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March 1, 2011

Employers Required to Certify Deemed Export Compliance When Sponsoring Non-US Employees

U.S. Citizenship and Immigration Services ("CIS") is requiring the use of a new version of the Form I-129 (Petition for a Nonimmigrant Worker) for employees in certain visas categories. Most significantly, Part 6 of the revised form will soon require employers to complete the *"Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States."* In completing this certification, companies must make an affirmative "deemed export" certification regarding their sponsored employees. This new certification requirement impacts employees holding visas in the following categories: H-1B, H-1B1 Chile/Singapore, L-1, and O-1A. Companies should take affirmative steps now to review their internal export control compliance process to ensure that they can accurately certify export control compliance for each H, L, or O petition they intend to file.

The certification in new Part 6 consists of two parts: First, the company must certify that it has reviewed the list of controlled technologies and technical data under the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR), respectively. Second, with respect to technology or technical data the petitioner intends to release to the foreign worker, the petitioner must check one of two boxes, stating either that: (1) an export license is not required; or, (2) an export license is required and will be obtained before the employer releases the controlled technology to the foreign employee. Companies submitting petitions postmarked on or after Dec. 23, 2010, were required to begin using the new Form I-129; however, CIS did not begin requiring companies to complete Part 6 until Feb. 20, 2011.

The EAR and the ITAR generally both prohibit (without a license) the export or transfer of controlled technology/technical data to foreign persons whether they are in the United States at the time of the transfer or abroad. Under the EAR, a transfer of controlled software or technology (i.e., "know-how") to foreign nationals in the United States is referred to as a "deemed export" –in other words, the transfer is *deemed* to be an export to the foreign person's home country. Such transfers may require companies to obtain a license from the Commerce Department's Bureau of Industry and Security (BIS). Under the ITAR, the transfer of controlled technical data to foreign persons, whether in the U.S. or abroad, is an export which may require a license. Transfers of controlled technology or software can occur in a variety of ways, such as through—

- Visual inspection by foreign persons of U.S.-origin equipment and facilities;
- Oral exchanges of information in the U.S. or abroad;
- The application to situations abroad of personal know-how or technical experience acquired in the US; or
- Access to network servers containing data on controlled commodities, technology or software, etc.

Common venues where technology transfers occur include: access to computer network servers containing controlled technology; providing drawings, blueprints, or specifications to an individual; technical training; collaborations with interns, consultants or the foreign person employees of customers; meetings; plant visits; telephone or conference calls; and, emails and faxes.

The "deemed export" or technology transfer rules apply ***only*** to "foreign persons," which are defined under the EAR and ITAR as individuals who are ***not:***

- U.S. citizens;
- Lawful U.S. permanent residents (i.e., Greencard holders);
- Persons granted asylum in the United States;
- Individuals having refugee status in the United States; or
- Temporary U.S. residents granted amnesty.

With regard to foreign persons who are dual-nationals, BIS considers the last citizenship attained by an individual as the controlling nationality. On the other hand, under the ITAR, DDTC looks at the country of birth as a controlling factor as well.

The CIS has provided no guidance as to how it intends to enforce the new certification provisions of the Form I-129. However, given that the design intent behind the new Part 6 was to increase communication and sharing of information among the various U.S. government agencies for export compliance purposes, the information collected by CIS will undoubtedly be made available to BIS and DDTC. In signing the Part 6 certification, companies are attesting to the accuracy and validity of the information provided. As a result, providing false or incorrect certification statements could lead to the assessment of severe civil and/or criminal penalties. In addition, significant civil and/or criminal penalties may be imposed for violating the deemed export rule or exporting controlled software or technology from the U.S. without a required license.

The number of penalty cases commenced against large and small companies, who were unaware that software, equipment or design/production know-how were controlled under EAR or ITAR, have increased over the past several years. Therefore, it is important for companies who have not previously taken steps to determine the export licensing requirements for their technology or implemented a formal export compliance management program to act immediately to ensure that they can accurately certify to their export compliance for each I-129 petition they intend to file with CIS.

BIS Eases Export Controls on Encryption Products

June 28, 2010

First Step in Broader Reform Effort

The Bureau of Industry and Security has published an interim final rule easing export controls on most encryption products and technology, including cell phones, laptop computers, disk drives, household appliances and many other items. This rule became effective June 25 and BIS will accept public comments on it until Aug. 24. This rule is the first step in the White House's effort to fundamentally reform U.S. export controls, and future efforts targeting encryption controls will include a review of the current restrictions on publicly available encryption software, integrated circuits with encryption functionality (chips, chipsets, development kits and toolkits, etc.), high-speed routers and other types of encryption products.

Key changes made by the new rule include the following.

License Exception ENC. Prior review by BIS and the National Security Agency of exports and re-exports of most items eligible for license exception ENC is no longer required and has been replaced by new encryption registration, classification request and reporting requirements depending on the product, transaction parameters and use of the item in question. Exporters may now self-classify most encryption items.

Specifically, for eligible items and transactions, the rule provides as follows.

• **No registration, classification request, annual self-classification reporting or semi-annual reporting requirements** for exports and re-exports to (1) private sector end-users headquartered in a country that is a close U.S. ally (i.e., listed in Supplement No. 3 to 15 CFR part 740) for internal development or production of new products and (2) any U.S. subsidiary, wherever located.

• Exports or re-exports of items not covered by 15 CFR 740.17(b)(2) or (3) **only require an encryption registration and the receipt of an encryption registration number (ERN)**. Classification requests, annual self-classification reporting and semi-annual reporting are not required.

• **Immediate shipment following the receipt of an ERN and submission of a classification request** is allowed for (1) all items listed in 15 CFR 740.17(b)(2), open cryptographic interface (OCI) items and non-standard cryptography technology to any end-user located or headquartered in a country that is a close U.S. ally, (2) cryptanalytic items and encryption source code ineligible for license exception TSU to non-government end-users located or headquartered in a country that is a close U.S. ally, and (3) eligible items (e.g., chips, chipsets, electronic assemblies, cryptographic libraries, development kits and toolkits, non-standard cryptography items, forensics items, etc.) shipped to any end-user located or headquartered in a country that is a close U.S. ally.

• **Upon receipt of an ERN and 30 days after the submission of a classification request** (1) cryptanalytic items may be shipped to non-government end-users in countries that are close U.S. allies, (2) OCI items and non-standard cryptography technology may be shipped to any end-user located or headquartered in a country that is a close U.S. ally, and (3) items eligible under 15 CFR 740.17(b)(3) may be shipped to any end-user, except for Group E:1 countries.

Mass Market Treatment. Prior BIS/NSA review of exports and re-exports of mass market encryption items is no longer required and has been replaced by new encryption registration, classification request and reporting requirements. Specifically, upon receipt of an ERN from BIS:

• mass market items with encryption exceeding 64 bits may be immediately exported and re-exported as 5A992/5D992 under NLR (no license required), except to Group E:1 countries, upon the submission of a classification request; and

• 30 days after the submission of a classification request, specified mass market items (e.g., chips, chipsets, electronic assemblies, cryptographic libraries, modules, development kits and toolkits, etc.) may be exported and re-exported as NLR, except to Group E:1 countries (while a classification request is pending before BIS exporters have the option of using license exception ENC for shipments to end-users in countries that are close U.S. allies).

Annual Self-Classification Reports must be submitted to BIS and NSA for exports and re-exports of items falling within the scope of 15 CFR 740.17(b)(1) for license exception ENC and 15 CFR 742.15(b)(1) for mass market items.

Semi-annual Sales Reporting Requirements have been removed for most encryption items under license exception ENC; as a result, the only items now subject to semi-annual reporting are those falling within 15 CFR 740.17(b)(2) and (b)(3)(iii).

A New Note 4 was added at the beginning of Category 5, Part 2 to incorporate the agreements made under the Wassenaar Arrangement in December 2009 to specifically exclude from information security controls certain items incorporating or using cryptography. As a result, information security controls are now focused on the use of cryptography for communications, computing, networking and information security. Items previously covered under the ancillary cryptography provisions, such as games, robotics, business process automation and other products that contain encryption capabilities but do not have communication, computing, networking or information security as a primary function, are now exempted from the Category 5, Part 2 controls.

***De Minimis* Treatment** is now afforded to encryption commodities and software authorized for license exception ENC after the submission of registration.

The rule adds provisions for **encryption components** and a new **list of additional sensitive items** in 15 CFR 740.17(b)(3) (i.e., items that perform vulnerability analysis, network forensics or computer forensics).

Previously reviewed 5E002 encryption technology (except technology relating to cryptanalytic items, non-standard cryptography or OCI has been decontrolled and may now be exported and re-exported to non-government end-users not in country groups D:1 or E:1.

Per a **grandfather provision**, exporters are not required to register, submit classification requests or file semi-annual reports for items that were subject to BIS review requests and for which classification determinations (i.e., Commodity Classification Automated Tracking System numbers) were obtained prior to June 25, 2010, provided that the encryption functionality has not changed. However, exporters are required to comply with these new requirements with regard to previously unclassified items described in 15 CFR 740.17(b)(2)(i).

For assistance, or for further information on this interim final rule or other export control compliance matters, please contact Melissa Miller Proctor at (949) 274-1428, Donna Bade at (312) 641-0000, Anu Gavini at (248) 474-7200 or Mark Ludwikowski at (202) 216-9307.

Bounty for FCPA Whistleblowers Likely to Increase Enforcement

July 23, 2010

On July 21st, blowing the whistle on corrupt practices became lucrative business. Contained within the Restoring American Financial Stability Act of 2010 that was signed into law on Wednesday was a provision that rewards whistleblowers with up to 30% of the penalties collected for violations of the Foreign Corrupt Practices Act ("FCPA"). Passage of the whistleblower provision is a signal that the intensified and unprecedented enforcement of the FCPA during the last few years will likely increase.

Now is the time to ensure that your FCPA compliance program is effective and well maintained. ST&R can assist you in developing and implementing all aspects of your compliance program.

The FCPA makes it illegal to pay or offer to pay anything of value to a foreign government official for the purpose of obtaining or retaining business. The law also requires that defined standards regarding accounting practices, books and records, and internal controls be adopted and maintained by publicly-traded companies and their majority-owned subsidiaries, regardless of whether or not they are based in the U.S.

Under this new provision, whistleblowers who voluntarily provide information leading to the successful enforcement of the FCPA can receive a payment of 10% to 30% of any penalty over $1,000,000. FCPA violations often lead to civil and criminal penalties well over $1,000,000 as well as significant federal prison sentences for individuals. Recent fines have exceeded $500 million. Under this new provision, a whistleblower providing "original information" that led to a $500 million enforcement action could receive $50-150 million. Clearly, this provision provides employees with lucrative incentives to report alleged misconduct to the government instead of directly to the companies themselves.

Now more than ever, it is imperative the companies operating internationally focus on FCPA compliance. Sandler, Travis & Rosenberg, P.A., provides a wide range of services to help companies ensure that they comply with the FCPA. These services include conducting risk assessments, devising corporate compliance programs, creating and conducting training seminars, advising clients on acceptable payments, conducting internal investigations, responding to government probes and defending against civil or criminal cases.

For additional information about the FCPA and how to minimize your company's risk of committing violations of this law, please contact Melissa Mandell Paul at 305.913.8677 or Marcus Cohen at 202.216.9307.

Census Proposed Rules Will Eliminate Many AES Option 4 Post-Departure Filings

Last Friday, the U.S. Census Bureau ("Census") published revisions to the Foreign Trade Regulations regarding the Automated Export System ("AES'). *See* 76 Fed. Reg. January 21, 2011. One of the most significant changes contained in the proposed rules is the restriction of Option 4 post-departure filings to specific commodities, which will eliminate this option for many exporters currently using the program. Census explained that the changes were necessary to strengthen national security concerns. Under the current AES system, approved Option 4 filers were granted the privilege of filing the AES information 10 days after export. In addition to limiting the commodities eligible for post-departure filing, the proposed regulations will reduce the timeframe for filing from 10 to 5 days after export.

The proposed regulations limit the commodities that may be exported under the Option 4 post-departure filing process to products in Schedule B headings in 0601- 4707. The commodities on the list fall into two

categories: those which are perishable, such as live plants, vegetables, fruit, flours, grains, starches, gluten, seeds and beans; and, those which may be shipped in bulk, such as clay, rock, granite, ores, coal, fuel wood, wood charcoal, recovered paper and paperboard. Any commodity that does not appear on the selected products list will not be eligible for post-departure filing. Approved exporters may need to segregate shipments of authorized and non-authorized products in order to take advantage of the post-departure filing benefits.

New approvals for Option 4 exporters have been suspended for many years. However, once the final rule is published, any U.S. Principal Party in Interest (USPPI) of the approved commodities will be eligible to apply for Option 4 status. For a USPPI to be approved for post-departure reporting, it must meet the revised post-departure criteria (i.e., reporting history, compliance, ship approved products, etc.) which will be available on the Post-departure Filing Application (PFA). The PFA is currently under development and will be located at www.cbp.gov. The proposed rules contain no grandfather provisions for previously approved Option 4 filers. Instead, companies that are currently granted Option 4 post-departure filing privileges will be forced to reapply into the program. Authorized U.S. 'agents' will not be eligible to apply on behalf of their clients.

In addition to the proposed changes to the postdeparture filing program, the proposed rule would also require mandatory AES filing for all shipments of used self-propelled vehicles, temporary exports and household goods, as well as make remedial changes to the Foreign Trade Regulations to provide clarification and correct errors.

Comments to the proposed regulations are due by March 22, 2011, and we are available to assist individual clients or groups of clients with a vested interest in preparing such comments. All currently approved Option 4 filers with products that will be ineligible are urged to take steps now to consider filing comments in response to Census' proposed rules, and ensure that they are prepared for pre-export AES filing. As a reminder, penalties for erroneous AES filings may be as high as $10,000 per violation.

As the SEC's Anticipated Issuance of the Final Rule on Conflict Mineral Reporting Nears, U.S. Companies in a Wide Range of Industries Are Urged to Take Affirmative Steps Now to Prepare

On December 23, 2010, the Securities and Exchange Commission ("SEC") issued its proposed, far-reaching regulations to implement Section 1502 of the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203, H.R. 4173; "Dodd-Frank Act") that was enacted on July 21, 2010. *See* 75 Fed. Reg. 80948 (December 23, 2010). The SEC's proposed regulations would require publicly traded companies to disclose whether certain minerals used in their products originated in the Democratic Republic of the Congo ("DRC") or adjoining countries (i.e., Angola, Burundi, Central African Republic, Republic of Congo, Rwanda, Sudan,[1] Tanzania, Uganda, and Zambia). The proposed SEC regulations will impact a wide range of industries, including jewelry, computers, cell phones, digital cameras, video games, electronics and communications equipment, medical equipment, aerospace, satellites, and semiconductor.

The term *conflict minerals* refers to minerals mined in conditions of armed conflict and human rights abuses, notably in the eastern provinces of the DRC. The DRC has been immersed in civil war, the Second Congo War (otherwise referred to as the African World War), and violence from armed rebel groups fighting for control of the DRC's vast natural resources and mines. The violence in the region has claimed more than 5.4 million lives and displaced millions from their homes since 1998. More than 200,000 cases of rape and sexual violence

[1] Please note that U.S. companies are currently prohibited from importing from, exporting to, or otherwise dealing with non-specified areas in the Sudan under the Sudanese Sanctions Regulations administered by the Treasury Department's Office of Foreign Assets Control.

against women and children have been documented by the United Nations. The war and the continuing conflicts are chiefly driven by the trade in conflict minerals. The conflict minerals that are the subject of the Dodd-Frank Act and the SEC's proposed rules include:

- Columbite-tantalite or "coltan" (the ore from which tantalum is extracted, which is used as an alloy in carbide tools and jet engine components, as well as hearing aids, pacemakers, airbags, GPS, automotive ignition and anti-lock braking systems in automobiles, laptop computers, cell phones, digital cameras, etc.);
- Cassiterite (used in the production of tin, alloys, tin plating, tin cans, and solder materials);
- Gold (in addition to its obvious use in jewelry, gold is used in connectors in higher end electronic cables, computers, communications equipment, aircraft and semiconductor devices);
- Wolframite (an important source of tungsten which is used in tungsten carbide to produce turning tools—it is also used as a substitute for lead in "green ammunition" and minimal amounts are used in electronic devices such as cell phones, lighting, heating and welding applications); and,
- Derivatives of any of the above or other minerals determined by the Secretary of State to be financing conflict in the DRC countries.

Under the SEC's proposed regulations, a company would be subject to the conflict mineral provisions if it is an issue that is required to file reports per Sections 13(a) or 15(d) of the Securities Exchange Act of 1934, and any of the above-referenced minerals are necessary to the functionality or production of a product manufactured by that company. This includes publicly traded U.S. companies, foreign private issuers, and smaller SEC reporting companies. The conflict minerals provisions were intended to apply to issuers that directly manufacture products or contract the manufacturing of their products. However, neither the Dodd-Frank Act nor the SEC's proposed regulations define the term "manufacture." With respect to the phrase "contract to manufacture a product," the SEC indicated that this would encompass—

- issuers that have ANY influence over the manufacturing of their products; and,
- issuers selling generic products under their own brand name or a separate brand name (regardless of ability to influence manufacturing specifications) as long as they have contracted with another party to have the product manufactured specifically for them.

In addition, the phrase "necessary to the functionality or production of a product" was not defined in either the Dodd-Frank Act or the SEC's proposed rules, and there are no provisions for a materiality threshold or de minimis level for amounts of conflict minerals used in products. If conflict minerals are necessary to the function or manufacture of a product, the issuer is required to conduct a reasonable country of origin inquiry and disclose whether the minerals in question originated in the DRC or adjoining countries. If the inquiry indicates that the minerals did not originate in the DRC or adjoining countries, the issuer must disclose this fact in its annual SEC report and a post a statement to this effect on its website. If, however, a company determines that the minerals did in fact originate in the DRC or adjoining countries, the issuer must undergo a private sector audit, submit a Conflict Minerals Report to the SEC, and post its disclosure and report on the company's website.

It is important to note that the SEC has provided no guidance for conducting a "reasonable country of origin inquiry" or private sector audits; however, the proposed rule references the "Due Diligence Guidance for Responsible Supply Chain Management of Conflict Minerals" that was published by the Organization for Economic Cooperation and Development ("OECD") on December 15, 2010. The OECD recommends that companies engage in a 5-step process for establishing a conflict mineral supply chain due diligence program.

The Dodd-Frank Act requires the SEC to implement conflict mineral regulations no later than April 15, 2011. Companies will be required to file their initial disclosure (and Conflict Minerals Report if required) after the first fiscal year following the entry into force of the SEC's Final rule. For example, if the SEC's Final Rule is published on April 15, 2011—

- Dec. 31st Fiscal Year-End Issuer will be required to submit their disclosures and Conflict Mineral Reports (if necessary) after the end of its fiscal year in Dec. 31, 2012.
- May 31st Fiscal Year-End Issuers must submit their disclosures and Conflict Mineral Report (if necessary) in their annual reports for the period covering June 1, 2011 – May 31, 2012.

Companies subject to the SEC's proposed rules are urged to take steps now to prepare for the enactment of the Final Rule in April 2011 by: (1) identifying products and equipment containing the minerals in question; (2) reviewing the OECD's guidance on Conflict Mineral Supply Chain Due Diligence; (3) establishing measures for conducting "reasonable country of origin inquiry"; (4) implementing a Conflict Mineral Supply Chain Due Diligence program; (5) enhancing record retention procedures relating to sourcing activities; and, (6) ensuring timely filing of required disclosures and/or Conflict Mineral Reports.

Administration's Proposed Export Control Reforms

In August of 2009, the President announced his National Export Initiative, a broad plan to increase domestic employment by doubling U.S. exports over five years. Consequently, in April 2010, Defense Secretary Robert Gates outlined the Administration's proposal for a three-phase U.S. Export Control Reform Initiative (ECR) which is centered on what officials have called, and as described further below, the "four singularities": a single export control list, a single export licensing agency, a single export enforcement coordination agency, and a single information technology (IT) system for export processing.

Four Singularities

Single Export Control List – (1) Combine the U.S. Munitions List (USML) with the Commerce Control List (CCL), which would provide clarity as to which items require export licenses and enable the government to concentrate on controlling critical technologies and items instead of spending time on inter-agency commodity jurisdiction disputes; and (2) consolidate the numerous lists of prohibited exporters and end-users into one single, frequently updated list in order to make it easier for exporters to ensure that they do not ship products to a restricted person or entity involved in activities contrary to U.S. national security interests.

Single Licensing Agency – Establish a single export licensing agency with jurisdiction over both defense articles and dual-use items and technologies in order to reduce confusion over where and how to submit export license applications, streamline the review process and enhance consistency in licensing approval.

Single Enforcement Coordination Agency – Create a single, integrated agency to enforce export controls (a function currently divided among the U.S. Department of Commerce's Office of Export Enforcement (OEE), Counter-Proliferation Program within U.S. Immigration and Customs Enforcement (ICE), and the Federal Bureau of Investigation (FBI)) in order to strengthen enforcement, particularly abroad, and enhance cooperation and coordination with the intelligence community.

Single Information Technology System – Develop a single, unified IT infrastructure that would receive,

process and help screen new license applications and end-users in order to reduce the redundancies, incompatibilities and costs associated with the current system of multiple databases.

While there have been many export control reform efforts in the U.S. in recent years, this one has been, and is expected to be, very different because it is being driven by senior government officials as part of a broader effort to increase U.S. exports and related employment – one of the White House's top priorities. The reform efforts are consistent with the goals and principles of Executive Orders 13563 and 12866, whose aim is to enhance effectiveness and efficiency and to promote transparency and openness in government, and the Presidential Memorandum on Regulatory Flexibility, Small Business, and Job Creation (January 18, 2011). The Memorandum is believed to be the Administration's response to the longstanding argument that reform is needed to more effectively limit the transfer of items (hardware, software and technology) to "bad actors" abroad as well as to improve the global competitiveness of U.S. companies.

Road to Reform

The Administration plans to complete the ECR in three phases. The first phase has entailed transitioning toward the single export control, tiered list and the single licensing agency by making changes to the current system. In Phase II, the Administration will review and revise the CCL and USML for purposes of implementing a tiered export control list, create a single IT structure and move toward a single licensing system. The final phase would involve the creation of the single licensing agency and the single enforcement agency.

Certain aspects of these phases, specifically Phases I and II, have already begun taking shape. The following are some of the steps in the process that have been completed or are already underway.

Control Lists

• Independent objective criteria has been developed by the technical experts within the U.S. government to create a tiered control list structure with the "crown jewels" and weapons of mass destruction (WMD) in the top tier and other tiers based on the lifecycle of the technology or product. Each tier is to be subject to different licensing policies – with Tier 1 facing the strictest policies and Tier 3 facing the loosest.

Three Tiers

Under the new criteria, the CCL and USML will be divided into the following three tiers:

Tier 1 – Items are WMD; WMD-capable unmanned delivery systems; plants, facilities or items specially designed for producing, processing, or using WMD, special nuclear materials or WMD-capable unmanned delivery systems; and items almost exclusively available from the U.S. that provide a "critical" military or intelligence advantage to the U.S.

Tier 2 – Items are almost exclusively available from regime partners or adherents and provide a "substantial" military or intelligence advantage to the U.S. or make a substantial contribution to the indigenous development, production, use or enhancement of a Tier 1 or Tier 2 item.

Tier 3 – Items are more broadly available and provide a "significant" military or intelligence advantage to the U.S. or make a significant contribution to the indigenous development, production, use or enhancement of Tier 1, 2, or 3 items or are otherwise controlled for national security, foreign policy or human rights reasons.

The objective of the tiered approach is to provide a way to (1) quickly add new items; and (2) eventually remove items as technologies age and are no longer in need of being controlled. It will also help to prioritize export controls and the processing of license applications.

On December 9 and 10, 2010, by way of *Federal Register* notices[2], BIS and DDTC issued proposed rules and requests for public comment regarding making the USML a positive control list, making both the CCL and USML clearer and more streamlined, and applying the new tiered approach to both lists. In one of the DDTC's proposed rules, they also requested public comment regarding the proposed overhaul and streamlining of Category VII (Tanks and Military Vehicles) – the testing ground for revamping the USML. Regarding public comments on BIS' proposed rule, they repeatedly emphasized the importance of providing known foreign availability[3] of items in the responses, as this information will play a significant role in placing dual-use items into the different tiers.

Comments on the proposed rules for BIS and DDTC were due February 7 and 8, 2011, respectively.[4]

• To address the jurisdictional problems between the CCL and USML, a "bright line" process based on national security concerns has been developed for identifying into which list an item may fall. Determinations of what items belong on the USML will no longer include the intent of the item's developers. Rather, all items on the USML (and the CCL) will be weighed against the criteria developed to determine new levels of control. If an item falls within the scope of one of the criteria's three tiers, then the item will be controlled for export, re-export and in-country transfer at the level established in the licensing policy developed for that tier. If not, it will not be placed on a control list. That being said, the aim of the U.S. government with the new criteria and tiering process is to do away with the Commodity Jurisdiction determination process – whether an item is controlled under the CCL or USML – and instead have export control jurisdiction determined by clear, technical parameters.

• "Holding" categories are being created on the CCL to control items that are not controlled on the USML and do not otherwise fit into an existing Export Control Classification Number (ECCN) on the CCL. In addition to the "holding" ECCN, other options are being considered for purposes of classifying items that are to be moved from the USML to the CCL. The alternative options include amending existing ECCNs; a new CCL/USML ECCN that BIS plans to create in coordination with DDTC; and/or a modification to the current EAR99 status.

Licensing

• To improve the current stove-piped approach in which the U.S. government has no way of knowing which requests for export authorization it has collectively authorized or denied, agencies are working to identify practices, business processes and definitions with the objective of making changes that will harmonize how they do business and remove inherent contradictions and duplicative efforts. For instance, there has been significant progress made in developing a single application form that would be used by all licensing agencies in the near-term.

• In June 2010, BIS published its first encryption reform regulation as part of the Administration's ECR whereby, in some cases, controls placed upon items containing, utilizing and/or calling to

[2] *Federal Register* Notices 75 FR 76664 (12/9/10), 75 FR 76930 (12/10/10) and 75 FR 76935 (12/10/10).
[3] Foreign availability means an item controlled in the U.S. is available from foreign suppliers on terms less restrictive than those governing U.S. exports.
[4] As of the date of publication of this article, the outcome of the requests for public comment by BIS and DDTC are unknown; however, the Administration hopes to complete the revisions to the CCL and USML by the end of this year.

cryptographic functionalities were significantly minimized (i.e., items qualifying for Note 4 to Category 5 of the CCL). For further information on the changes, please refer to *BIS Eases Export Controls on Encryption* herein. Also, effective January 7 of this year, BIS removed "publicly available" mass market encryption object code software with a symmetric key length greater than 64-bits, and publicly available encryption object code classified under ECCN 5D002 from control under the Export Administration Regulations (EAR) when the corresponding source code for such object code meets the criteria specified under License Exception TSU.

• By way of a *Federal Register* notice published in December 2010 (75 FR 76653), BIS proposed a rule creating a new License Exception STA (Strategic Trade Authorization) which would ease licensing restrictions on 164 countries by allowing exports, re-exports and in-country transfers of certain controlled items to Wassenaar members, NATO countries, and other specified countries for civil end-use, where subject countries do not pose a risk of proliferation or diversion. However, requirements for use of this proposed exception would include, for example, a notification requirement (i.e., exporters must furnish ECCNs for subject items to consignees and consignees who, in turn, must provide the ECCNs to subsequent transferees); a unique destination control statement (including references to subject ECCNs); and the consignee must provide a written statement of acknowledgment to the U.S. exporter.

Enforcement

• The President signed Executive Order 13558 in November 2010, which established the Export Enforcement Coordination Center (EECC) between the Departments of State, Treasury, Defense, Justice, Commerce, Energy, and Homeland Security as well as elements of the intelligence community. The center will have a full-time staff and the Department of Homeland Security will administer the EECC as well as provide its Director.

The EECC will coordinate and de-conflict investigations, serve as a central point of contact for coordinating export control enforcement with intelligence community activities, and synchronize overlapping outreach programs. As the single licensing IT system comes online, the EECC will also screen all license applications.

IT System

• Agencies are moving toward building a single interface for exporters rather than the two different electronic systems currently maintained by BIS and DDTC and the paper process used by OFAC. The migration to a single system will allow the agencies to see the universe of what is considered for export to a given end-user. The State Department's munitions licensing organization is already linked with USXPorts, the Defense Department system deployed in 2003, and follow-on steps will migrate BIS and OFAC as well as the other departments and agencies that participate in the interagency review of export license applications.

• An assessment has been initiated to determine how to integrate the single licensing system with the various enforcement systems.

Other Updates

To facilitate screening parties involved in U.S. export transactions (for purposes of ensuring compliance with U.S. export control and sanctions regulations), the individual export screening lists maintained by the Departments of Commerce, State and Treasury have been consolidated into a downloadable file and are available to the public. This electronic file is located on the U.S. government's website at http://export.gov/ecr/.

Last Step – Phase III

Under Phase III, the agencies propose to transition the reformed export control system into a new interagency structure by:

• Merging the two mirrored control lists into one;

• Creating a single new independent export licensing agency governed by a board of directors reporting to the President that will be comprised of the heads of the federal departments currently responsible for U.S. export controls;

• Finalizing the efforts to merge Commerce's OEE and the Counter-Proliferation Program within ICE into a single dedicated export enforcement unit under ICE; and

• Deploying an enterprise-wide IT system so that exports can be tracked from the filing of a license application until the item is exported.

Undoubtedly, completion of the phased export control reform effort will be slow in coming. Although Phases I and II could be accomplished by regulatory changes and executive order (and do not require legislative action), resistance and criticism from deep-rooted interests in both the public and private sectors are expected. In addition, the creation of new export control agencies would require congressional action and Congress remains as deeply divided over this issue as it has for the past decade. The Administration also faces numerous jurisdictional and statutory hurdles as well as potential conflicts with existing multilateral export control treaties.

Temporary Exports From, Imports Into Brazil to be Eased with Adoption of Carnet System

October 07, 2010

Doing business in Brazil will soon become easier for many international businesses following that country's agreement to adopt the use of carnets, an international passport for merchandise honored by more than 75 countries. The Brazilian Senate's approval of the Istanbul Convention will facilitate trade in many items by eliminating the need to endure extensive customs procedures, pay duties and value-added taxes, and purchase temporary import bonds. Brazil's decision to participate in the international carnet system follows several years of efforts by STTAS do Brasil in conjunction with the World ATA Council and the U.S. Council for International Business.

The Istanbul Convention, adopted by the World Customs Organization in June 1990 and in force since 1993, is primarily designed to facilitate the temporary entry and exit of goods by removing the need to pay customs taxes or complete entry procedures. Commercial representatives, exhibitors, executives and other professionals use carnets to move goods among signatory countries with relative ease and flexibility and little cost.

Goods eligible to use carnets include commercial samples, professional equipment and goods for exhibitions and fairs; ordinary goods crossing borders in connection with international business such as computers, tools, cameras, industrial machinery, automobiles, gems and jewelry, and wearing apparel; and extraordinary items such as paintings, circus animals and equipment used in sporting events and music performances. Carnets are not available for consumable or disposable goods (e.g., food and agriculture products), giveaways and postal traffic.

Carnets are currently used for trade among all Istanbul Convention signatory countries and will become available in Brazil once a guaranteeing authority that will issue and accept carnets is officially designated, a process that is already underway. Once this step is completed, companies doing business in Brazil can expect a reduction in the amount of time required to clear goods, productivity increases and enhanced control over goods temporarily imported, as well as significant efficiency gains for the Brazilian customs administration.

For further information about the benefits of the ATA carnet in Brazil or throughout the world, please contact Doug Browning at (202) 216-9307, Lee Sandler at (305) 267-9200, or STTAS do Brasil professionals at 5511 3045-3080.

USDA: Export Regulations Revised, Imports of Mexican Limes Allowed

Proposed Removal of List of Ports of Embarkation and Export Inspection Facilities. The Department of Agriculture's Animal and Plant Health Inspection Service is proposing to amend the live animal export regulations by removing the list of designated ports of embarkation and their associated export inspection facilities. These ports and facilities would henceforth be listed on the Internet rather than in the regulations, thus enabling APHIS to amend the list in a timelier manner and allowing greater flexibility in regulating animal exports. Comments on this proposal should be submitted no later than Nov. 16.

USDA regulations require all animals, except those exported by land to Canada or Mexico, to be exported through designated ports of embarkation, unless the exporter can show that doing so would cause the animals to suffer undue hardship. To be so designated a port must have an export inspection facility available for the inspection, holding, feeding and watering of animals prior to exportation. Export inspection facilities must meet specified standards concerning physical construction requirements, facility size, inspection implements (e.g., pens and animal restraining devices), cleaning and disinfection, feed and water, access by inspectors, animal handling arrangements, testing and treatment of animals, facility location, disposal of animal wastes, lighting, office and restroom facilities, and walkways. The proposed rule would not amend these requirements and instead would only remove the list of designated ports of embarkation and associated export inspection facilities, which currently can only be amended by rulemaking.

APHIS is also proposing some changes to the regulations pertaining to the approval and denial, revocation or suspension of approval of export inspection facilities, which it states are somewhat ambiguous regarding the circumstances that may trigger a revocation. Under the proposed rule, designated ports of embarkation and export facilities would be re-evaluated annually for compliance by means of an APHIS inspection. If a facility were to fail an annual compliance inspection it would be immediately removed from the list of designated

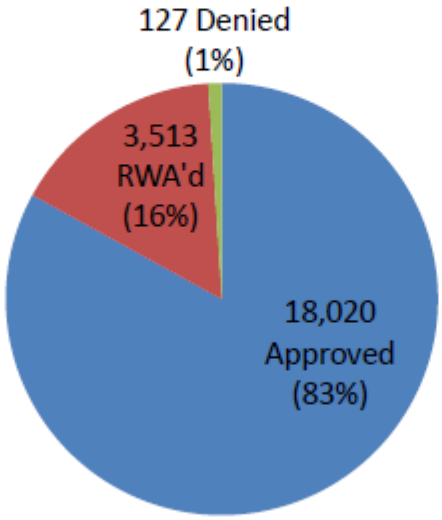
facilities. Operators of facilities that fail either an initial inspection or an annual compliance inspection would have the opportunity to request another inspection after remedying the deficiencies identified.

BIS FY 2011 Report to Congress

BIS FY 2010 Annual Report to Congress: General Statistics	
Commodity Jurisdiction Requests	769 Recommendations (Average processing time: 36 days)
Commodity Classifications	7,360 (Average processing time: 42 days)
Encryption	• FY 2010 (Q3): 300 ERN Requests Received • 1 ,600 licenses for encryption items approved.
Special Comprehensive Licenses	• 6.8% of licenses obtained were for SCLs ($2.8 Billion) • 7 Onsite SCL Reviews Conducted • 2 Desk Audits of SCLs Conducted
Export Management Compliance Programs	18 Reviews of Written Procedures
Validated End Users (VEUs)	• 2 additional companies granted VEU Status • Amendments made to existing VEU for company in China • Revocation of VEU authorization for company in India
License Determinations	• FBI LDs: 101 • Export Enforcement LDs: 505
Antiboycott	1,020 requests for antiboycott guidance received
End Use Checks	• 708 End Use Checks Conducted in 30 Countries • 67 Pre-License Checks • 641 Post Shipment Verifications
Project Guardian	36 Outreach Contacts Made

Export License Applications Processed by BIS in FY 2010

(Total Processed: 18,020 Applications Valued at $66.2 Billion)



Average BIS License Application Processing Time: 29 Days

BIS FY 2010 Annual Report to Congress: Penalties and Other Actions	
Criminal Penalties	• 31 Criminal Convictions • $12.3 Million Criminal Fines • $2 Million in Forfeitures • 522 Months Imprisonment
Administrative Penalties	• 53 Administrative Cases Completed • $25.4 Million Administrative Penalties
Antiboycott Violations	• 14 Administrative Cases Completed • $380,975 Administrative Penalties
Other Enforcement Actions	• 215 Warning Letters Issued • 88 Detentions • 28 Seizures • Temporary Denial Orders on 3 Companies and 3 Individuals • Renewal of TDOs against 7 Companies • 823 Outreach Contacts with Industry

Sandler, Travis & Rosenberg, P.A. Expands West Coast Presence with New Arizona Office

Sandler, Travis & Rosenberg, P.A., a leading provider of international trade and customs services, announced Sept. 13 that it has opened an office in Scottsdale, Ariz., within the Phoenix metropolitan area. This new office, the firm's second on the West Coast, will enable ST&R to better serve the rapidly growing import and export community in the Southwest. It will also allow the firm to further enhance the services it provides to clients doing business around the world, particularly along the U.S.-Mexico border or through the major ports in Southern California.

Melissa A. Miller Proctor, a member of the firm and head of its Export Practice, will oversee the Arizona office. An experienced international trade law attorney, Ms. Proctor possesses a comprehensive knowledge of U.S. export controls and customs laws and regulations. She also has a wealth of practical operational experience that enables her to provide creative and cost-effective service to clients such as importers, exporters, manufacturers, retailers, customs brokers and freight forwarders. She can be reached via email or phone at (480) 305-2110 or (480) 331-1741.

Sandler, Travis & Rosenberg, P.A. (ST&R) is a customs and international trade law firm concentrating its practice in assisting clients with the movement of goods, personnel and ideas across international borders. ST&R provides governments, manufacturers, importers, exporters and retailers the advice and counsel they require to succeed amid the constantly changing demands of global trade.

Sandler & Travis Trade Advisory Services Inc. (STTAS), which is affiliated with ST&R, is recognized as the leading provider of customs and international trade advisory services to the public and private sectors. STTAS offers hands-on global import/export solutions for multinational companies eager to increase their ability to move merchandise across international borders in an efficient, seamless and compliant manner. STTAS also assists governments throughout the world in building customs agencies and procedures that expand import and export capabilities, reduce risk factors and comply with international standards.

Combined, ST&R and STTAS are currently the largest provider of customs and international trade services worldwide with 535 global trade professionals located in 12 offices in 7 countries. Our success is based on a combination of unsurpassed domain expertise, proprietary technology and business process best practices.

For more information about ST&R and STTAS, please visit our website at www.strtrade.com.

You can also stay up-to-date on the latest developments on this issue by subscribing to ST&R's WorldTrade\INTERACTIVE daily e-newsletter.

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