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BIS Proofreads, Corrects Export Regulations

In the Federal Register Oct. 5, the Bureau of Industry and Security (BIS) made "targeted editorial corrections and clarifications" to its Export Administration Regulations (EAR). The updates reflect more than 15 years of previous edits and changes to its regulations, in addition to the move from postal mail to online submission of its license applications and advisory opinion requests. Welcome to the internet.

> "These changes are minor editorial revisions that either reflect [BIS] policies that were previously published in the Federal Register and added to the EAR or reflect the modernization of procedures implemented by BIS. These revisions do not change the substance of the EAR," BIS said. "The errors addressed by this rule were inadvertent and these corrections will provide clarity and facilitate understanding of the regulations," it added.

For example, three sections were updated to reflect BIS' use of the SNAP-R system "by eliminating or rewording parts of the sections that are no longer relevant given the online nature of the system. The SNAP-R system has been in place since October of 2006 and has largely replaced the previous system that involved the submission of paper license applications, but the EAR has not been fully updated to reflect that change," it said.

In all, the rule updated 11 parts of the EAR, specifically parts 732, 734, 736, 738, 740, 744, 748, 750, 770, 772 and 774, the agency noted. Other changes reflect policy changes to Cyprus and Mexico, the removal of License Exception Civil End Users (CIV), and revisions to the definitions of "foreign-produced direct product," "U.S. person" and "release."

USTR Outlines, Starts Implementing China Trade Policy

While observers complained about the lack of specific details, U.S. Trade Representative (USTR) Katherine Tai ended up laying out a "new" Biden administration policy for con-

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ducting trade with China. Gone from her speech were words that have been used for years: no more market access, no more dependence on the World Trade Organization (WTO), and no phase-two agreement. The policy simply will depend on frank discussion and accountability for past commitments.

To those who would advocate a decoupling of business with China, which many would consider almost impossible, Tai responded: “I think that the issue perhaps is, what are the goals we’re looking for in a kind of re-coupling? How can we have a trade relationship with China where we are occupying strong and robust positions within the supply chain and that there is a trade that’s happening as opposed to a dependency?”

Tai made no mention of removing existing tariffs that the previous administration imposed, but rather announced she will start a “targeted tariff exclusion process.” To that end, the USTR’s office invited public comments on whether to reinstate previously extended exclusions. From the various tranches, USTR subsequently extended 549 exclusions, most of which expired by Dec. 31, 2020, the Oct. 8 Federal Register notice said. The remainder expired earlier this year, it added. Comments are due Dec. 1.

> Tai also hesitated to call the previous administration’s China policies a “failure.” Instead, she said, the phase-one agreement “is the starting point because that is the structure and that is the architecture of the trade relationship that we have right now. But you have to start somewhere if you want to get somewhere else.”

The USTR acknowledged the administration supports the WTO, but it needs to look at other venues to settle disputes. “As much as we will continue to invest and commit and try to innovate in terms of being a member at the WTO and seeking to bring reform to the WTO that we also need to be agile and to be open-minded and to think outside of the box with respect to how we can be more effective in addressing the concerns that we really have been struggling to address with China on trade,” she said.

Tai also pointed to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Asian trade deal to which China recently applied. While the U.S. joined the predecessor agreement which was signed in 2015, the previous administration withdrew from the deal. “The world economy has shown us realities in the intervening years that I think we really have to pay attention to. So, in terms of our continued investment and engagement with our partners and allies in the Indo-Pacific, I think what we need to do is to fully engage and address the realities and challenges that we see today,” she said.

Industry, Lawmakers Respond to USTR China Policy

In response to USTR Katherine Tai’s speech on the administration’s China policy, almost everyone had something to say. As former Rep. Morris Udall famously said at a House committee hearing years ago, “Everything has been said but not everyone has said it.”

Industry groups, lawmakers, think tanks and Chinese officials all put in their two cents, often contradicting each other. “In principle, I’d like to stress that China-U.S. economic and trade relations are essentially mutually beneficial. There is no winner in a trade war,” Chinese Foreign Ministry Spokesperson Zhao Lijian said in his daily press conference.

“Cooperation and dialogue instead of decoupling and confrontation is the strong aspiration of various sectors in both China and the U.S., including the business community. The U.S. should heed these calls and do more things conducive to the sound and steady development of China-U.S. economic and trade ties,” Zhao added.

Rep. Earl Blumenauer (D-Ore.) called the speech “a laudable development in our bilateral relationship.” He added, “Unlike the prior administration, this administration’s commitment to partner with our allies around the world to hold China accountable will lead to more constructive outcomes. A worker-centered, holistic approach that emphasizes enforcement is more important now to the U.S.-China relationship than ever.”

> Rep. Kevin Brady (R-Texas) took a different view. “We could better confront China by proceeding to Phase Two negotiations, or through high-standard new trade agreements that strengthen economic partnerships with our allies. Sadly, the Biden Administration is not pursuing either, nor is it seeking renewal of crucial Trade Promotion Authority that would give them the tools they need,” he said.

“We continue to strongly believe tariffs on semiconductors and associated products are, in effect, a damaging tax on U.S. chipmakers and consumers. We welcome the Biden administration’s decision to resume the tariff exclusion process, which is important to relieve unnecessary burdens on our economy, and look forward to providing input into this process,” Semiconductor Industry Association (SIA) President and CEO John Neuffer said.

“We support the Biden administration’s plan …to enforce the Phase One deal with China and maintain tariffs on finished textile and apparel products. We believe it’s important to hold China accountable for pervasive intellectual property theft and persistent predatory trade practices that have undermined U.S. manufacturers and its workforce,” National Council of Textile Organizations (NCTO) President and CEO Kim Glas said.

“We encourage the administration to pursue a comprehensive strategy that prioritizes active engagement with its Chinese counterparts as well as collaboration with key U.S. partners around the world. Such efforts should be taken with a view to phasing out remaining tariffs in order to better support innovation and the economic recovery,” Information Technology Industry Council (ITIC) President and CEO Jason Oxman noted.

“The Biden Administration has a real opportunity to work with key allies on a strategy to address shared concerns around national security, industrial subsidies, state owned enterprises and overcapacity while pulling back from ineffective unilateral tariffs that never provided the intended leverage,” National Foreign Trade Council (NFTC) President Jake Colvin said.

BIS Finalizes Controls on Emerging Biotechnology Software

In one of the first controls on emerging technology, BIS finalized controls on "software" for the operation of nucleic acid assemblers and synthesizers controlled under Export Control Classification Number (ECCN) 2B352 that "is capable of designing and building functional genetic elements from digital sequence data," the agency said.

In the final rule, BIS added new ECCN 2D352 to control such "software" and amended ECCN 2E001 to indicate that "technology" for the "development" of "software" controlled by new ECCN 2D352 is controlled for chemical and biological weapons (CB) reasons and anti-terrorism (AT) reasons. "While this software has substantial beneficial civilian applications, it can be misused for biological weapons purposes," the Federal Register notice said.

> BIS proposed the controls in November 2020 (see **WTTL**, Nov. 9, 2020, page 1). The controls were finalized by the multilateral Australia Group (AG) in August 2021. The agency received comments from four respondents to its proposed rule. In April 2018, BIS added the assemblers and synthesizers themselves to ECCN 2B352, implementing recommendations from the February 2017 AG inter-sessional and June 2017 AG plenary implementation meetings.

"This 'software' generally does not require a license for export, reexport or transfer (in-country) to destinations located in AG-participating countries. That being the case, the controls that apply to this 'software' under new ECCN 2D352 should not impair the ability of the United States to trade in intermediate goods with most of its allies or to collaborate on R&D with such countries," BIS said in response to one of the comments.

Legal observers note that the "new controls also will impact future Committee on Foreign Investment in the United States (CFIUS) reviews of foreign investment in or acquisitions of U.S. biotech companies with genetic editing software or technology, potentially triggering a mandatory filing requirement," according to attorneys from Fenwick & West law firm. "Going forward, biotech companies involved in critical technologies in the U.S. should closely analyze future foreign investment or transactions opportunities with these CFIUS implications in mind," they wrote in a blog post.

OECD Countries Agree to Shelve Digital Taxes Eventually

The agreement in principle on a 15% global minimum tax approved by more than 130 members of the Organization of Economic Cooperation and Development (OECD) Oct. 8 eventually could resolve years of wrangling and disagreement over digital service taxes (DSTs), but the process of getting there might be rocky.

In June, the USTR's office threatened additional tariffs over DSTs adopted by six countries, including the United Kingdom (UK), but then suspended those tariffs as multi-lateral negotiations continued at the OECD and other venues (see **WTTL**, June 14, page

4). The latest agreement commits countries to remove DSTs when the first pillar comes into effect. “There continue to be ongoing discussions about appropriate transitional arrangements,” the UK government said.

The two-pillar solution now moves to the G20 Finance Ministers meeting Oct. 13 in Washington and could get a further work-over when the G20 Leaders gather in Rome at the end of the month. In any case, the deal has miles to go before U.S. businesses will feel its effects.

“Countries are aiming to sign a multilateral convention during 2022, with effective implementation in 2023. The convention is already under development and will be the vehicle for implementation of the newly agreed taxing right under Pillar One, as well as for the standstill and removal provisions in relation to all existing Digital Service Taxes and other similar relevant unilateral measures,” the OECD said.

> Specifically, Pillar One forces companies to pay taxes where they do business rather than where they call home. “Under Pillar One, taxing rights on more than $125 billion of profit are expected to be reallocated to market jurisdictions each year. Developing country revenue gains are expected to be greater than those in more advanced economies, as a proportion of existing revenues,” the organization noted.

“This will bring more certainty and help ease trade tensions. The OECD will develop model rules for bringing Pillar Two into domestic legislation during 2022, to be effective in 2023,” it added. Pillar Two would stop so-called “tax tourism,” creating a disincentive for companies to shop for the nation with the lowest tax rate in the world; instead, all countries would have a minimum tax of 15%, as a start.

“The global deal will stabilize an eroding international tax system that has been plagued by a chaotic array of unilateral measures that reflect growing dissatisfaction with a set of rules and norms that fail to consider the modern reality of increased globalization and digitalization,” Treasury Secretary Janet Yellen told a G20 business meeting in Italy.

At press time, Canadian Deputy Prime Minister Chrystia Freeland welcomed the international tax deal but confirmed her government would continue with its planned DST in case the deal falls through. “The DST would be imposed as of January 1, 2024, but only if the treaty implementing the tax regime under this global agreement has not come into force. In that event, the DST would be payable as of 2024 in respect of revenues earned as of January 1, 2022. It is our sincere hope that the timely implementation of the new international system will make this unnecessary,” she said.

Republican lawmakers who are key to approving and writing U.S. tax policy repeated major objections to the plan. “Rather than securing an agreement that would provide certainty and immediately eliminate digital services taxes, the Administration has instead used this global forum to advance its short-sighted domestic tax agenda,” Sen. Mike Crapo (R-Idaho) and Rep. Kevin Brady (R-Texas) said in a joint statement.

Senators Try Section 232 Oversight Bill One More Time

Let's try this again. For the third time, a bipartisan group of senators re-introduced a bill (S. 2934) to requiring congressional approval of Section 232 tariffs on imports, starting with steel and aluminum, but also covering potential new tariffs on the six ongoing national security investigations.

Most recently, the administration in September launched a new Section 232 investigation into imports of neodymium-iron-boron (NdFeB) permanent magnets (sometimes referred to as neodymium magnets, neo magnets, or rare earth magnets), which are used in the production of wind turbines, electric vehicles, and a number of other items (see **WTTL**, Sept. 27, page 2).

"As our economy continues to recover from the economic crisis, we must ensure that Congress has a say in any future actions that could restrict trade or impose consequential changes," co-sponsor Sen. Mark Warner (D-Va.) said in a statement. The bill "will also help guarantee that any efforts to crack down on unfair or illegal trade practices are strategic, and done in concert with our allies," he added.

Industry groups, including the Tariff Reform Coalition (TRC) under the auspices of the National Foreign Trade Council (NFTC), welcomed the bill. "Over the past few years, we have seen how harmful tariffs can be for industries all across the U.S. economy, and it is past time that Congress moves to ensure that such actions are taken only when necessary to protect our national security and after having consulted with the industries that would be most affected," NFTC President Jake Colvin said.

Environmental Group Files Complaint Under USMCA

International environmental organization Oceana Oct. 4 filed the first enforcement petition against the U.S. under the U.S.-Mexico-Canada Agreement (USMCA), claiming the U.S. has failed to effectively enforce its environmental laws to protect critically endangered North Atlantic right whales. Less than 400 of the whales remain in the world.

> "A factual record will clarify the many ways that the U.S. government has failed to effectively enforce its environmental laws specifically designed to protect these endangered marine mammals from the primary human threats of fishing gear entanglement and vessel strikes, as well as the additional stressors of climate change, ocean noise, and offshore energy development," the group said.

Targeted agencies include: the National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA) Office of Law Enforcement, NOAA Office of General Counsel, the U.S. Coast Guard, and Interior's Bureau of Ocean Energy Management (BOEM). The Commission for Environmental Cooperation (CEC) Secretariat will review Oceana's assertions, and "the U.S. government will be required to respond and explain its environmental failures," the group noted.

Biden Embraces EU Officials to Reinforce China Policy

As his Cabinet officials outlined his administration's trade policy on China, President Biden pushed full-steam ahead on his mission of playing nice with his European allies, to garner their support in forcing both Russia and China to play by a rules-based international system.

Biden Oct. 4 met with the head of NATO and called European Commission President Ursula von der Leyen, while his national security advisor was on his way to meet with his Chinese counterpart. The same day, USTR Katherine Tai gave a speech in Washington, outlining the importance of consulting with allies on the administration's China policy (see related story, page 1).

In his call with European Commission President Ursula von der Leyen that day, Biden reaffirmed his support for the EU's continued implementation of the outcomes from the June 2021 U.S.-EU Summit as well as the just-concluded Trade and Technology Council meeting in Pittsburgh (see **WTTL**, Oct. 4, page 2).

> Biden argued for continued work to "ensure rules governing global trade and critical and emerging technologies are rooted in democratic values and market principles and address shared supply chain concerns," a call readout said. He "also underscored the importance of close U.S.-EU cooperation in the Indo-Pacific," it added.

In his meeting with NATO Secretary-General Jens Stoltenberg, "President Biden reaffirmed his strong support for NATO and the importance of bolstering deterrence and defense against strategic competitors and transnational threats. President Biden also conveyed our full support for the NATO agenda agreed by leaders in June, including ensuring the Alliance is fully equipped and resourced to address the modern threat environment, and developing a new Strategic Concept," a White House readout said.

Meanwhile, Secretary of State Antony Blinken met French Foreign Minister Jean-Yves Le Drian in Paris the next day, reiterating their leaders' promise of closer consultations, a State readout of the meeting said. "They discussed areas of cooperation and close coordination, including in the Indo-Pacific and the Sahel region," it added.

* * * Briefs * * *

<u>TRADE FIGURES</u>: Merchandise exports in August jumped 25.8% from year ago to record-high $149.6 billion, Commerce reported Oct. 5. Services exports grew 15.8% to $64.0 billion from August 2020. Goods imports increased 18.4% from August 2020 to $239.1 billion, as services imports grew 32.75% to $47.9 billion.

<u>OCTG</u>: U. S. Steel Tubular Products, Borusan Mannesmann Pipe USA, PTC Liberty Tubulars LLC, United Steel Workers and Welded Tube filed countervailing and antidumping duty (AD) petitions Oct. 6 with ITA and ITC against imports of oil country tubular goods (OCTG) from Argentina, Mexico, Korea and Russia. Petitioners allege dumping margins of 320.17% for Argentina, 280.14% for Mexico and 136.17% for Russia.

CARRIER BAGS: In 5-0 "sunset" votes Oct. 4, ITC said revoking antidumping and countervailing duty orders on polyethylene retail carrier bags from China, Indonesia, Malaysia, Taiwan, Thailand and Vietnam would renew injury to U.S. industry.

NOMINATIONS: At shared 90-minute Senate Banking Committee hearing Oct. 7, BIS assistant secretary for export enforcement nominee Matthew Axelrod, former Justice official, answered just two questions: one on how his experience will inform his potential new job and does he support President Biden's campaign promise to return firearms and ammunition to State jurisdiction. Biden sent Senate Axelrod's nomination in September (see **WTTL**, Sept. 20, page 1).

MORE NOMINATIONS: President Biden Oct. 7 sent Senate nomination of Elaine Trevino to be first woman of color and first Latina as USTR chief agricultural negotiator. She is president of trade association Almond Alliance of California (AAC).

STILL MORE NOMINATIONS: President Biden Oct. 6 resurrected Coordinator for Sanctions Policy office at State by announcing intent to nominate James O'Brien to role. O'Brien is currently principal of international advisory firm Albright Stonebridge Group. Daniel Fried previously held role from January 2013 through February 2017. Former Secretary of State Rex Tillerson eliminated office in October 2017.

PLEASE SIR, NO MORE NOMINATIONS: Senate Banking Committee Oct. 5 approved BIS nominees Alan Estevez and Thea Kendler by voice vote. Votes on Treasury nominees Brian Nelson and Elizabeth Rosenberg were tied on party lines. In advance of scheduled committee vote two weeks earlier, which was then postponed, Sens. Pat Toomey (R-Pa.) and Ted Cruz (R-Texas) doubled down on hold on State and Treasury nominees over Biden administration's Nord Stream sanctions waiver (see **WTTL**, Sept. 20, page 6).

SEMICONDUCTORS: Commerce Oct. 4 established Microelectronics Early Alert System to address semiconductor supply chain challenges. "Commerce is calling on companies and manufacturers to voluntarily share information regarding any new or ongoing COVID-related shutdown or disruption to microelectronics and semiconductor manufacturing facilities and their related supply chains around the world," department announced. BIS previously requested industry comments on how to secure semiconductor supply chain (see **WTTL**, Sept. 27, page 5).

POWER TRANSFORMERS: CAFC Oct. 4 affirmed CIT decision sustaining Commerce's final results in fifth administrative review of antidumping duty order on large power transformers from South Korea. "We hold that Commerce's determinations to rely on facts otherwise available, to cancel verification, and to draw an adverse inference in selecting from among the facts otherwise available are supported by substantial evidence and otherwise not contrary to law," Circuit Judge Jimmie Reyna wrote for three-judge panel in *Hyundai Electric v. U.S.* "Hyundai failed to provide the information necessary for Commerce's analysis despite being given multiple opportunities to do so. Where necessary information is absent, Commerce need not conduct a verification in an attempt to obtain the missing information," he added.

DEUTERIUM: Got any deuterium lying around? Responsibility for licensing of exports of deuterium for non-nuclear end use will move to BIS effective Dec. 6, agency announced Oct. 6. Exports of deuterium for nuclear end use will remain under Nuclear Regulatory Commission (NRC) jurisdiction. Deuterium will join nuclear grade graphite under ECCN 1C298 and will be controlled for nuclear proliferation (NP). Graphite moved to BIS jurisdiction in July 2005 (see **WTTL**, July 25, 2005, page 4).