, whether a company may export a non-U.S. product to a designated entity without confirmation that a license was obtained authorizing the incorporation of the components.

Specifically, the product is destined for Huawei or one of its non-U.S. affiliates that are listed on the Entity List under footnote 1. “Company X must have received a license or have confirmation that a license was obtained by the manufacturer of the foreign produced component(s) subject to the EAR under footnote 1,” the FAQ noted.

The only Entity List entries tagged with the “footnote 1” designation are Huawei and each of its blocked non-U.S. affiliates. In August 2020, BIS added 38 more Huawei affiliates to its Entity List, broadened controls under the FDP rule and expanded controls on blocked firms (see **WTTL**, Aug. 24, page 1).

Failure by the company to either confirm that the component supplier has obtained an export license or obtain an export license itself “implicates General Prohibition 10 [which] prohibits proceeding with transactions with knowledge that a violation has occurred or is about to occur,” the agency explained.

## Justice Strengthens Policies on Individual Conduct, Monitors

In policies that will directly impact prosecutions on Foreign Corrupt Practices Act (FCPA), export controls and sanctions, Deputy Attorney General Lisa Monaco Oct. 28 returned to the policies of the previous Democratic administration, rescinding or updating guidance on individual misconduct and the use of monitors in corporate cases. “I am directing the department to restore prior guidance making clear that to be eligible for any cooperation

credit, companies must provide the department with all non-privileged information about individuals involved in or responsible for the misconduct at issue. To be clear, a company must identify all individuals involved in the misconduct, regardless of their position, status or seniority,” Monaco told the American Bar Association (ABA).

In November 2015, Justice announced changes to its staff guidance on all criminal and civil prosecutions, specifically on voluntary disclosures and individual responsibility (see **WTTL**, Nov. 23, 2015, page 9). The revised factors “now emphasize the primacy in any corporate case of holding individual wrongdoers accountable and list a variety of steps that prosecutors are expected to take to maximize the opportunity to achieve that goal,” then-Deputy Attorney General Sally Yates said in a speech the same day.

Monaco also announced a change related to historical misconduct. “The department is making clear that all prior misconduct needs to be evaluated when it comes to decisions about the proper resolution with a company, whether or not that misconduct is similar to the conduct at issue in a particular investigation. That record of misconduct speaks directly to a company’s overall commitment to compliance programs and the appropriate culture to disincentivize criminal activity,” she said.

Finally, Monaco rescinded previous Justice guidance that suggested that monitorships were the exception. “Instead, I am making clear that the department is free to require the imposition of independent monitors whenever it is appropriate to do so in order to satisfy our prosecutors that a company is living up to its compliance and disclosure obligations” under a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA), she added.

## **USTR Nominees Will Bring Worker Focus to WTO, IP Protection**

At their Senate Finance Committee confirmation hearing Oct. 26, U.S. Trade Representative (USTR) nominees María Pagán and Christopher Wilson handled questions on a range of issues, including fisheries subsidies, World Trade Organization (WTO) reform, engaging with China, ocean plastics, human trafficking and controversial intellectual property (IP) waivers for vaccines.

USTR Deputy General Counsel Pagan was nominated to be deputy USTR in Geneva, and Wilson, who currently serves as assistant USTR for South and Central Asia, will be the agency’s first chief innovation and intellectual property negotiator. That position was created by the Trade Facilitation and Trade Enforcement Act of 2015.

Both nominees referred to USTR Katherine Tai’s recent speeches on the administration’s worker-centered trade policy. “If confirmed, I will always be thinking about how we can defend U.S. innovation and intellectual property in order to help workers and generate broad-based, durable prosperity,” Wilson said in his opening statement.

Tai also “laid out her vision to help the organization reorient its mission to better serve and advance the interests of regular people. For example, taking steps to address the COVID-19 pandemic would be a good start. It also means finding a way to incorporate the interests and priorities of workers into the WTO’s work,” Pagan said in her opening statement.

Pagan further expounded on the administration’s intentions in the WTO reform process, especially after years of inaction on the Appellate Body. “What we want, and if confirmed what I will work hard to do, is to have conversations so that we can restore the Appellate Body and the dispute settlement system to what we thought we had agreed to. We never intended the Appellate Body to be a rulemaking body,” Pagan said.

“I suspect that I will spend a lot of time having these conversations with our counterparts at the WTO to make sure that we can restore the Appellate Body and the system to the way that we envisioned it at the beginning. And I don’t think it’s going to be an easy conversation,” she added.

Both nominees answered a question on the Trade-Related IP (TRIPS) vaccine waiver. “The conversations in Geneva are ongoing,” Pagan said. On the IP potentially going to China or Russia, she added, “We will be very clear-eyed to make sure that won’t happen.” For his part, Wilson noted that there are “lots of ins and outs that still need to happen” in that conversation. We have to “make sure we’re managing the risks,” he added.

## **BIS Requests Comments on Brain-Computer Interface Technology**

BIS Oct. 26 started chipping away at the task of identifying potential emerging technologies. In the Federal Register, the agency requested comments on the potential uses of brain-computer interface (BCI) technology and whether export controls on this technology would be effective and appropriate. Comments are due Dec. 10.

In a November 2018 advance notice of proposed rulemaking (ANPRM), the agency identified BCI technology as part of a representative list of specific categories for evaluation as a potential emerging technology (see **WTTL**, Nov. 19, 2018, page 1). BCI technology includes neural-controlled interfaces, mind-machine interfaces, direct neural interfaces and brain-machine interfaces, the agency noted.

In response to the 2018 ANPRM, BIS received 13 comments related to BCI technology. One respondent noted that the technology is currently available in many countries, while others warned that “overly broad export controls on such technology could hinder research” in such sectors as human health care and assistive technologies, automotive development, artificial intelligence, advanced materials development, human-machine interfaces and robotics.

The agency listed the types of specific comments requested, including: international standards on the technology; foreign availability; potential impact of export controls on

U.S. development; ethical or policy issues; types of BCI technologies that are significantly more vulnerable than others to cybersecurity threats; and potential for transmitted BCI data to be hacked.

## **Ex-Im Bank Nominee Will Have to Juggle Multiple Priorities**

At her Senate Banking Committee confirmation hearing Oct. 26, Reta Jo Lewis, who was nominated to be Export-Import (Ex-Im) Bank president, defended the bank's policies, explained how it must compete against China and other foreign export credit agencies, and committed to ongoing outreach efforts to minority, women-owned and small businesses.

Lewis, who would be the first Black woman Ex-Im Bank president, is currently senior fellow and director of congressional affairs at the German Marshall Fund of the U.S. (GMF). At their confirmation hearing in September, Judith Pryor, nominee to be Ex-Im Bank first VP, and Owen Herrnstadt, a nominee for the Ex-Im board, also explained statutory constraints on lending and the four-year gap in lending prior to reauthorization in 2019 (see **WTTL**, Oct. 4, page 5).

If confirmed, I will “work with all of you to fully implement the provisions of Ex-Im’s 2019 reauthorization, with a special focus on transformational export areas, renewable energy, energy efficiency, and energy storage exports, strategic competition with China, and increasing support for historically under-served businesses,” Lewis said.

The hearing reflected long-time party divisions over the bank’s very existence. “If we want to promote domestic manufacturing and increase competitiveness of U.S. exports, we need to create a favorable climate by maintaining low taxes, provide regulatory certainty, and cut red tape to attract capital formation. To claim that Ex-Im is needed to achieve these goals defies the facts. The vast majority of American exports get done without Ex-Im support,” Sen. Pat Toomey (R-Pa.) said in his opening statement.

In contrast, Sen. Sherrod Brown (D-Ohio) argued that it is necessary to compete with China. “China’s export finance activity is larger than all of the export credit provided by the G7 countries combined, and we can expect China to continue using export credit as a weapon to win manufacturing business in critical sectors,” he said in his opening statement.

## **Biden, Allies Rally Around Tax Agreement, Trade Council**

They say all roads lead to Rome. Armed with a domestic win with a framework on infrastructure and an almost-global agreement on a corporate minimum tax, President Biden traveled to Italy to meet with trading partners and the heads of the G20 and ending in the United Kingdom (UK) with an international meeting on climate change.

A week before the trip, the U.S. and five European nations reached a joint compromise that would all but put the wrangling over unilateral digital service taxes (DSTs) behind them (see **WTTL**, Oct. 25, page 3). The deal comes just two weeks after more than 130 members of the Organization of Economic Cooperation and Development (OECD) approved an agreement in principle on a 15% global minimum tax.

During his meeting with French President Emmanuel Macron Oct. 29, Biden mended some fences, but the discussion ended with the usual diplomatic joint statement. “As new technologies emerge, we will seek to ensure that norms and standards governing their use reflect our shared democratic values, while respecting our respective regulatory autonomy,” the two leaders said.

“In this regard, the two Presidents welcome the launch of the Trade and Technology Council as an important forum for enabling the United States and the EU to update the rules of the road for the 21st century economy. They also support a bilateral dialogue on the impact of emerging technologies on our economies and societies,” the U.S.-France joint statement said.

Biden and Macron also announced a joint effort to improve cooperation on arms exports. “The presidents intend to launch a U.S.-France defense trade strategic dialogue to foster a shared view on defense market access and export issues. In this context, the two governments will identify steps to improve the efficiency and effectiveness of defense export authorizations,” the joint statement noted.

Prior to meeting Macron, Biden spoke with Italian Prime Minister Mario Draghi, the chair of the G20 meeting. “Both leaders recognized the historic achievement of a global minimum tax, building resilience against future pandemics, and the commitment to rapidly decarbonize how we produce electricity,” a White House readout noted.

Similarly, the corporate tax deal will be a high priority at the G20 meeting. “I think it would be hard to find as genuinely significant and substantive an outcome of the G20 as the G20 agreement on global minimum tax. That’s a big piece of business. And everyone from China to Saudi Arabia, to Indonesia, to Mexico, to Argentina, to the United States, to Europe has agreed to that,” National Security Advisor Jake Sullivan previewed for reporters during a press gaggle Oct. 28.

At press time, Biden was set to hold two additional consequential meetings on the sidelines of the main G20 talks. The first was with the E3 -- the leaders of Germany, France and the UK -- on Iran. The leaders were expected to discuss trying to resume negotiations for a return to the Joint Comprehensive Plan of Action (JCPOA), as well as the allies’ shared concerns about Iran’s nuclear program.

The next day, Biden was scheduled to host a supply chain meeting with leaders from multiple continents to address how the world could better coordinate supply chain disruptions and challenges, but more important build long-term supply chain resilience.

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

**EXPORT ENFORCEMENT:** Obaidullah Syed, owner of Pakistan-based Business System International Pvt. LTD., and Chicago-based BSI USA, pleaded guilty Oct. 26 in Chicago U.S. District Court to charges of illegally exporting computer equipment to blocked entity Pakistan Atomic Energy Commission (PAEC) without required licenses from 2006 to 2015. Indictment was unsealed in September 2020 (see **WTTL**, Sept. 28, 2020, page 9). Syed and others conspired “to knowingly submit and cause the submission of false and misleading export information through the Shippers Export Declaration and Automated Export System,” plea agreement noted. Shipped items included a C-Brick with L1 controller and fans; two PCA 2 x 500 MHz IP35 PIMMs (R14K 8MB); an AC/DC 3100WDC power supply for Onyx2 Rack; a Seagate 146Gb 15K FC disk drive; and six Finisar TXRX OPT 1G/10G 850nm transceivers. Syed was arrested day before indictment was unsealed. Sentencing is set for Feb. 23, 2022.

**MORE EXPORT ENFORCEMENT:** Peter Sotis of Delray Beach, Fla., owner and principal of Add Helium LLC, and Emilie Voissem of Sunrise were convicted Oct. 21 in Miami U.S. District Court after six-day trial on charges of exporting dual-use goods, including four rebreathers, to Libya without required Commerce license in 2016. Sotis was arrested in October 2019 and released on \$250,000 bond (see **WTTL**, Nov. 4, 2019, page 9). Rebreathers, which absorb carbon dioxide out of scuba diver’s exhaled breath, are classified under ECCN 8A002. “After being instructed by a Department of Commerce special agent that the rebreathers could not be exported to Libya while a license determination was pending, the coconspirators attempted to evade the export restriction by having an intermediary company, U.S. Company 1, arrange to pick up and export the controlled items to Libya without a license,” indictment noted. Sentencing set for Jan. 6, 2022.

**ALLOY MAGNESIUM:** In 5-0 “sunset” vote Oct. 28, ITC said revoking antidumping duty order on alloy magnesium from China would renew injury to U.S. industry.

**THERMAL PAPER:** In 5-0 final vote Oct. 26, ITC determined U.S. industry is materially injured by dumped imports of thermal paper from Germany, Japan, Korea and Spain. Commission also made negative finding on critical circumstances on imports from Germany and Korea.

**ETHIOPIA:** As promised, DDTC Nov. 1 publishes rule amending International Traffic in Arms Regulations (ITAR) § 126.1 to codify export policy for Ethiopia and Eritrea. “The policy of denial applies to licenses or other approvals for exports of defense articles or defense services to or for the armed forces, police, intelligence, or other internal security forces of either Ethiopia or Eritrea,” Federal Register notice said. Biden administration in September imposed open-ended sanctions on persons involved with humanitarian crisis in country (see **WTTL**, Sept. 20, page 3).

**HUAWEI:** Senate Oct. 28 passed *Secure Equipment Act of 2021* (S. 1790/H.R. 3919) by unanimous consent. Bill would direct Federal Communications Commission (FCC) to clarify that it will no longer review or issue new equipment licenses to companies that pose national security threat. Bill passed House Oct. 20 in 420-4 vote. FCC in March initiated revocation proceedings against three Chinese telecom companies and published final list of covered telecom producers, including Huawei and ZTE (see **WTTL**, March 22, page 2).