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BIS Proposes Increased Controls Under License Exception STA

Based on ten years of department review of coating technology, the Bureau of Industry and Security (BIS) Oct. 22 proposed changes to "clarify and expand restrictions on the availability" of License Exception Strategic Trade Authorization (STA). Comments are due Dec. 6.

> Specifically, the agency proposed expanded restrictions on certain coating technology under Export Control Classification Number (ECCN) 2E003.f, as well as on certain technology in ECCN 1E001 that has applications in the "development" and "production" of hot section gas turbine parts and components as well as advanced military composite structures.

"Recognizing that the scope of 2E003.f coating technology includes technology with sensitive industrial applications, this proposed rule would expand restrictions on the use of License Exception STA for ECCN 2E003.f technology, when the technology is used for the application of inorganic overlay coatings on gas turbine engine combustors, or turbine blades, vanes or 'tip shrouds,'" the Federal Register notice said.

For ECCN 1E001, BIS proposes to exclude License Exception STA eligibility to all destinations for technology for the "development" or "production" of equipment and materials specified by ECCNs 1A002, 1C001, 1C007.c, 1C008.a.1, 1C009.b, and 1C010.b, .c or .d. "This rule also proposes to correct the inconsistencies between License Exceptions STA and TSR [Technology and Software Under Restriction] and to exclude these same technologies from eligibility for License Exception TSR."

Credit Suisse Pays $475 Million for Mozambique Scheme

Swiss firm Credit Suisse Group AG (CSAG) agreed Oct. 19 to pay $475 million to U.S. and United Kingdom (UK) authorities, including nearly $100 million to the Securities and

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Exchange Commission (SEC), for violating the Foreign Corrupt Practices Act (FCPA) and other charges in a scheme involving three interconnected transactions involving UK-based Credit Suisse entities and state-owned entities in Mozambique from 2013 to 2016.

"The transactions include a syndicated loan and two securities offerings by Mozambican state-owned entities, the first of which Credit Suisse underwrote, structured, marketed and distributed, and the second of which Credit Suisse underwrote, structured, marketed and distributed as a joint lead manager with another international investment bank, VTB Capital plc (VTB)," the SEC order noted.

Through the actions of three former bankers, Credit Suisse knew that that the two newly formed state-owned entities -- ProIndicus and EMATUM-- had no prior business operations. "The ProIndicus and EMATUM projects were vehicles through which the CS Bankers and intermediaries received kickbacks and corrupt Mozambique government officials obtained bribes, which were paid by the intermediaries," the SEC said.

> "The CS Bankers, who hid the corruption scheme and their kickbacks from other members of management, received kickbacks totaling at least $50 million. Together with Mozambican government officials, the improper payments and kickbacks totaled at least $200 million," it added.

Under the global settlement, Credit Suisse agreed to pay $34 million in disgorgement and interest and a $65 million penalty to the SEC. Justice imposed a $247 million criminal fine, with Credit Suisse paying, after crediting, $175 million, and Credit Suisse also agreed to pay over $200 million in a penalty to UK authorities. VTB Capital, a London-based subsidiary of Russian bank VTB, separately agreed to pay more than $6 million to settle SEC charges related to its role in misleading investors in the second 2016 bond offering.

CSAG and its Hong Kong-based subsidiary, Credit Suisse (Hong Kong) Limited (CSHK), previous agreed in July 2018 to pay Justice and the SEC $77 million to settle FCPA charges for its role in a scheme to corruptly win investment banking business by hiring more than 100 friends and family of Chinese officials (see **WTTL**, July 9, 2018, page 2).

"Credit Suisse is satisfied with the completion of the proceedings by U.S., UK and Swiss regulatory authorities into the bank's arrangement of loan financing for Mozambique state enterprises and can now draw a line under the observation matter," the company said in a statement. "The bank also regrets that it initially failed to ensure all relevant information was readily available and hence provided to the regulator in a complete manner," it added.

BIS Implements 2017 Wassenaar Cyber Changes

Good things come to those who wait, maybe. After six years of industry comments and agency pushback, BIS Oct. 20 finally published its interim final rule implementing changes to controversial cyber intrusion software controls that Wassenaar Arrangement

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(WA) members agreed to at its December 2017 plenary. BIS in October 2018 implemented dozens of other changes WA members agreed to at that plenary (see **WTTL**, Oct. 29, 2018, page 1). A separate rule on the cybersecurity controls has been in the works since then; an earlier proposed rule published in May 2015 garnered more than 250 comments from industry denouncing the over-broad regulations, which were then renegotiated in 2017.

Specifically, the new rule: creates ECCNs 4A005 and 4D004, as well as a new paragraph 4E001.c; makes conforming changes to other ECCNs in refer to the new language; adds Paragraph .j "IP network communications surveillance systems or equipment" to ECCN 5A001; amends License Exception GOV to exclude cybersecurity items; and adds the WA definitions for "cyber incident response" and "vulnerability disclosure."

> The latest rule also 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. "These items warrant controls because these tools could be used for surveillance, espionage, or other actions that disrupt, deny or degrade the network or devices on it," the Federal Register notice said.

The most recent rule has a 45-day comment period and a 90-day delayed effective date. Comments are due Dec. 6; the rule is effective Jan. 19, 2022. "Because of the limited scope of this rule, BIS believes the impact would be minimal. However, to ensure full consideration of the potential impact of this rule, BIS seeks public comment on this interim final rule, including comments on the potential cost of complying with this rule, and any impacts this rule has on legitimate cybersecurity activities," the agency said.

The U.S. "is committed to working with our multilateral partners to deter the spread of certain technologies that can be used for malicious activities that threaten cybersecurity and human rights," Commerce Secretary Gina Raimondo said in a statement. The rule is "an appropriately tailored approach that protects America's national security against malicious cyber actors while ensuring legitimate cybersecurity activities," she added.

Legal observers note that although officials claim the rule is narrowly targeted, its impact could reach far and wide. These could include "network infrastructure manufacturers, cybersecurity software and service providers, IT forensics firms, bug bounty programs, and those engaged in vulnerability testing and research," attorneys from Fenwick & West wrote in a client alert. Companies "should evaluate the impact of these controls to their business operations, whether there are more effective ways to draw lines around controlled products and whether they can propose more accurate definitions," they wrote.

U.S., European Partners Formally Compromise on Digital Taxes

As predicted, the U.S. and five European nations reached a joint compromise Oct. 21 that would all but put the wrangling over unilateral digital service taxes (DSTs) behind them.

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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 (see **WTTL**, Oct. 11, page 4).

Following that agreement, the U.S., Austria, France, Italy, Spain and the UK came to a compromise where the European countries would withdraw their DSTs, before the first pillar of the global minimum tax is enacted. In exchange, the U.S. "will terminate trade actions proposed under Section 301 and commit not to impose further trade actions … during the Interim Period, provided that the country follows through on the agreement," the parties said in a joint statement.

In June, the U.S. Trade Representative's (USTR) office found DSTs adopted by six countries -- Austria, Spain, the UK, India, Italy and Turkey -- were worthy of imposing additional tariffs, but then suspended those tariffs while multilateral negotiations continued. Turkey and India have not joined the agreement.

> "In general, Austria, France, Italy, Spain and the United Kingdom had preferred for withdrawal of Unilateral Measures to be contingent on implementation of Pillar 1, while the United States had preferred withdrawal of Unilateral Measures immediately as of October 8, 2021, the date political agreement with respect to Pillar 1 was reached," the parties said.

Although the five European nations are not required to withdraw their Unilateral Measures until Pillar 1 takes effect, "each country agrees to provide a credit (Interim Credit) equal to the Credit Amount. The Interim Credit shall be applied in the first taxable year that a taxpayer that is part of an MNE [Multinational Enterprise] group is subject to Amount A tax liability after the Interim Period, and only against corporate income tax liability arising from the new taxing right under Pillar 1."

"Overall, this political agreement carefully balances the perspectives of several countries and is yet further demonstration of our commitment to working together to reach consensus, and to deliver far-reaching multilateral reforms that help support our national economies and public finances," Treasury said in a statement.

"We reached our agreement on DSTs in conjunction with the historic OECD global agreement that will help end the race to the bottom over multinational corporate taxation by leveling the corporate tax playing field. In coordination with Treasury, we will work together with these governments to ensure implementation of the agreement and rollback of existing DSTs when Pillar 1 enters into effect. We will also continue to oppose the implementation of unilateral digital services taxes by other trading partners," USTR Katherine Tai said in a statement.

Information Technology Industry Council (ITI) President and CEO Jason Oxman called the deal "a meaningful step" in a statement. "The elimination of such measures is essential to provide much-needed certainty and predictability for businesses, and to prevent further negative ramifications for all industries that do business across borders," he added.

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Treasury Review Targets Sanctions Evasion

As promised from the first days of the administration, Treasury Oct. 19 released its "top to bottom" review of U.S. economic and financial sanctions. Facing a combative Congress and ever-changing threats in cyberspace and crypto currency, department officials outlined the administration's approach to target countries' attempts to evade sanctions.

> Deputy Treasury Secretary Wally Adeyemo began the review in April with a meeting of former lawmakers, government officials and academics (see **WTTL**, April 5, page 1). At that meeting, participants confirmed the role of sanctions as a key instrument of U.S. national security and foreign policy.

During a Senate Banking Committee hearing Oct. 19 on the sanctions review, Adeyemo outlined the five initiatives that emerged from the review: adopting the use of a structured policy framework; expanding sanctions exceptions to support the flow of legitimate humanitarian assistance; reviewing sanctions programs and authorities on a regular basis; communicating and coordinating more effectively with stakeholders; and modernizing the department's operational capabilities to take on growing threats like ransomware and other cybercrime.

"These changes are also needed to keep pace with the evolution of the global financial architecture, which has a profound impact on the efficacy of U.S. financial sanctions. American adversaries—and some allies—are already reducing their use of the U.S. dollar and their exposure to the U.S. financial system more broadly in cross-border transactions. While such changes have multiple causes beyond U.S. financial sanctions, we must be mindful of the risk that these trends could erode the effectiveness of our sanctions," Treasury's review noted.

While the review highlighted a few success stories in the use of sanctions, such as in Iran, Colombia and Libya, the department took pains to note it was "neither an assessment of each of the 37 existing sanctions programs administered and enforced by the Office of Foreign Assets Controls (OFAC), and the over 12,000 OFAC designations and nearly 3,000 OFAC delistings, nor a full examination of all economic statecraft tools," the report noted.

At the hearing, Sen. Pat Toomey (R-Pa.) repeated his opposition to the administration's waiver on Nord Stream 2 sanctions: "The administration has also chosen to ignore a law requiring sanctions for Russia's Nord Stream II pipeline. The pipeline's project manager has been using sanctioned Russian entities to construct and finance Nord Stream 2 – meaning the manager's integral role in the pipeline is predicated on a massive sanctions evasion campaign," he said in his opening statement. Industry groups, including the National Foreign Trade Council (NFTC), welcomed Treasury's review.

"Too often, the United States has used sanctions as a blunt instrument," NFTC President Jake Colvin said in a statement. The group commended Treasury for "a thoughtful analysis of the benefits, limits and best practices that ought to govern U.S. sanctions," he added.

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Trading Partners End Export Support for Coal-Fired Power Projects

What a difference seven years makes. Under the auspices of the Organization for Economic Cooperation and Development (OECD), 11 Participants to the Arrangement on Officially Supported Export Credit, including the U.S., agreed Oct. 22 to end support, in the form of export credits, for unabated coal-fired plants.

> In September 2014, there was bipartisan support in both the House and Senate of members from coal-producing states for provisions that would prevent the Export-Import (Ex-Im) Bank from implementing its policy of not funding the export of coal-fired power plants (see **WTTL**, Sept. 15, 2014, page 3).

"Specifically, the ban will apply to officially supported export credits and tied aid for: new coal-fired power plants without operational carbon capture, utilization and storage (CCUS) facilities; and existing coal-fired power plants, unless the purpose of the equipment supplied is pollution or CO2 abatement and such equipment does not extend the useful lifetime or capacity of the plant, or unless it is for retrofitting to install CCUS," the OECD said.

Treasury Climate Counselor John Morton welcomed the decision. "We have worked closely with partners to achieve this agreement because actions like these are vital to tackling climate change and reaching the goal of net-zero emissions by 2050. The Department will continue to work with countries throughout the world as they transition towards cleaner and greener sources of energy," he said in a statement.

The agreement will take effect once all participants have completed their internal agreement processes, which is expected by the end of October. In addition to the U.S., participants are Australia, Canada, the European Union (EU), Japan, Korea, New Zealand, Norway, Switzerland, Turkey and the UK.

Commerce Will Need to Focus on Enforcement, IG Says

One of Commerce's top management and performance challenges in fiscal year (FY) 2022 is enforcing trade agreements and export controls, putting a spotlight on the Bureau of Industry and Security (BIS) and the International Trade Administration (ITA) resources, according to the department Inspector General's report (OIG-22-001) published Oct. 14.

"OIG's FY 2022 top management and performance challenges include these priority areas related to trade enforcement: combating unfair trade practices by effectively resolving trade barriers and enforcing U.S. trade agreements; [and] protecting national security through effective enforcement of export controls," the report said.

The FY 2022 report cited the transfer of thousands of items from the U.S. Munitions List (USML) to the Commerce Control List (CCL). BIS' licensing workload increased from

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33,615 applications processed in FY 2016 to 37,895 applications in FY 2020, a 12.7% increase. Of the licenses processed in FY 2020, 12,400 (32.7%) were for items transferred from the USML to the CCL.

> "To be effective, export controls must be enforced, and companies or individuals who illegally export EAR-controlled items, including through evasion and circumvention, must be detected and prosecuted accordingly. With greater responsibilities overseeing many more items under its jurisdiction, BIS must ensure it enforces the EAR and pursues action against violators," the OIG noted.

In response to the FY 2021 report that highlighted the challenge to evaluate and improve processes for adjudicating Section 232 exclusion requests: "We received concurrence on most of our recommendations, and both bureaus have taken or will take actions to implement them," the report said (see **WTTL**, Oct. 26, 2020, page 3).

G7 Trade Ministers Tackle Digital Trade, Forced Labor

Not satisfied with tackling the easy stuff like reining in 150 World Trade Organization (WTO) members to come to a consensus on any pressing issue, the G7 trade ministers Oct. 22 outlined their commitment to ending forced labor, protecting digital trade and modernizing international trade rules.

The G7 trade ministers held their inaugural meeting in March launching a new G7 Trade Track (see **WTTL**, April 5, page 3). In addition to USTR Katherine Tai, attending the meeting were ministers from Canada, France, Germany, Italy, Japan and the UK.

"We stand united in our commitment to build back better from the pandemic and provide our citizens with the intended benefits of free, fair, and sustainable trade, including raised living standards, full employment, sustainable development, and a protected and preserved environment," the ministers said in a joint communique.

"We deepened discussions on market-distorting practices and the need to defend the integrity and sustainability of the rules-based multilateral trading system. We noted the continued opaqueness of these practices and the chronically low levels of compliance of some WTO members with regards to providing complete and timely notifications to meet their subsidy notification obligations," they added.

On digital trade: "To harness the opportunities of the digital economy and support the trade of goods and services, data should be able to flow freely across borders with trust,including the trust of individuals and businesses," the ministers wrote in a separate joint statement. "We should address unjustified obstacles to cross-border data flows, while continuing to address privacy, data protection, the protection of intellectual property rights, and security," they added.

On forced labor: "We call on all countries, multilateral institutions and businesses to commit to uphold human rights and international labor standards, and respect relevant

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principles on responsible business conduct throughout global supply chains to prevent forced labor," the ministers said. "We further recognize the need to uphold international labor standards in all areas of the economy, including within the digital economy and through the use of emerging technologies to improve the traceability of global supply chains, ensuring developing countries are not left behind," they added.

* * * Briefs * * *

TISSUE PAPER: In 5-0 "sunset" vote Oct. 22, ITC said revoking antidumping duty order on certain tissue paper products from China would renew injury to U.S. industry.

ALUMINUM FOIL: In 5-0 final vote Oct. 19, ITC determined U.S. industry is materially injured by dumped imports of aluminum foil from Armenia, Brazil, Oman, Russia, and Turkey and subsidized imports from Oman and Turkey.

FORCED LABOR: CBP issued withhold release order (WRO) on imports of fresh tomatoes produced in Mexicao by Agropecuarios Tom S.A. de C.V., Horticola S.A. de C.V., and their subsidiaries "based on information that reasonably indicates the use of forced labor against its workers," agency said. CBP in January issued WRO against tomato products produced in Xinjiang (see **WTTL**, Jan. 18, page 3)…Day before, CBP issued WRO on disposable gloves pro-duced by Supermax Corporation Bhd. and its subsidiaries for same reason. CBP in September lifted ban on imports of disposable gloves produced in Malaysia by Top Glove (see **WTTL**, Sept. 13, page 6).

FCPA: Colombian national Alex Nain Saab Moran (Saab) was extradited Oct. 17 from Cabo Verde to face charges in Miami U.S. District Court for alleged role in laundering proceeds of FCPA violations in connection with scheme to take advantage of Venezuela's government-controlled exchange rate. Saab and business partner Alvaro Pulido Vargas (Pulido) were indicted in July 2019 (see **WTTL**, July 29, 2019, page 6). OFAC in July 2019 designated 10 individuals, including Saab and Pulido, and 13 entities involved in "vast corruption network that has enabled [Maduro] regime to significantly profit from food imports and distribution in Venezuela," agency noted at time. Three days after Saab's extradition, new indictment against three Colombian nationals and two Venezuelan nationals, including Pulido, was unsealed in Miami court. Next day, State announced reward of up to $10 million for information leading to Pulido's arrest and/or conviction.

ARMS EXPORTS: Reps. Gregory W. Meeks (D-N.Y.), Abigail Spanberger (D-Va.) and Susan Wild (D-Pa.) Oct. 20 introduced Safeguarding Human Rights in Arms Exports (SAFEGUARD) Act of 2021 (H.R. 5629) that would prohibit arms sales to countries committing genocide or war crimes and elevate protection of human rights in export control of defense articles and defense services. Sens. Bob Menendez (D-N.J.) and six cosponsors introduced parallel Senate bill in April (S.1473). "Our bill would make sure fundamental questions of national security and human rights are addressed during the official process of reviewing, exporting, and monitoring weapons and military equipment transfers," Spanberger said in statement.

SHRIMP: Wild-caught shrimp imports from Mexico will resume after State certified that Mexico's turtle excluder devices (TEDs) program is as effective as U.S. program, department announced Oct. 21. "Mexico implemented a plan of action in the past several months to strengthen sea turtle conservation in its shrimp trawl fisheries, resulting in significantly improved use of TEDs," State spokesperson said. Department suspended exports from Mexico's commercial shrimp fishery in April. During her trip to Mexico City in July, USTR Katherine Tai discussed sea turtle bycatch with Mexican officials (see **WTTL**, July 12, page 4).

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