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BIS to Publish “Hybrid” Rule for New Sanctions on Russia

The Bureau of Industry and Security (BIS) will publish on Aug. 6 what some officials are calling a “hybrid” regulation that will bring under export licensing requirements dozens of items that formerly were not controlled when the exporter has knowledge they are intended for use in the production or exploration of oil in Russia in deepwater, Arctic or shale projects. The agency will identify 52 items, which may have been classified as EAR99 before, by their 10-digit Schedule B code numbers in the Harmonized Tariff Schedule (HTS). Licenses for these items, as well as for those identified from the Commerce Control List (CCL), will face a presumption of denial.

The European Union (EU), which agreed to impose similar sanctions July 31, has already identified 32 specific energy-related products or groups of products on its version of the HTS known as the Combined Nomenclature (CN) for controls. The list identifies products mostly at the CN 8-digit level with some at the 6-digit level (see related story page 5).

The BIS rule will implement new sanctions President Obama announced July 29 against Russia for its continued support for separatists in Ukraine. The new rule will apply to Export Control Classification Numbers (ECCNs) 0A998, 1C992, 3A229, 3A231, 3A232, 6A991, 8A992, and 8D999 “when the exporter, reexporter or transferor knows or is informed” the item will be used in the cited Russian energy sectors “or is unable to determine whether the item will be used in such projects,” the regulation states.

BIS says it is adding ECCN 0A998 to the controls because U.S. companies analyze seismic and other data for Russian projects. Although this data doesn’t come under the normal definition of technology, the “product obtained through the analysis of raw seismic or other types of data is a commodity sold by companies. Such data is now controlled under this new entry,” it declares. Other changes will add provisions on general prohibitions, add new note 6 for Russia in the D:1 category on the Country Chart and limit use of license exceptions for identified items.

Hirschhorn Claims No Change in Crude Oil Export Policy

As many oil companies reportedly are scrambling to take advantage of what they consider to be a new, more permissible Commerce policy permitting the export of crude oil

condensates, Under Secretary Eric Hirschhorn told WTTL in an exclusive interview that the policy “hasn’t changed since 1986.” The policy is “the same that it has been.” If some see a change, Hirschhorn said he doesn’t understand why. If condensates are “processed through a crude oil distillation tower, that is the exact phrase, they are petroleum products” and not subject to the general ban on crude oil exports, he explained.

Hirschhorn cited the language in Export Administration Regulations (EAR) Section 754.2.a, which says “processed through a distillation tower; that’s the language in the regulation.” That differs from “lease condensate” which is subject to controls. “Believe me, I have seen it 50 times in the last week, so I know exactly what it says,” he told WTTL.

“Lease condensate means condensate as it comes out of the ground. Processed condensate, if it’s been processed through a crude oil distillation tower is not crude oil,” he stated. “That’s the regulation,” he added. “What’s new is the composition of what’s coming out of the ground, which may be different,” he said. “People didn’t care much about condensates in the past; there wasn’t a lot of them; and there wasn’t much of a market for them; and there may be more of a market now,” he suggested.

Earlier in the year, BIS issued commodity classifications to two oil production firms allowing them to export their condensate without a license. Many oil firms considered the decision to represent a new BIS policy, although Commerce said it was not. The decision, however, has put BIS in a political squeeze between senators who favor the classification ruling, such as Sen. Lisa Murkowski (R-Alaska), and senators who oppose it, such as Sens. Robert Menendez (D-N.J.) and Edward Markey (D-Mass.), who have demanded that Commerce justify its decision (see **WTTL**, July 14, page 1).

WTO Fails to Agree on Trade Facilitation Protocol

Near 10:00 P.M. and moments from its midnight deadline July 31, World Trade Organization (WTO) Director General Roberto Azevedo reconvened the WTO General Council to deliver the depressing news that after a week of effort he was unable to reach a deal to save the trade facilitation agreement that trade ministers approved at the Bali meeting in December. Without naming India as the culprit for the collapse of the deal, he admitted he did “not have the necessary elements that would lead me to conclude that a breakthrough is possible. We got closer – significantly closer – but not quite there.”

He said the remaining gaps are unbridgeable. “We have not been able to find a solution that would allow us to bridge that gap. We tried everything we could. But it has not proved possible,” he told WTO members.

“My sense, in the light of the things I hear from you, is that this is not just another delay which can simply be ignored or accommodated into a new timetable – this will have consequences. And it seems to me, from what I hear in my conversations with you, that the consequences are likely to be significant,” Azevedo said. He said the Bali meeting represented a chance to revive and revitalize the dormant WTO negotiating function. “But, just seven months later, once again I am very, very concerned,” he conceded.

Ever the optimist, however, Azevedo said he would use the WTO’s month-long August recess to travel and talk with members to collect their views and determine how to

proceed. “When everyone is back in Geneva, I will be asking the chairs of the negotiating groups and the regular bodies to consult with Members on what can be done in these changed circumstances,” he said.

U.S. Trade Representative (USTR) Michael Froman issued a statement saying WTO members have to implement the commitments to which they have agreed. “Geneva will be quiet for the next several weeks. This is a good time for all of us to reflect on these developments and to consider the implications going forward. We will consult with our trading partners on potential paths forward,” he said.

In a statement, Sen. Orrin Hatch (R-Utah) was blunter in his reaction to the failure of the WTO to agree on the protocol to implement the trade facilitation deal. “Sadly, just as with the collapse of the Doha Round in July of 2008, India has once again blocked significant progress towards greater trade liberalization and by doing so, put the broader international trading system at risk,” he said. “This is an inauspicious start for the new Modi government,” he added (see **WTTL**, July 28, page 1).

Census to Amend AES to Allow Late Entry of Data after VSDs

The Census Bureau will amend the Automated Export System (AES) to allow exporters that failed to file an Electronic Export Information (EEI) for an item subject to the International Traffic in Arms Regulations (ITAR) to file correctly after submitting a voluntary disclosure with State’s Directorate of Defense Trade Controls (DDTC) and getting DDTC approval to make the filing, bureau officials report. Under the change, Census will create a new code that filers can enter on the EEI when making the new filing.

The code will reflect the fact that the exporter did not file an EEI initially for the export, submitted a disclosure to DDTC, and DDTC has issued a warning letter or taken no action. The code can only be used for the specific transaction covered by the disclosure, and DDTC officials supposedly will be checking AES data to make sure the code isn’t used improperly.

Without the code, there is no way for an exporter to file this information long after the export occurred. The officials concede that there are likely to be very few cases where the code will be used because most export violations usually involve incorrect EEI filings with the wrong licensing information rather than no filing at all. They say they can’t predict whether the late filing might trigger other legal liability, since Customs and Border Protection has responsibility for AES enforcement.

Mills Says BIS Will Treat 600-Series VSDs as State Would

BIS Assistant Secretary for Export Enforcement David Mills said July 30 that the agency intends to treat voluntary self-disclosures (VSDs) for items transferred to the 600 series on the CCL from the U.S. Munitions List (USML) “very similar” to how State’s Directorate of Defense Trade Controls (DDTC) treated disclosures for such items when they were on the USML. “I recognize that there has been some angst in the export community about the compliance philosophies of BIS and DDTC at State in regard to military items,” he told the BIS Update Conference (see **WTTL**, June 16, page 1). “Without

prejudging the matter, however, it is my sense that we will handle the 600-series VSDs in a manner very similar to that of DDTC and most will result in warning letters or no action at all, as is the case with most VSDs previously filed under the EAR [Export Administration Regulations],” Mills promised. He said BIS has received 18 VSDs for 600-series items that have already made the transition to the CCL.

“What this issue primarily speaks to is how the two agencies handle cases under the doctrine of strict liability, which I believe to be substantially the same,” Mills said. The difficult cases fall between those with aggravating factors but where criminal prosecution is not warranted, he suggested.

Exporters have been concerned that BIS would impose more fines on firms filing VSDs for transferred items than DDTC did when they were under the USML. DDTC imposes only two or three consent agreements each year.

“As we become more familiar with VSDs filed for the 600 series, it is my intention, as previously announced, to issue new BIS administrative enforcement guidelines modeled upon those promulgated by the Office of Foreign Assets Control,” he said. For OFAC, the baseline for financial penalties is the transaction value of the violative action.

Hochberg Defends Ex-Im Against Corruption Charges

After fired Export-Import Bank (Ex-Im) employee Johnny Gutierrez invoked his Fifth Amendment right against self-incrimination half a dozen times at a House hearing July 29, Ex-Im Chairman and President Fred Hochberg spent the next two hours refuting Republican charges that the bank is brimming with corruption and faces greater financial risks than it has reported. The House Oversight and Government Reform Committee subpoenaed Gutierrez after a *Wall Street Journal* article reported that he was under investigation for allegedly accepting bribes to approve financing for several firms.

After he repeatedly pleaded the Fifth at the hearing, economic growth and regulatory affairs subcommittee chairman Jim Jordan (R-Ohio) dismissed him from the hearing. No such luck for Hochberg.

In addition to defending the overall honesty of Ex-Im employees, Hochberg also had to refute testimony by Diane Katz, a research fellow at the Heritage Foundation, a conservative think-tank, who claimed that Heritage has “documented 124 investigations initiated between October 2007 and March 2014” of fraud involving Ex-Im financing. Hochberg also refused Jordan’s repeated demands to reveal the names of three other Ex-Im employees cited in the Journal article or to say what companies were part of the investigations.

Hochberg confirmed that four persons are under investigation. Three of them were Ex-Im employees who have been fired and one who is on administrative leave while the bank’s inspector general and the FBI investigate their cases. He said he declined to give more information based on the recommendations of the bank’s general counsel and the inspector general. When pressed by Jordan to explain why he refused to answer the subcommittee’s questions, Hochberg said, “I am choosing not to interfere with a criminal investigation” (see **WTTL**, July 28, page 6). Hochberg also defended the bank’s handling of its \$3 billion financing of a liquefied natural gas project in Papua, New Guinea, sponsored by ExxonMobil and other major energy firms. Katz had claimed the bank had

failed to do adequate due diligence and oversight of the funding and allowed excess local payments. Exxon has “certified under criminal penalty that the costs were true and occurred and validated,” Hochberg asserted. He also quoted from the Ex-Im inspector general’s report that said the project was properly structured and that there was no evidence whatsoever of any improper local costs being submitted.

Republican subcommittee members also bombarded Hochberg with the same questions he had faced at a hearing of the House Financial Services Committee June 25. They questioned the accounting methods the bank uses to calculate its risks, profits and defaults, including money owed by Cuba.

Meanwhile, President Obama stepped into the fight for Ex-Im at an Aug. 1 press conference where he hit Republicans for failing to pass a wide range of legislation. The bank “traditionally has been championed by Republicans,” he said. “For some reason right now, the House Republicans have decided we shouldn’t do this,” he noted, citing the need to help American firms increase exports and jobs. “When did that become something that Republicans oppose?” the president asked. “We will lose business and we will lose jobs if we don’t pass it,” he asserted.

U.S., EU Target Russian Oil, Banking Under New Sanctions

American and European officials claim the sanctions imposed so far on Russia are starting to have a negative impact on its economy and new sanctions the U.S. and European Union (EU) adopted July 29 against Russian banks and oil exploration will have an even greater effect. “We have seen sanctions bring the Russian economy to a standstill through a large and broad-based deterioration of Russian financial assets; capital flight that already exceeds all of last year; and a significant increase in Russian borrowing costs,” said Treasury Secretary Jacob Lew in a statement (see **WTTL**, July 28, page 8).

The U.S. and EU sanctions are prospective and will not block existing contracts, including for weapons, such as France’s sale of Mistral Class amphibious assault ships to Moscow. “France would not have agreed to the sanctions if it couldn’t sell the ships,” one EU official told **WTTL**.

The new sanctions President Obama imposed July 29 block transactions with three major Russian financial institutions -- Bank of Moscow, Russian Agricultural Bank (aka Rosselkhozbank) and VTB Bank OAO. Given the major fines imposed on foreign banks in the last year for violating U.S. sanctions against Iran, the new measures are certain to chill all financial transactions with Russian institutions, even those not named.

Obama also named one Russian state-owned defense technology firm, United Shipbuilding Corporation, which BIS added to its Entity List (see story page 1). “We’re blocking the exports of specific goods and technologies to the Russian energy sector. We’re expanding our sanctions to more Russian banks and defense companies. And we’re formally suspending credit that encourages exports to Russia and financing for economic development projects in Russia,” Obama said in his announcement.

At the same time, the EU Council’s Committee of Permanent Representatives agreed on similar sanctions July 29, and the EU Council of Ministers ratified the action July 31. The new EU restrictions were spelled out formally in the EU Official Journal published

July 31. The EU sanctions placed restrictions on Russia's access to EU capital markets, barring EU nationals and companies from buying or selling new bonds, equity or similar financial instruments with a maturity exceeding 90 days, issued by major state-owned Russian banks. It also bars the servicing of such financial instruments and prohibits brokering. The EU imposed specific sanctions on Sberbank, VTB Bank, Gazprombank, Vnesheconom-bank and Rosselkhozbank. The EU also embargoed the import and export of arms from and to Russia, including all items on the EU common military list and dual use goods and technology for military use in Russia or to Russian military end-users.

It imposed sanctions on future crude oil production. “Exports of certain energy-related equipment and technology to Russia will be subject to prior authorization by competent authorities of Member States. Export licenses will be denied if products are destined for deep water oil exploration and production, arctic oil exploration or production and shale oil projects in Russia,” it said.

Annex II to the new rules identifies specific energy-related items on the EU Combined Nomenclature (CN) list – its version of the Harmonized Tariff Schedule – that are now subject to export licensing and a policy of denial. “The competent authorities shall not grant any authorization for any sale, supply, transfer or export of the technologies included in Annex II, if they have reasonable grounds to determine that the sale, supply, transfer or export of the technologies is for projects pertaining to deep water oil exploration and production, Arctic oil exploration and production, or shale oil projects in Russia,” the rule states. Annex II includes line pipe, casings, rock-drilling tools, pumps, liquid elevators, drilling derricks and floating or submersible production platforms.

Exports Under AGOA Low but Growing, USTR Claims

As African leaders prepare to meet in Washington for a U.S.-Africa Summit Aug. 4 and a year before the program's expiration, the Obama administration is finally paying attention to the the African Growth and Opportunity Act (AGOA). While touting some of act's success, U.S. Trade Representative (USTR) Michael Froman told a Senate Finance committee hearing July 30 that the growth in trade has been relatively low and uneven and coming from just a handful of countries.

Froman noted a 2013 review of the program that identified several areas that need improvements, including the length of its extension, product coverage, rules of origin, eligibility criteria and the eligibility review processes. A Government Accountability Office report in July (GAO-14-722R) supported these findings (see **WTTL**, July 28, page 9).

“Utilization of AGOA is low and uneven,” Froman said in his prepared statement. “The bulk of U.S. imports under AGOA come from a handful of countries. And although we are beginning to see increasing diversification, exports under the program are still concentrated in a few sectors. And finally, while the growth in exports has been impressive over the life of AGOA, in absolute terms the level of exports is quite low,” Froman said in his prepared statement.

Although AGOA covers 97.5% of the tariff lines for goods from Africa, “there are still 316 tariff lines that continue to lie outside the program, and we believe Congress should

consider whether any new products can now be added to the program keeping in mind domestic sensitivities,” he added. Committee Chairman Ron Wyden (D-Ore.) seemed to agree with these findings. “Congress should explore ways to improve AGOA to further drive growth in a broader range of African exports,” he said. This might include expanding the list of products AGOA covers to make it easier for producers to draw from a bigger variety of sources for manufacturing.

While AGOA doesn't expire until September 2015, Wyden said the evaluation process must start early. “African apparel producers who benefit from the program often receive orders up to nine months in advance, but they won't receive these orders if there is uncertainty about when AGOA expires,” he said.

*** * * Briefs * * ***

WASSENAAR: In Aug. 4 Federal Register, BIS will implement changes to CCL agreed to at Wassenaar Arrangement's December 2013 plenary. Responding to controversy around controls on cybersecurity and surveillance products, agency says intends to publish separate rule in September setting forth those changes to CCL. Latest rule will revise de minimis rule and post-shipment verification reporting requirements. In addition, BIS will extend controls on specified fly-by-wire source code software and technology until June 20, 2015, as agency continues to negotiate for multilateral controls for this software and technology, notice says. Rule will update license requirements for Mexico “because of its recent membership in multiple multilateral export control regimes.” In addition, it will implement increase in control threshold for high-performance computers (see **WTTL**, July 7, page 1)

BIOSENSORS: In Federal Register Aug. 4, BIS will remove references to biosensor systems and related “software” and “technology” from EAR “holding” ECCN 0Y521 “because these items automatically became designated as EAR99 items on March 28, 2014, and the references to them in the supplement are now obsolete,” notice will say. Items had been added March 28, 2013 (see **WTTL**, April 1, 2013, page 3). Under regulations, items placed in holding category can stay there for one year from final rule, unless they are re-classified under different ECCN, designated as EAR99 or have their 0Y521 classification extended.

TRADE PEOPLE: Senate Finance Committee July 31 approved unanimously Robert Holleyman to be deputy USTR, replacing Demetrios Marantis (see **WTTL**, July 21, page 2) and Nathan Sheets to be under secretary of Treasury for international affairs. Nominations will not get to Senate floor until September.

FCPA: Gun manufacturer Smith & Wesson agreed July 28 to pay SEC \$2 million to settle charges of violating FCPA from 2007 through 2010 “when it authorized its agents to provide gift guns and make other improper payments to foreign officials in Pakistan, Indonesia, Turkey, Nepal and Bangladesh in order to induce foreign officials in those countries to award sales contracts,” SEC order said. Ex-Smith & Wesson VP Amaro Goncalves was one of 22 individuals whose FCPA convictions were dismissed in 2012 (see **WTTL**, Feb. 27, 2012, page 2).

ANTIBOYCOTT: Cathleen Ryan, who was assistant director of BIS' Office of Antiboycott Compliance (OAC), has been named director. She fills post left vacant by Feb. 24 retirement of former director Ned Weant (see **WTTL**, March 3, page 6). Ryan, who joined BIS in 1993, has B.S. from Georgetown University, MBA from New York University and J.D. from NYU.

CENSUS BUREAU: In series of changes in Foreign Trade Division, Dale Kelley has become chief of division, replacing Nick Orsini who has moved to other Census division. Omari Wooden has shifted from trade ombudsman to be senior foreign trade advisor, while Joe Cortez is new ombudsman. Kiesha Downs is new chief of regulations, outreach and education branch.