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Industry "Misreading" Category XII Proposal, DTSA Official Says

The thermal-imaging industry is "misunderstanding and misreading" proposed changes to U.S. Munitions List (USML) Category XII, a Defense Technology Security Administration (DTSA) official claims. Michael Grenn, deputy director of DTSA's technology directorate, made that observation Aug. 25 after listening for an hour to members of the Bureau of Industry and Security's (BIS) Sensors and Instruments Technical Advisory Committee (SITAC) repeat complaints they have about the proposal.

> "The good news, I think, is that we can resolve a lot of the issues that were raised. Some of them were just a misread," Grenn said. "In each of these examples, there is a tremendous disconnect on the language; what it means; how it's read; how it's interpreted," he said (see **WTTL,** July 13, page 4).

Grenn's statement drew a reaction from SITAC Chairman Steve Tribble, vice president of FLIR Systems. "You have in this room people who live and breathe this stuff on a daily basis from a compliance and technical standpoint. If these people in this room can't interpret the language properly, then I think we have a problem," he said.

As they did in their written comments, SITAC members argued that the Category XII pro-posal, as well as proposed changes to CCL Category 6, did not create the "bright line" they were intended to draw between defense and commercial thermal-imaging products. They complained that the proposals would still leave many products subject to the International Traffic in Arms Regulations (ITAR), which has impeded foreign sales for U.S. products. In some cases, the proposals would bring under ITAR some components that had been EAR99 under the Export Administration Regulations (EAR), they said.

Grenn asserted that the technology for the "basic building blocks" for thermal-imaging products "was ITAR in the past, is ITAR today and has not had a negative impact on industry and would like to continue that to be so in the future," he said.

AFL-CIO Calls for Tough TPP Rules of Origin for Autos

The head of the AFL-CIO expressed "deep disappointment and anger" Aug. 21 over reports that the U.S. is offering weak rules of origin (ROO) for autos and auto parts in negotiations for a Trans-Pacific Partnership (TPP) to appease Japan. In a letter to U.S.

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Trade Representative (USTR) Michael Froman, AFL-CIO President Richard Trumka also complained that "the number of loopholes or exceptions is also growing, further watering down the standard." The Auto ROO was one of the disagreements that blocked progress on a TPP deal during the meeting of trade ministers from the 12 negotiating countries in Maui, Hawaii, July 31 (see **WTTL**, Aug. 10, page 3).

> Canada and Mexico, whose auto production has become integrated with the U.S. under NAFTA, objected to a proposed ROO that would have allowed Japanese cars to include a higher level of non-TPP parts. "I hope it is not the case that the Canadian and Mexican negotiators are actually holding a harder line than our own government on this issue," Trumka wrote.

"As you know, we have asked for the auto, auto parts and light truck regional value content to be at least as high as the NAFTA standard – 62.5%, increasing to 75% over several years. We have also advocated for reducing the loopholes and exceptions that have weakened previous standards," Trumka told Froman. "We read in press accounts that the Canadian and Mexican negotiators are holding out for a ROO no less than 50%, while our own government has reportedly struck a deal with the Japanese government for a level of 45% for automobiles and 30% for auto parts," he wrote, citing an article published in Britain's *Globe and Mail.*

"If this report is accurate, I want to convey to you my deep disappointment and anger that the U.S. government has so little regard for American jobs and the health of our manufacturing sector," Trumka wrote. "The only argument in favor of a weak ROO is that Japan already outsources significant elements of automobiles to non-TPP countries and wants to continue to do so and to export those products to TPP countries under favorable terms," he added.

"Japan has argued that it needs the lower rule because of the long phase-out in auto tariffs. This makes no sense, as it has been clear since Japan joined the TPP negotiations that there would be a lengthy phase-out for auto and light truck tariffs. And the lengthy tariff phase-out does not affect auto parts," Trumka argued. "Indeed, we still have no confidence that we will gain meaningful access to Japan's domestic auto market through TPP, so this accommodation further advantages Japanese companies' economic strategies while undercutting American jobs," he stated.

"Indeed, in a recent discussion with your staff, they agreed that the new approach being considered is a 'hybrid deemed originating rule,' simply with a new set of products. Many of the items on this list are important job-generating products here in the U.S. The approach being considered could result in the weakest effective rule of origin in any trade agreement signed by the U.S.," he wrote, conceding that ROO can be complex.

"We have been informed by USTR staff that certain methods yield an equivalent portion of production at different figures (i.e. that one method calculates a certain content at 55% and is equivalent to a different method that calculates the same content at 65% or at 75%, or that some methods contain more loopholes and exceptions than others). But these equivalencies lack a clear evidentiary basis and seem to change arbitrarily, and the loopholes and exceptions appear to be subject to ongoing negotiation," he told Froman.

"My staff, and those of other unions with substantial employment in the sector, have been asking for five years for detailed analysis and data to support various assertions on

how to compare one methodology to another. We have never received any data on this subject, and so are understandably skeptical. It appears that these equivalencies are asserted for the convenience of the negotiators," he said.

BIS Eliminates Special Comprehensive Licenses

Citing low usage and new superseding license exceptions created under export control reform, BIS Aug. 26 removed the authorization for the Special Comprehensive License (SCL) from its Export Administration Regulations (EAR). BIS had proposed removing the authorization in September 2014 (see **WTTL**, Oct. 6, 2014, page 7).

> In the Federal Register notice, BIS concluded that "the SCL has outlived its usefulness to the exporting public since recent changes to the EAR permit exporters to accomplish similar results using individual licenses and without undertaking the more onerous SCL application," it said.

The only change to the September proposal was the effective date. "As a practical matter to facilitate administrative ease for SCL holders who already have begun to transition to licenses other than the SCL and for SCL holders who have yet to begin that transition for their transactions under the EAR, BIS provides instead in this final rule that all SCLs still in effect at this publication will expire one year from the effective date of this rule, which will be September 26, 2016," it said.

BIS received comments from three SCL holders who are private companies in the fields of geophysical and seismic technology, it said. In response, the agency said the comments did not warrant changing the decision to drop SCLs. "BIS believes all current features of the SCL can be replicated in an individual license, and thus the usefulness and effectiveness of export authorizations under the EAR should not be impacted negatively by removal of the SCL," the agency explained.

BNY Mellon Settles SEC Charges of FCPA Violations

Bank of New York (BNY) Mellon, the multinational financial services company, agreed Aug. 18 to pay the Securities and Exchange Commission (SEC) $14.8 million to settle charges that it violated the Foreign Corrupt Practices Act (FCPA). The company allegedly provided valuable student internships to family members of foreign government officials affiliated with a Middle Eastern sovereign wealth fund in 2010 and 2011.

> "These officials sought, and BNY Mellon agreed to provide, valuable internships for their family members. BNY Mellon provided the internships without following its standard hiring procedures for interns, and the interns were not qualified for BNY Mellon's existing internship programs," the SEC complaint noted.

"BNY Mellon failed to devise and maintain a system of internal accounting controls around its hiring practices sufficient to provide reasonable assurances that its employees were not bribing foreign officials in contravention of company policy," the agency said. "The Interns were less than exemplary employees. On at least one occasion, Interns A and B were confronted by a BNY Mellon human resources employee concerning their

repeated absences from work. A Boutique portfolio manager who worked with Intern C observed that his performance was 'okay' and that 'he wasn't actually as hard-working as I would have hoped.' Despite these issues, BNY Mellon accommodated the Interns in order to favorably influence Officials X and Y," the SEC order noted.

> Without admitting or denying the findings, the company agreed to pay $8.3 million in disgorgement, $1.5 million in prejudgment interest, and a $5 million penalty. The SEC considered the company's remedial acts and its cooperation with the investigation when determining a settlement, it said.

"We are pleased to reach an agreement with the SEC that allows us to put this matter behind us. As the SEC noted, we cooperated with the SEC throughout this process, and had already taken steps to enhance our existing internal controls and procedures with respect to our internship and hiring practices," Kevin Heine, a company spokesperson, wrote in an email to WTTL.

Universities, Tech Firms Join Outcry Against Proposed Definitions

Of the over 100 comments BIS received to proposed rules aimed at harmonizing definitions in the International Traffic in Arms Regulations (ITAR) with those in the Export Administration Regulations (EAR), many came from universities and technology firms taking issue with proposed definitions of "fundamental research" and "public domain." Gun owners and Republican senators previously joined the opposition to the proposals.

> In comments to State and BIS, the University of California, Berkeley, noted that the revised definition for 'public domain' includes information that is submitted for review prior to publication. "The revised Section 120.11(a)(5) appears to require that information also be accepted for publication to qualify as 'public domain'," it wrote (see **WTTL**, Aug. 10, page 5).

"The language should be changed to clarify that information submitted for review for publication qualifies as 'public domain' … regardless of acceptance for publication or actual publication. This clarification would allow information that is not favorably received or actually published to still qualify as 'public domain,'" the university said.

NYU expressed concern that "software" was removed from the fundamental research definition. "While natural-language documents written by a researcher would be 'technology' that could be freely shared as arising during fundamental research, a computer-language document (a program in source code) written by the same researcher would be subject to deemed export restrictions," it wrote. NYU recommended that software arising during, or resulting from, fundamental research not be subject to the EAR.

In its comments, Toronto-based software provider Perspecsys suggested allowing tokenization as "an acceptable data obfuscation method in addition to encryption." In a May 2014 advisory opinion addressed to Perspecsys, State's Directorate of Defense Trade Controls (DDTC) opened the door to using this security technique without a DDTC license under certain conditions (see **WTTL**, June 16, 2014, page 2). "According to many data security experts, tokenization provides data obfuscation, security, and operational functionality that is stronger than or as strong as encryption-only systems

when implemented properly. Tokenization should therefore be explicitly recognized in the regulations as an approved data obfuscation method," it wrote.

> Intel took issue with the proposed definition of "development." The company noted that the term "serial production" no longer applies in the current technology/manufacturing environment.

"Considering exporters can develop, design, manufacture, and export 'technology' for a single prototype or proof-of-concept which may never be serially manufactured but is still subject to the EAR, the current definition conflicts with modern business models and customer demands," it wrote. "The development of technology required is agnostic of whether the resulting commodity will be manufactured once, or serially," Intel added.

Google answered the question of whether the proposed definition of ''peculiarly responsible'' effectively explains how items may be ''required'' for particular functions. "It does not. The proposed definition reaches too far and would control too much information (i.e. 'technology'). In particular, the "release" portion of the "catch and release" process laid out in the proposed definition will lead to too many absurd results," the search company said.

"In the term 'peculiarly responsible,' it is significant that 'responsible' is modified by the word 'peculiarly,' which denotes a special, causal relationship with the thing that is being controlled. The proposed definition of 'peculiarly responsible' effectively removes 'peculiarly' from the equation and controls a wider swath of 'technology' than is warranted," it added.

Industry Wants Toxins Under Commerce Control

Getting only ten comments on a proposed rule must be a nice change for export officials after some of the more controversial rules of the past few months. BIS and State's Directorate of Defense Trade Controls (DDTC) had expected that transfers of products from USML categories XIV (toxins) and XVIII (directed energy weapons) would only affect a few companies and universities. In general, many of the comments the two agencies posted Aug. 28 were from companies arguing for their specific product lines to be less strictly controlled.

> Northrop Grumman recommended that protective items, including Joint Service Lightweight Integrated Suit Technology (JSLIST) or Uniform Integrated Protection Ensemble (UIPE), currently listed in Category XIV(f)(4) be moved to newly created Export Control Classification Number (ECCN) 1A607. "This proposed ECCN provides more than adequate levels of control and such classification would better enable exports to our allies as well as support individuals deploying in support of USG operations," it wrote.

Other comments cited examples of devices currently in commercial use that might be moved to DDTC jurisdiction. Biofire wondered whether its commercial Ebola test "could be controlled under the proposed language in paragraph (g)(l) or (f)(2) in the event of further development using some DoD [Defense Department] funds in order to accelerate development of a detection test kit for emerging strains intended for use in a civilian outbreak." Universities still are concerned about their government funded research being

controlled under DDTC's International Traffic in Arms Regulations (ITAR), despite officials claiming to address their objections (see **WTTL**, June 22, page 3). "Because of the way the proposed regulations are written, NIH funded microbial research could fall under ITAR, which would seem counter to the charter of NIH. We recommend that a specific carve out be added to exempt NIH, CDC, and USDA funded work from ITAR controls," the Association of University Export Control Officers wrote.

> Other universities agreed. "Restrictions should be based on the nature of the research, not the source of the funding. We are concerned that there appears to be an increasing tendency to equate Department of Defense research funding with ITAR status, regardless of the nature of research, which for universities such as UC consists of fundamental research, the results of which are shared broadly," University of California (UC) wrote.

On Category XVIII, IPG suggested retaining the use of "specially designed" in lieu of "sole or primary purpose," which it says is not defined or used elsewhere. "Paragraphs (b) and (e) of proposed Category XVIII employ 'specially designed' and the inconsistency in proposed paragraph (a) leads to confusion in understanding the coverage of the new rule. In addition, a rewritten Category XVIII should fully implement the "specially designed" criteria to ensure that products with commercially applications are placed on the CCL, as opposed to the USML," the company wrote.

* * * Briefs * * *

ENVIRONMENTAL GOODS: In response to USTR request, ITC Aug. 28 launched second Section 131 investigation into probable economic effect of providing duty-free treatment for imports of environmental goods from all U.S. trading partners on U.S. industries and consumers as result of WTO talks on these goods. Separately, it launched investigation Aug. 21 in response to earlier USTR request to examine economic impact of reduced tariffs on just six environmental products (see **WTTL**, Aug. 10, page 7).

TRADE PREFERENCES: USTR in Federal Register Aug. 25 determined that Curaçao meets criteria of Caribbean Basin Trade Partnership Act and, "therefore, imports of eligible products from Curaçao qualify for the enhanced trade benefits provided under the Act." In December 2013, President Obama made country eligible for CBERA (see **WTTL**, Jan. 6, 2014, page 8).

CHLOROPICRIN: In 6-0 "sunset" vote Aug. 20, ITC said revoking antidumping duty order on chloropicrin from China would renew injury to U.S. industry.

CREPE PAPER: In 6-0 "sunset" vote Aug. 18, ITC said revoking antidumping duty order on crepe paper from China also would renew injury to U.S. industry.

ITC: MaryJoan McNamara has joined the ITC as Administrative Law Judge (ALJ), commission announced Aug. 17. Previously, she served as ALJ with Social Security Administration's Office of Disability Adjudication and Review (National Hearing Center) in Baltimore. Prior to that, she was civil litigation attorney in private practice, consultant to State on provisions of Hague Convention; and specialist in Agriculture's Office of Adjudication and Compliance.

EXPORT ENFORCEMENT: Eyad Farah of Barrington, Texas, was indicted in Tampa, Fla., U.S. District Court on charges of conspiring to export firearms to Jordan without license. Firearms were allegedly concealed in vehicles that had been purchased at used car auctions in Central Florida. Farah was arrested in Frankfort, Germany, in June and is in U.S. custody. Jury trial is

set for Oct. 5. Codefendant Mahmoud Abdel-Ghani Mohammad Assaf previously pleaded guilty to his role in conspiracy and is set to be sentenced Sept 18. Yasser Ahmad Obeid was sentenced to 51 months in prison in related case in December 2014 and also pleaded guilty.

EX-IM FRAUD: Jorge Amad, co-owner of Miami telecommunications company, was sentenced in Miami U.S. District Court Aug. 24 to 24 months in prison for defrauding Export-Import Bank from 2007 through 2012. He pleaded guilty in June (see **WTTL**, July 27, page 11). Co-owner Ricardo Beato and Freddy Moreno-Beltran, Colombian national, are awaiting sentencing.

CURRENCY: AFL-CIO President Richard Trumka wrote to USTR Michael Froman Aug. 21 to complain about Vietnam's devaluation of its currency. Letter follows previous union complaints about China's devaluation of its renminbi (see **WTTL**, Aug. 17, page 6). "Not only is China a notorious currency manipulator, so are several TPP participants," he wrote. "The recent Asian currency devaluations (in addition to the devaluation of the Vietnamese currency, the Australian and New Zealand dollars and the Malaysian ringgit are also down against the U.S. dollar since the PBOC's [Bank of China] action last week) illuminate the importance of enforceable currency disciplines in the TPP and have started talk of 'currency wars'," he wrote.

SECTION 129: CIT Senior Judge R. Kenton Musgrave asserted CIT's jurisdiction Aug. 20 over Commerce decisions in Section 129 reviews aimed at bringing U.S. into compliance with WTO rulings (slip op. 15-92). "Congress provided this court with the jurisdiction to ensure that section 129 determinations are supported by substantial record evidence and otherwise in accordance with law, and to require their alteration where they are not," he wrote. "This jurisdictional power is not conditioned upon USTR's approval," he added. In case involving diamond sawblades from China, Musgrave granted Commerce request for voluntary remand and Diamond Sawblades Manufacturers' Coalition's (DSMC) request for preliminary injunction to block liquidation of imports. "Absent issuance of a preliminary injunction that continues the TRO's present enjoinder of liquidation, Commerce will instruct Customs to liquidate the relevant entries, thereby depriving DSMC of its right to meaningful judicial review of the challenged section 129 determination," he explained. Separately, ITC voted in "sunset" review Aug. 7 to continue antidumping order on sawblades (see **WTTL**, Aug. 17, page 7).

SANCTIONS: Swiss financial services company UBS AG agreed Aug. 27 to pay $1.7 million to settle 222 OFAC charges of violating U.S. sanctions. From January 2008 to January 2013, UBS processed 222 transactions related to securities held in U.S. custody for or on behalf of unnamed individual customer of UBS in Zurich, Switzerland, that was on OFAC's List of Specially Designated Nationals. "Although UBS identified all of the apparent violations, the disclosures are not voluntary self-disclosures within the scope of OFAC's definition, because they were substantially similar to another apparent violation of which OFAC was already aware," OFAC said. "We are pleased to have resolved this matter. It related to a single client of UBS in Switzerland. We discovered and voluntarily brought the relevant transactions to OFAC's attention. They have agreed that the firm's conduct in this matter was not egregious," UBS spokesman Gregg Rosenberg wrote in email to WTTL.

SOUTH AFRICA: USTR Michael Froman met Aug. 26 with South African Trade Minister Rob Davies. "Froman underscored the urgency of finding a resolution to the remaining issues in order to avoid a reduction of AGOA benefits for South Africa," USTR press statement said. USTR's office held hearing Aug. 7 on out-of-cycle review of South Africa's AGOA eligibility as required by renewed AGOA statute (see **WTTL**, Aug. 17, page 5).