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BIS Allows Narrow Exceptions to Huawei Export Policy

After a weekend of industry hand-wringing over Bureau of Industry and Security's (BIS) placing Huawei and 68 non-U.S. affiliates on the agency's Entity List, BIS May 20 issued a narrow and temporary General License (GL), exempting transactions in four specific categories: continued operation of existing networks and equipment, support to existing handsets, cybersecurity research and vulnerability disclosure, and engagement as necessary for development of 5G standards by a duly recognized standards body.

BIS added Huawei and its affiliates to the Entity List May 15 because the firm "is engaged in activities that are contrary to U.S. national security or foreign policy interest," the agency said (see **WTTL**, May 20, page 1). BIS also cited the January indictment of Huawei in Brooklyn U.S. District Court on Iran sanctions violations and other charges.

Transactions would be authorized for 90 days through Aug. 19. The GL "grants operators time to make other arrangements and the Department space to determine the appropriate long-term measures for Americans and foreign telecommunications providers that currently rely on Huawei equipment for critical services," said Commerce Secretary Wilbur Ross. "In short, this license will allow operations to continue for existing Huawei mobile phone users and rural broadband networks," Ross added.

In a speech May 23 in Germany, Huawei Deputy Chairman Ken Hu called the restrictions "totally unjustified" and "based on ungrounded allegations." Hu added that the move "sets a dangerous precedent" and "goes against the values of the international business community, cuts off the global supply chain and disrupts fair competition in the market."

Commerce Proposes Adding Currency to CVD Rules

In a move that should thrill Democrats but concern trading partners, Commerce May 23 proposed to impose countervailing duties on countries that act to undervalue their

currency. While the rule does not call out China specifically, this proposal would only add fuel to the ongoing trade war with Beijing. Commerce did not identify all the “currency-related fact patterns that might satisfy the legal criteria for countervailability” in the proposed rule and request for comments, which will be in the Federal Register May 28. “In general terms, the currency undervaluation benefit calculation requires an identification of what the currency’s value should be, absent the undervaluation. To do this, one method is to employ the concept of an equilibrium ‘real effective exchange rate’ (REER) or its equivalent, consistent with International Monetary Fund (IMF) methodologies,” it said.

The department intended “to seek and to defer to [Treasury’s] evaluation and conclusion as to whether government action on the exchange rate has resulted in currency undervaluation, unless we have good reason to believe otherwise,” the notice said. In its latest semiannual report in October, Treasury again found no major trading partner met the criteria for currency manipulation (see **WTTL**, Oct. 22, 2018, page 5).

“This change puts foreign exporters on notice that the Department of Commerce can countervail currency subsidies that harm U.S. industries,” said Commerce Secretary Wilbur Ross in announcing the rule. “Foreign nations would no longer be able to use currency policies to the disadvantage of American workers and businesses,” he added.

It is “very likely that a move of this nature” would violate international trade commitments, former Mexican trade negotiator Kenneth Smith Ramos tweeted May 24. “Especially if the U.S. has the discretion to decide unilaterally when a currency is undervalued intentionally,” he added.

Democratic lawmakers have long sought this trade remedy. Most recently, Reps. Bill Pascrell, Jr. (D-N.J.) and Tim Ryan (D-Ohio) in April 2017 re-introduced the “Currency Reform For Fair Trade Act” (H.R. 2039), which would “clarify that countervailing duties may be imposed to address subsidies relating to a fundamentally undervalued currency of any foreign country,” the bill said.

Anti-trade groups repeatedly cite the president’s campaign promise to “declare China a currency manipulator on Day One and crack down on any country misaligning its currency to cheat on trade, but Trump’s Treasury secretary has chosen to rely on criteria created by the previous administration that ensure no action is taken,” said Lori Wallach, director of Public Citizen’s Global Trade Watch, in a blog post before the Treasury report was issued.

Industry Groups Respond to Huawei General License

Industry groups quickly responded to BIS’ GL. “We hope to work with the administration to broaden the scope of the license so it advances U.S. security goals in a manner that does not undermine the ability of the U.S. semiconductor industry to compete globally and ensures the economic security of an industry that is the backbone of this country’s technology leadership,” Semiconductor Industry Association (SIA) President & CEO John

Neuffer said in a statement. Two days later, SIA clarified what it called “confusion” about the GL’s scope. “The license is narrowly focused and does not allay our concerns about economic impacts on the semiconductor industry,” the group said. “No new sales to Huawei for new equipment are permitted. As a result, the license offers only very limited relief to suppliers of Huawei, including U.S. semiconductor companies, as the majority of their business with Huawei involves sales for new devices,” it added.

Chinese Foreign Ministry Spokesperson Lu Kang maintained his country’s resolve in a press conference May 21. “The U.S. is using state power to crack down on foreign enterprises and disrupt market activities. To be frank, it won’t serve U.S. interests in the end,” he noted. “The Chinese government has the resolve and the capability to defend our legitimate and lawful rights and interests,” the spokesperson added.

BIS Implements Wassenaar List Changes

BIS May 23 picked low-hanging fruit and implemented some of the changes made at the Wassenaar Arrangement’s (WA) annual plenary in December. Specifically, the agency added to its Commerce Control List (CCL) five “recently developed or developing technologies”: discrete microwave transistors, continuity of operation software, post-quantum cryptography, underwater transducers designed to operate as hydrophones, and air-launch platforms.

The rule only implements changes that are essential to U.S. national security and “warrant early implementation.” Other changes, including most notably relaxed controls on civil industrial Internet-of-Things, high-performance continuous-wave lasers, and infrared cameras, will be addressed in a separate rule, BIS noted in the Federal Register (see **WTTL**, Dec. 17, page 1).

BIS updated four existing Export Control Classification Numbers (ECCNs) -- 3A001, 5A002, 6A001 and 9A004-- and adding a new one: 3D005. ECCN 3D005 will “control software that ensures continuity of operation when electronics are exposed to Electro-magnetic Pulse (EMP) or Electrostatic Discharge (ESD),” the agency noted.

ECCN 3A001 now controls discrete microwave transistors “rated for operation with a peak saturated power output greater than 5 W (37.0 dBm) at all frequencies exceeding 8.5 GHz up to and including 31.8 GHz,” BIS said. “While older devices specified limited frequency ranges, new microwave transistors cover wider frequency bands at higher power levels, opening up new possibilities for radar and other transmitting applications,” it added.

BIS updated ECCN 5A002 to control certain types of post-quantum cryptographic algorithms. The rule adds a Technical Note 2 to ECCN 6A001 “to alert the public that underwater acoustic transducers designed to operate as passive receivers are hydrophones.” The heading of ECCN 9A004 is revised to add air-launch platforms. The rule also adds new Item paragraph 9A004.g, which controls “aircraft” “specially designed” or modified to be air-launch platforms for space launch vehicles (SLV).

House Democrats Want Stronger Enforcement in USMCA

While many Democratic lawmakers and union groups oppose the new U.S.-Mexico-Canada Agreement (USMCA) outright, many held out hope that the updated agreement would provide stronger enforcement mechanisms, beyond just rhetoric on general obligations. At a House Ways and Means Committee trade subcommittee hearing May 22, witnesses and committee members agreed that was not to be.

“Given the many challenges and the poor record on enforcement under NAFTA, there is a particular need for new ideas for more flexible and versatile enforcement mechanisms,” subcommittee chair Earl Blumenauer (D-Ore.) said at the hearing on enforcement. Blumenauer also took on the administration’s dependence on Section 301 tariffs to enforce trade commitments. “Let’s be clear: Section 301 is no substitute for strong enforcement provisions in the new NAFTA,” he said.

On the same day, Sen. Ron Wyden (D-Ore.) urged the administration to fix enforcement in the updated NAFTA agreement, which “contains some improvements, but essentially replicates the failings of the original,” he wrote to U.S. Trade Representative (USTR) Robert Lighthizer. “While questions remain about whether the substantive obligations in the new Agreement are the best possible outcome for American workers, all of the obligations become meaningless if the United States cannot effectively and swiftly enforce them,” Wyden added.

At the trade subcommittee hearing, witnesses strongly supported labor and environmental groups, perhaps reflecting the sentiments of the majority. Owen Herrnstadt, director of trade for the International Association of Machinists and Aerospace Workers, outlined three recommendations: enforcement must be adequately funded and staffed, independently administered and monitored; labor obligations must be based on strong clear standards; and labor obligations must cover broad sectors of workers.

“Until the recommendations mentioned above are adopted, the revised agreement will continue to fall short in effectively enforcing strong labor standards. Consequently, under the current text, wage suppression for Mexico’s workers and the outsourcing of U.S. jobs will continue,” Herrnstadt said.

Sandra Polaski, a former deputy director-general at the International Labor Organization (ILO) echoed that sentiment. “The USMCA requires significant amendments before it can be deemed a good deal for U.S. and North American workers. The minor improvements made to the labor chapter will be meaningless without very robust additional enforcement mechanisms,” she said.

In a letter to USTR in April, Committee Chairman Richard Neal (D-Ma.) and 25 committee Democrats raised similar concerns with the labor provisions (see **WTTL**, April 15, page 8). “We question whether there is reason to believe that the new Agreement will lead to meaningful change and real improvements for labor standards in Mexico. Our questions

relate to both the specifics of the language of the new labor provisions and their enforceability in particular,” they wrote.

Ex-Im Should Review Other Government Debt Data, GAO Says

During a three-year period, the Export-Import Bank (Ex-Im) authorized transactions worth about \$1.7 billion associated with 32 U.S.-based companies that had a delinquent federal debt indicator in the government’s System for Award Management (SAM) during the same month as the authorization, according to a Government Accountability Office report (GAO-19-337) released May 23.

The report covered calendar years 2014 through 2016. “While these results alone do not mean Ex-Im should have suspended these transactions, they do indicate that there is a practical opportunity to use SAM data to help determine applicants’ eligibility,” the report said.

The report also cited another \$4.1 billion of transactions associated with 97 U.S.-based companies “that had a delinquent federal debt indicator in SAM during the transaction maturity period (i.e., after the month they were approved, but before the transactions’ maturity date),” it said. Ex-Im authorized about \$34.3 billion in total authorizations during this same period, GAO noted.

Ex-Im Bank “has procedures to identify applicants and participants with delinquent federal debt, such as obtaining applicants’ credit reports that may indicate these debts when they apply to Ex-Im’s financing programs,” the GAO noted. However, the bank “is missing additional opportunities to use readily available data containing delinquent federal debt indicators from [SAM] to detect applicants and participants that may have delinquent federal debt,” the report noted.

Specifically, GAO recommended Ex-Im “assess and document the practicality of incorporating” into both its pre- and post-authorization reviews “searches of data elements in SAM that indicate delinquent federal debts owed by applicants, and, if practical, implement relevant approaches—such as manual searches or batch matching,” the report said.

In response, Ex-Im noted that while the bank is in “full compliance with all requirements” regarding restrictions on doing business with delinquent federal debtors, it agreed with the recommendations. As such, the bank asked GAO to provide it with the data used to make the recommendations. “This data will enable Ex-Im to correlate its findings with GAO’s data and determine the number of Ex-Im borrowers that are included” and the amounts that tie to those borrowers.

* * * **Briefs** * * *

CERAMIC TILE: In 5-0 preliminary vote May 24, ITC found U.S. industry may be injured by allegedly dumped and subsidized imports of ceramic tile from China.

EXPORT ENFORCEMENT: Gene Shilman of Edison N.J. pleaded guilty May 22 in Newark U.S. District Court to exporting controlled firearm components and parts, ammunition, night-vision goggles and bulletproof vests to Russia and Ukraine from May 2014 through October 2018 without required State or Commerce licenses. In September 2018, Shilman falsely represented on Customs form that parcel destined for Ukraine contained tools and cartridges. After turning himself in, he was released on \$100,000 unsecured bond. Sentencing is scheduled for Sept. 16.

VENEZUELA: In Federal Register May 24, BIS moved Venezuela to EAR Country Group D:1, which lists countries of national security concern, from more favorable Country Group B. BIS also added Venezuela to Country Groups D:2-4, which list countries of nuclear, chemical and biological weapons, and missile technology concern, respectively. Prior to this final rule, Venezuela was already included in Country Group D:5. “The conduct of Venezuela raises sufficient concern that interagency review of proposed exports, reexports, or transfers (in-country) of national security controlled items subject to the EAR, previously eligible for certain license exceptions to Venezuela, and the possible imposition of license conditions or license denials on exports, reexports, and transfers (in-country), will enhance BIS’s ability to protect U.S. national security interests,” notice said.

WTO: After meeting in Paris May 23, EU Trade Commissioner Cecilia Malmström, USTR Robert Lighthizer, and Japanese Economy Minister Hiroshige Seko “reiterated their concerns, reviewed ongoing work, and agreed to deepen their cooperation” on such issues as “nonmarket policies and practices, market-oriented conditions, forced technology transfer policies and practices, industrial subsidies and state-owned enterprises, WTO reform, and digital trade and e-commerce,” three said in joint statement. Three major business groups in April commended their countries’ efforts to tackle the thorny issues of reforming the organization (see **WTTL**, April 8, page 1).

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