



Update on International Business Compliance

12.06.2011

1. EXPORT CONTROLS

BIS Issues Proposed Rule Addressing Items Transferred From the USML to CCL

The Bureau of Industry and Security ("BIS") issued a significant proposed rule establishing the regulatory framework for items transferred from the U.S. Munitions List ("USML") to the Commerce Control List ("CCL"). The rule is a major development under the Obama Export Control Reform Initiative.

The rule contemplates that as part of the Obama Export Control Reform Initiative, DDTC will transfer jurisdiction over certain USML items (mostly generic parts and components) to the CCL for regulation by BIS. Under the proposed rule, BIS proposes establishing the mechanism for regulating the transferred items under the EAR after such transfer. A number of the main provisions of the proposed rule are as follows:

- A new "600 Series" will be established on the CCL - referred to informally as the "Commerce Munitions List." Items transferred from the USML will be listed in the 600 Series.
- 600 Series items will require export licenses to all destinations except Canada.
- Certain license exceptions under the EAR will apply to 600 Series items. Notably, however, the recently enacted Strategic Trade Authorization ("STA") exception will not automatically apply; rather parties will be required to apply for STA in a separate application which must be approved by the Departments of Defense, State and Commerce.
- Items that are "Specially Designed" for items listed in the 600 Series will also be controlled. The term "Specially Designed" is defined to refer to when an item has technical properties that achieve or exceed the controlled performance levels, characteristics or functions of the referenced item identified on the CCL.
- A new category OY521 will be established as an equivalent to USML Category XXI, which would control items such as emerging technologies on a temporary basis until a permanent category of controls can be identified.
- The proposed rule references CCL entries for certain military vehicles transferred from the USML including those designed or modified for non-combat military use.
- The proposed rule has not yet been promulgated in final form and is not yet effective. The full text of the rule can be found at: http://www.bis.doc.gov/news/2011/fr_07152011.pdf

Imprisonment

A Tennessee entrepreneur selling body armor on the Internet was arrested and convicted for ITAR violations and sentenced to 46 months in prison. According to press reports, Immigration and Customs Enforcement ("ICE") agents were searching the Internet looking for companies selling items regulated under the U.S. export laws. The defendant in the case was offering to sell body armor and bulletproof vests on eBay for shipment anywhere in the world. According to press reports, the ICE agents set up a sting and contacted the defendant to purchase the body armor for "clients in the United Arab Emirates" and other foreign locations. The agents eventually placed orders, and, when the products were delivered, the defendant was arrested. The defendant pleaded guilty, and U.S. District Judge Thomas Phillips sentenced him to 46 months in prison. For additional details see:

<http://www.justice.gov/usao/tne/news/2011/January/011311%20Pendzich%20Guilty%20Plea%20Arms%20C>
and

<http://www.justice.gov/usao/tne/news/2011/October/101311%20Pendzich%20Sentencing%20Arms%20C>

DDTC Issues Guidelines For Implementing New Dual National/Third Country National Policy For Agreements

As reported in the May 20, 2011 Williams Mullen International Business Compliance Update, on May 16, 2011 DDTC issued a final rule related to transfers by foreign parties of ITAR-controlled items to dual national ("DN") and third-country national ("TCN") employees. Under the rule, the transfer of unclassified defense articles, including technical data, will be permitted to or within a foreign business entity, governmental entity or international organization provided the foreign organization takes certain compliance steps to prevent diversion of ITAR-controlled technology, including screening employees, making an affirmative decision to allow access and maintaining records of screening procedures. The rule provides an option for the foreign party to vet its own DN's and TCN's for risk of diversion. The new Guidelines provide detailed recommendations for conducting vetting activities. There are three options available for vetting DN/TCN's: (i) the foreign party undertakes the responsibility itself; (ii) the foreign party identifies the countries of the foreign party's DN/TCN to DDTC, and DDTC undertakes the vetting based on these countries; and (iii) the foreign party requests the approval of the specific DN/TCN by DDTC. The Guidelines provide instructions for how foreign parties implement each of these three options. The Guidelines also provide specific language to be used in Technical Assistance Agreements and Manufacturing License Agreements for each of the three options and instructions for submitting General Correspondence requests to DDTC for individual DN/TCN vetting. The Guidelines are prepared to address agreements (e.g., TAA's and MLA's). Separate Guidelines will be promulgated in the future regarding procedures for DN/TCN's for other types of licenses. Copies of the Guidelines and supporting documentation can be found at http://www.pmdtcc.state.gov/licensing/documents/D-TCN_AG_GuidanceFinal.pdf

BIS Adopts "Best Practices" to Guard Against Unlawful Diversion

BIS has adopted a new set of best practices for exporters to guard against unauthorized diversion

of exports. The practices ("Best Practices") are designed to guard against the diversion of dual-use items shipped to a transshipment "hub," or to any intermediate country before being shipped to the country of ultimate destination and are meant to augment BIS's Export Management and Compliance Guidelines. These Best Practices are the result of recommendations by the Bureau of International Security and Nonproliferation that industry develop stronger internal compliance programs, conduct focused outreach and raise awareness of export control obligations. Highlights of the Best Practices are as follows:

- Pay heightened attention to BIS's Red Flag Indicators and communicate any concerns regarding unlawful diversion internally.
- Seek to utilize only those trade facilitators and freight forwarders that administer sound export control management and compliance programs that include transshipment trade best practices.
- Obtain detailed information on credentials of foreign customers to assess diversion risk.
- For routed transactions, establish and maintain trusted relationships with parties to mitigate risks.
- Communicate export control classification and destination information to end-users and consignees on government and commercial export documentation.
- Provide the ECCN or EAR99 classification to freight forwarders for all export transactions and report the classifications in the Automated Export System, if applicable.
- Use information technology to the maximum extent feasible to augment "know your customer" and other due-diligence measures in combating the threats of diversion and increasing confidence that shipments will reach authorized end-users for authorized end-uses.

South Sudan Controls Added to EAR

BIS has added controls on exports and reexports of US origin dual-use items to the Republic of South Sudan. South Sudan became a separate nation July 9, 2011. South Sudan has been added to the Commerce Country Chart in Country Group B, which makes it eligible for certain export and reexport License Exceptions. Country Group B includes a wide range of countries that raise relatively few national security concerns. Controls that continue to apply to "Sudan" under the EAR will not apply to South Sudan. BIS will require a license for the export or reexport of items controlled unilaterally for regional stability and crime control reasons, as well as items controlled by certain multilateral export control regimes.

Electronic Payment at DDTC

As of October 1, 2011, companies registering with DDTC are required to submit registration payments electronically. Payments may be made through Automated Clearing House or Federal Reserve Wire Network if the source of the funds is in the United States or Society for Worldwide Interbank Financial Telecommunications ("SWIFT") if the source of the funds is a foreign bank. The DS-2032 Statement of Registration has been revised to accommodate electronic payments. DDTC has posted the revised form and instructions on its website. Detailed guidelines on the submission process can be found at: <http://www.pmdtcc.state.gov/registration/epr.html>.

Revisions to Licensing Guidelines for DSP-73 and DSP-61 for Decrementation

DDTC has updated the supporting documentation requirements for DSP-73 and DSP-61 license applications. Specifically, the update relates to the decrementation of DSP-61 licenses. A DSP-61 authorizes single entry/exit. The update clarifies that this entry/exit authorization is per line item identified on the license. Accordingly, if entry/exit is made for only a portion of the license, the license will remain valid for the remaining line items and quantities. Note, though, that the quantity and scope must never be exceeded.

Obama Issues New Executive Order Targeting Significant Transnational Organizations

President Obama issued an Executive Order as part of his Strategy to Combat Transnational Organized Crime. The order established a sanctions program to block property from and prohibit transactions with transnational criminal organizations ("TCOs"). The program allows Treasury to freeze any assets a TCO (or individuals or entities related to a TCO) has within the United States, prohibit any TCO-related transactions through the U.S. financial system and make it a crime for a U.S. person to engage in a transaction with a TCO (or a party related to a TCO). This program is one of a series of tools that are being implemented as part of the strategy. Other tools include a proposed legislative package to enhance the authorities' ability to take action against this type of activity, a new presidential proclamation under the Immigration and Nationality Act to deny entry to certain individuals involved in this type of activity, a new rewards program for those who provide information that assists in stopping this type of activity, and an interagency threat mitigation working group.

Libya Rule Changes

OFAC has issued the new Libyan Sanctions Regulations, 31 CFR part 570. These regulations replace and supersede General License Nos. 2 and 3. General License Nos. 1B, 4 and 5, as well as certain statements of licensing policy, are not being incorporated into the regulations at this time and remain available. OFAC also issued General License Nos. 7a, 8a and 9, which included updates to the Specially Designated Nationals list by removing certain entities. General License No. 7a also lifted blocks on property (subject to a reporting requirement) and transactions involving the Libyan National Oil Corporation (NOC) or entities owned or controlled by the NOC. General License 8a also authorized certain prospective transactions involving the Government of Libya, the Central Bank of Libya and certain related entities. Further details are available at:

<http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20111118.aspx>,

Cuba Travel Advisory

OFAC is making clear that, while it has expanded the licensing of travel to Cuba for certain specific purposes, the Cuban Assets Control Regulations still contain significant travel restrictions, and US foreign policy does not allow for virtually unrestricted group travel to Cuba. Statements in the media that suggest otherwise are incorrect. OFAC licenses organizations that sponsor and organize certain educational exchange programs that promote contact with the Cuban people, as long as certain licensing requirements are met. Travel for general "tourist activities" continues to be prohibited under the Cuban Assets Control Regulations.

Other Export Control Developments

BIS

- Statement by U.S. Commerce Secretary John Bryson on the Confirmation of Eric Hirschhorn as the Under Secretary of the Department's Bureau of Industry and Security:
<http://www.commerce.gov/news/press-releases/2011/11/01/statement-us-commerce-secretary-john-bryson-confirmation-eric-hirschh>
- Addition of Certain Persons on the Entity List: Addition of Persons Acting Contrary to the National Security or Foreign Policy Interests of the United States:
http://www.bis.doc.gov/federal_register/rules/2011/76fr67059.pdf
- President's Export Council Subcommittee on Export Administration; Notice of Open Meeting:
http://www.bis.doc.gov/news/2011/fr_10272011.pdf
- Four Companies Settle Antiboycott Charges:
http://www.bis.doc.gov/news/2011/bis_press10272011.htm
- BIS Adds Fifteen Parties to Entity List for Sending Components for Improvised Explosive Devices to Iraq and Iran: http://www.bis.doc.gov/news/2011/fr_10252011.pdf
- Addition of Certain Persons on the Entity List; Implementation of Entity List Annual Review Change; and Removal of Persons From the Entity List Based on Removal Requests:
http://www.bis.doc.gov/federal_register/rules/2011/76fr63184.pdf
- New York Resident and His Company Plead Guilty to Conspiracy to Export Computer-related Equipment to Iran: <http://www.bis.doc.gov/news/2011/doj10072011.htm>
- Texas Firm and its Foreign Affiliates Settle 288 Charges of Unlicensed Exports and Reexports to Iran, Syria, and Other Countries: http://www.bis.doc.gov/news/2011/bis_press10032011.htm
- North Carolina CEO Fined for Export Violations Involving Libya:
http://www.bis.doc.gov/news/2011/bis_press07012011.htm
- Final Rule on Export Controls for High Performance Computers: Wassenaar Arrangement Agreement Implementation for ECCN 4A003 and Revisions to License Exception APP:
http://www.bis.doc.gov/news/2011/fr_6242011.pdf
- Export Control Reform Initiative: Strategic Trade Authorization License Exception - press release & federal register notice: http://www.bis.doc.gov/news/2011/bis_press06162011.htm;
http://www.bis.doc.gov/news/2011/fr_06162011.pdf

DDTC

- Guidelines for General Correspondence for Amendment of Existing ITAR Authorizations Due to U.S. Entity Name/Address and/or Registration Code Changes have been updated:
http://www.pmdtc.state.gov/licensing/documents/gl_GCUS.pdf
- Guidelines for Requests for Proviso Reconsideration and/or Clarification have been updated:
http://www.pmdtc.state.gov/licensing/documents/gl_proviso.pdf
- Guidelines for DSP-85 Applications: Supplemental Guidance have been posted:
http://www.pmdtc.state.gov/licensing/documents/gl_DSP85.pdf
- Amendment to the International Traffic in Arms Regulations: Libya:
<http://www.pmdtc.state.gov/FR/2011/76FR30001.pdf>

OFAC

- Central Bank of South Sudan FAQ: http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20111019_22.aspx

- General licenses authorizing the exportation or reexportation of food items to Iran and Sudan: http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20111013_22.aspx
- Update of Notice Regarding the Implementation of Certain Sanctions Under the Iran Sanctions Act of 1996, as Amended: <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20110914.aspx>
- OFAC Guidance on the Donations of Food and Medicine to Iran and the Non-Specified Areas of Sudan: http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20110620_44.aspx.
- North Korea Regulatory Update: Amendment of North Korea Sanctions Regulations; Removal of Foreign Assets Control Regulations and Regulations Prohibiting Transactions Involving the Shipment of Certain Merchandise between Foreign Countries (Transaction Control Regulations): http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20110620_33.aspx
- Release of updated list of authorized providers of air, travel, and remittance forwarding services to Cuba: <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20110610.aspx>.

2. CUSTOMS AND TRADE LAW

President Signs FTA with South Korea

President Obama has signed the Free Trade Agreement with South Korea. It is currently before South Korea's National Assembly for ratification. The agreement is considered the commercially most significant trade agreement for the United States in 16 years. The International Trade Commission estimates that the reduction in South Korean tariffs and tariff rate quotas on goods alone will add \$10-17 billion to the U.S. Gross Domestic Product and around \$10 billion to annual merchandise exports to South Korea. Once South Korea ratifies it, each country must demonstrate compliance with obligations that take effect immediately before the agreement will enter into force.

Retroactive GSP Renewal Makes GSP Petitions for 2011 Due

A bill that President Obama signed into law renews the Generalized System of Preferences ("GSP") program through July 31, 2013, with retroactive effect to December 31, 2010, when the program expired. The GSP program promotes economic growth in the developing world by providing preferential duty-free entry for selected products from designated beneficiary countries and territories. The new law requires that additional duties paid since the expiration of GSP on December 31, 2010 be refunded without interest. With GSP renewal, the Office of the United States Trade Representative ("USTR") is receiving submissions to modify the list of products eligible for duty-free treatment and the status of certain beneficiary developing countries because of country practices. The deadline for country practice petitions and product petitions, other than requests for competitive need limitation ("CNL") waivers, is December 5. The deadline for requests for CNL waivers is December 16. The GSP bill also renews until the end of 2013 a scaled-down version of the Trade Adjustment Assistance ("TAA") program, with retroactive effect to February 12, 2011, when certain group eligibility requirements and individual benefits and services expired. The TAA program provides benefits to workers who have lost their jobs or suffered a reduction of hours and wages as a result of increased imports or shifts in production outside the United States.

Commerce Refines Assessment of AD Duties in NME Cases

The Department of Commerce has refined the way in which it instructs U.S. Customs and Border Protection ("CBP") to liquidate non-reviewed entries in antidumping ("AD") cases. In cases in which Commerce conducts an administrative review of an AD order involving merchandise from an NME, importers sometimes declare a cash deposit rate that is company-specific, but the underlying sales are never reported by that foreign producer or reviewed by Commerce. Previously, Commerce would instruct CBP to assess AD duties at the cash deposit rate in effect at the time of entry. Under the new policy, for entries not reported in the reviewed company's U.S. sales database during an administrative review or otherwise determined not to be covered by the review, Commerce will instruct CBP to liquidate such entries at the NME-wide rate, as opposed to the company-specific rate declared by the importer at the time of entry. This will apply to all non-reviewed entries from exporters selected for individual examination. In addition, if Commerce determines that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under the exporter's case number will be liquidated at the NME-wide rate. Note that importers will generally have no way to know whether their purchases were reported by their supplier. Hence, they may be surprised to learn (even years after the products were imported) that their AD duty liability is substantially higher than anticipated at the time of entry.

Noteworthy Export Control Case Settlements

There have been two noteworthy settlements in the export control arena. Electronics wholesaler Sunrise Technologies and Trading Company and its president entered into a plea agreement after being indicted on charges of exporting laptops to Iran by transshipping them through the UAE. Justice, the Bureau of Industry and Security ("BIS") and the Office of Foreign Assets Control ("OFAC") announced that the company and its president pleaded guilty, agreed to pay a \$25 million criminal fine and consented to a suspended ten-year export denial order. The agreement did not contemplate prison time. In the other settlement, Flowserve, with its foreign affiliates, voluntarily disclosed 288 violations of BIS's Export Administration Regulations, including exports to Iran, Syria and other sanctioned countries. The company agreed to pay a \$2.5 million fine. The company could have faced a fine of \$72 million.

Sampling Method and "Offsetting" Added to CBP Regulations

Provisions added to CBP's regulations allow for the use of statistical sampling methods in CBP audits and prior disclosure cases and for offsetting overpayments and underpayments and over-declarations and under-declarations when an audit involves a calculation of lost duties, fees, taxes or monetary penalties under 19 U.S.C. ? 1592. The new provisions also allow importers to use the same techniques in their internal company customs-related operations. The new provisions take effect December 27, 2011.

If you have any questions concerning the subject matter addressed above, please feel free to contact any member of Williams Mullen's International Practice ([Thomas B. McVey](#), [William J. Benos](#), [James R. Cannon, Jr.](#), [Evelyn M. Suarez](#), [Marc G. Marling](#), [Eliot Norman](#), [David P. Sanders](#)

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