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BIS, DDTC Hear Industry Complaints on Night-Vision Transfers

Responding to overwhelming industry suggestions, export control agencies repropoed parallel rules Feb. 19 amending night-vision controls under U.S. Munitions List (USML) Category XII and the Commerce Control List (CCL) 600 series. As predicted, the Bureau of Industry and Security (BIS) and State's Directorate of Defense Trade Controls (DDTC) proposed reverting to the old use of "specially designed" to differentiate between military and commercial thermal-imaging products.

Final rules could be published by June or July 2016, BIS Deputy Assistant Secretary Matthew Borman predicted Jan. 26 (see **WTTL**, Feb. 1, page 1). That has traditionally been the cutoff for regulatory changes in an election year. Comments on the second proposed rules are due April 4, 2016.

"In response to a high number of substantive public comments, certain articles will be controlled based on the design intent of the manufacturer," DDTC said in its notice. "This was decided because the Department found that certain articles could be used as components or as end items for the same military application. While applying the standard terminology 'specially designed for a defense article' would apply to articles that operate as a component for a higher-level assembly, that terminology would not describe the same articles when used as end items on their own for the same military purpose," it added.

Observers seem hopeful that the proposed regulations will "enable U.S. industry to continue to lead the way in technology development and also compete worldwide," one industry source told **WTTL**. "It's not perfect, but it adds significant clarity to a confusing technology area," he noted.

Proposed Night-Vision Rules Aim to Simplify Controls

In addition to clarifying controls on certain products based on design intent, the rules proposing transfers from the USML to the CCL make several other changes to its previous

proposed rule from May 2015. For example, the agencies do not “propose to amend part 742 to create a new worldwide Regional Stability (RS) control for dual-use items but would maintain a new worldwide RS control for certain military technology,” BIS wrote. “All other items described in this proposed rule that are or would be subject to RS controls would generally be subject to an RS Column 1 control, which imposes a license requirement for all destinations except Canada,” it added.

On the USML side, the State rule would add more than 50 new paragraphs enumerating the specific items under its jurisdiction, listing such items as fire control systems, laser spot trackers, helmet mounted display (HMD) systems, targeting or target location systems, and infrared imaging systems.

The State rule also added a new note defining what constitutes a military end-user. “An item is specially designed for a military end user if it was created for use by a military end user or users. If an item is created for both military and non-military end users, or if the item was created for no specific end user, then it is not specially designed for a military end user. Contemporaneous documents are required to support the design intent; otherwise, use by a military end user will establish that the item was specially designed for a military end user,” the department said in its proposed rule.

The BIS rule proposes new revisions to the Export Administration Regulations (EAR) that were not included in the May 2015 proposed rule. “In order to make the EAR more consistent and easier to apply, this proposed rule would revise various parts of the EAR related to certain QRS-11 sensors and to license requirements related to uncooled thermal imaging cameras,” BIS said.

In the latest rule, BIS also proposed revising several specific Export Control Classification Numbers (ECCNs), including: 0A987, optical sighting devices for firearms; 2A984, concealed object detection equipment; 6A004, optical equipment and components; 6A005, lasers, components, and optical equipment; 6A007, gravity meters and gravity gradiometers; 6A008, radar systems, equipment, and assemblies; 6A107, gravity meters and gravity gradiometers; 7A001, accelerometers; 7A002, gyros or angular rate sensors; 7A003, inertial measurement equipment or systems; 7A005, Global Navigation Satellite Systems receiving equipment; 7A101, accelerometers; and 7A102, gyros.

Unlike the previous proposals, this proposed rule would create only one set of 600-series ECCNs corresponding to USML Category XII rather than two sets, BIS said. “The May 5 proposed rule included a 6x615 series for military fire control, range finder, and optical items and a 7x611 series for military guidance and control items. In order to simplify controls, this proposed rule would only establish one set of 600 series ECCNs, the 7x611 series, which would correspond to all items proposed for control under USML Category XII,” it noted.

“This proposed rule also does not include controls proposed in the May 5 proposed rule for certain maintenance, repair, or overhaul software or technology related to certain dual-use infrared detection commodities. Such controls, which were proposed in new ECCNs 6D994

and 6E994, would exceed those of the Wassenaar Arrangement, and based on public comments, would likely have resulted in extensive license requirements for purely commercial activities, such as civil automotive repair,” BIS said.

Cuba Will Get Scheduled Flights, Presidential Visit, Tractors

It was a big week for Cuba – lots of trade and travel talk – culminating with the announcement Feb. 18 that the president and first lady will travel to the island March 21-22. It will be the first time an American president has visited Cuba since Calvin Coolidge came into port aboard a U.S. battleship in 1928.

“We want to open up more opportunities for U.S. businesses and travelers to engage with Cuba, and we want the Cuban government to open up more opportunities for its people to benefit from that engagement,” White House Deputy National Security Advisor Ben Rhodes wrote in a Medium post. Ultimately, the Obama administration would like to see Congress lift the trade embargo, but that does not mean the administration takes lightly the Cuban government’s human rights abuses, Rhodes wrote.

At the same time, Cleber LLC, owned by Horace Clemmons and Cuban-born Saul Berenthal, is set to become the first American company since 1959 to set up a manufacturing plant in Cuba. Treasury’s Office of Foreign Assets Control (OFAC) Feb. 15 gave the Alabama-based partners permission to open a tractor factory in the Mariel economic zone set up by the Cuban government. The duo expects to get final approval from the Cuban government in March and they’ll begin manufacturing small tractors for Cuban farmers, and possibly for export to other Latin American countries, in early 2017.

Travel to the two countries will also become significantly easier. Transportation Secretary Anthony Foxx and Assistant Secretary of State for Economic and Business Affairs Charles Rivkin traveled to Cuba Feb. 16 to sign an arrangement that re-establishes scheduled air service between the U.S. and Cuba (see **WTTL**, Dec. 21, page 8).

U.S. carriers have until March 2 to apply for permission to offer flights to Cuba. Under the arrangement, each country can operate up to 20 daily roundtrip flights between the U.S. and Havana, up to 10 daily roundtrip flights between the U.S. and Cuba’s nine other international airports, for a total of up to 110 daily roundtrip flights. Travelers must still officially fall into one of 12 categories approved by OFAC.

“Reestablishing a strong and vibrant aviation partnership after 50 years is understandably a complex and challenging task with many legal and logistical obstacles to overcome,” Rivkin said in a statement. “In that respect, I thank and commend the representatives of both governments who have worked diligently since the first round of aviation talks last March.”

If that weren’t enough, Commerce and Treasury hosted Cuban Minister of Foreign Trade and Investment Rodrigo Malmierca in Washington Feb. 17-18 for the second round of the

U.S.-Cuba Regulatory Dialogue. Commerce Secretary Penny Pritzker traveled to Cuba for the first round of talks in October. During the dialogue, Pritzker urged her Cuban counterpart to ease restrictions so U.S. companies can invest in the island, while Malmierca maintained that the U.S. embargo is the primary obstacle to trade and investment.

“To seize this moment and start building a relationship between our nations, it is important that we see concrete policy changes that make it easier for U.S. businesses to capitalize on our regulatory changes. Such changes will demonstrate Cuba’s commitment to increasing trade ties with the United States for the benefit of the Cuban people,” Pritzker said at the opening of the dialogue.

Obama’s actions have been met with resistance from both sides of the aisle. Rep. Ileana Ros-Lehtinen (R-Fla.) called Obama’s upcoming visit “shameful” and Sen. Bob Menendez (D-N.J.) said, “It is totally unacceptable for the President of the United States to reward a dictatorial regime with an historic visit when human rights abuses endure and democracy continues to be shunned.” Following the stop in Cuba, Obama and his wife will travel to Argentina to meet with that country’s new president.

Software Firm Pays \$28 Million to Settle Bribery Charges

Massachusetts software company PTC Inc. agreed Feb. 16 to pay more than \$28 million to settle charges of violating the Foreign Corrupt Practices Act (FCPA) with the Securities and Exchange Commission (SEC) and Justice. From at least 2006 into 2011, two wholly owned PTC subsidiaries in China provided nearly \$1.5 million in improper payments to Chinese government officials who were employed by Chinese state-owned entities (SOEs) that were PTC customers, the SEC order said. These payments were made to obtain or retain business from the SOEs.

“Specifically, PTC-China provided non-business travel, primarily sightseeing and tourist activities, as well as improper gifts and entertainment, to the Chinese government officials. PTC earned approximately \$11.85 million in profits from sales contracts with SOEs whose officials received the improper payments,” SEC noted.

Under the settlement, PTC also agreed to a nonprosecution agreement (NPA) with Justice, paying a \$14.54 million criminal penalty. PTC China admitted that the cost of these recreational trips was routinely hidden within the price of PTC China’s software sales to the Chinese state-owned entities whose employees went on the trips, Justice said.

“PTC China routinely engaged the services of local ‘business partners,’ Chinese companies that helped PTC China find prospective contracts, assisted PTC China in the sales process with Chinese SOEs, and provided additional services to PTC China's customers that had been outsourced by PTC China, including information technology services,” the NPA noted. “PTC China failed to conduct meaningful due diligence of its Chinese business partners, notably with respect to corruption risks or anti-corruption controls of these

Chinese business partners,” it added. “Some of the overseas travel expenses paid for by the business partners were tracked by PTC China sales staff on spreadsheets that they maintained separately from PTC China's electronic accounting records to help PTC China better understand the composition of, and negotiate, fees with the Chinese business partners,” the NPA said.

“The company is pleased to have resolved this matter,” PTC said in a statement. The settlement pertained to “expenditures by certain former employees and business partners in China,” it added. “PTC has implemented extensive remedial measures related to these matters, including the termination of the responsible employees and business partners, the establishment of an entirely new leadership team in China, the establishment of a dedicated compliance function, and other enhancements to compliance programs,” the PTC statement said.

State Defends Stance on Gun Blueprints Appeal

In a case that has angered gun owners and free speech groups, the State Department and its Justice lawyers defended its authority under the International Traffic in Arms Regulations (ITAR), filing a brief Feb. 11 in *Defense Distributed v. U.S. Department of State* in the U.S. Fifth Circuit Court.

The lawsuit got a boost in December when conservative lawmakers and free-speech groups, including the Electronic Frontier Foundation and Cato Institute, filed amicus briefs in support of the plaintiff (see **WTTL**, Dec. 21, page 15).

In May 2013, the Directorate of Defense Trade Controls Compliance (DTCC) asked Defense Distributed, an online weapons retailer, to pull gun blueprints off its website, saying it could violate the Arms Export Control Act (AECA). Defense Distributed and the Second Amendment Foundation filed for an injunction to block DDTC's action in May 2015 in Austin, Texas, U.S. District Court. The district court denied the injunction, but the company appealed that ruling to the circuit court.

Defense Distributed argued the injunction violated its both first and second amendment rights. “Plaintiffs’ constitutional claims are ...without merit. Plaintiffs’ First Amendment argument misunderstands the nature of the licensing scheme and ignores the context of the Department’s actions here. The licensing scheme does not target plaintiffs’ ability to express ideas, but rather applies here only because the computer files at issue direct a computer to produce firearm components,” State responded.

“This case does not involve university lectures or discussions of matters of theoretical interest at a dinner party. Rather, the regulation’s application in this case involves the dissemination of computer files to foreign nationals that can be used, automatically, to generate firearms or firearm components that are on the U.S. Munitions List,” it noted. “Plaintiffs’ reliance on the Second Amendment is misplaced. The only limitation at issue

here concerns the placement of certain computer data files on an unrestricted Internet site. Nothing in the statute or regulations prevents American citizens on U.S. soil from obtaining the files directly from Defense Distributed, much less from obtaining a firearm from other sources or from possessing a firearm for self-defense,” it added.

Unions Get Boost in Complaints Against TPP

The Trans-Pacific Partnership (TPP) does not go far enough to protect U.S. workers and labor plans with Vietnam, Brunei, Malaysia and other Asian countries lack specificity, the AFL-CIO claims in a report released Feb. 16. Labor union complaints got a boost two days later when House Ways and Means Committee Ranking Member Sander Levin (D-Mich.) officially announced his opposition to TPP at a breakfast with reporters in Washington.

“TPP as negotiated falls short of an acceptable outcome, and I cannot support it. There are four key areas - worker rights, currency manipulation, the rules of origin, and investment – where the results are wholly inadequate,” said Levin.

“We’re disappointed but not surprised given Congressman Levin’s votes against trade promotion authority and the trade enforcement bill,” Assistant U.S. Trade Representative (USTR) for Public Affairs Matt McAlvanah said in a statement. “In TPP, we’ve made historic progress on issues important to House Democrats and look forward to continuing to work on a bipartisan basis to move legislation forward.”

As the president met with ASEAN leaders in Rancho Mirage, Calif., AFL-CIO Trade Policy Specialist Celeste Drake was tearing apart the TPP labor rights provisions during a phone call with reporters. “Calling the TPP’s labor rights provisions a gold standard is a mirage,” said Drake. “We know from experience that the discretionary dispute settlement model does not work for vulnerable workers, and the highly touted ‘new’ labor provisions do not provide meaningful new protections for abused and exploited workers.”

Drake and AFL-CIO Director of International Affairs Cathy Feingold also touched on ongoing labor discussions between the U.S. and Mexico. Though the Mexican government committed in December to address worker rights violations, the labor union has seen “no actual proof that these really structural changes are going to happen” before TPP implementation. Feingold expressed concerns over currency manipulation (singling out Japan, China and Malaysia as currency manipulators) and non-TPP countries receiving TPP benefits under the rules of origin.

It will be an uphill battle for the Obama administration to pass TPP. Many Democrats, including presidential candidates Hillary Clinton and Sen. Bernie Sanders (I-Vt.), do not support the deal and House Speaker Paul Ryan (R-Wisc.) does not believe that there are enough votes in the House to pass the trade agreement (see **WTTL**, Feb. 15, page 7). However, the administration could be buoyed by automaker and agricultural lobbying groups. Supporting TPP is part of the National Cattlemen’s Beef Association’s 2016 priorities, and Global Automakers, the lobbying group that represents such car producers

as Toyota, Nissan and Hyundai, recently reiterated their support for TPP. “The TPP accord will provide these companies with even more opportunities to invest locally, creating more American jobs and further strengthening our domestic manufacturing base. We encourage the President and Congress to work together to find a way forward on this important trade deal,” Global Automakers Vice President Paul D. Ryan, upon TPP’s signing, said in a prepared statement.

Dutch Telecom Firm Settles Charges of Uzbek Bribery

Amsterdam-based telecommunications firm VimpelCom Limited and its subsidiary in Uzbekistan, Unitel LLC, agreed Feb. 18 to settle charges of conspiracy to violate the Foreign Corrupt Practices Act (FCPA) by making corrupt payments to Uzbek government officials from 2004 through 2012.

In the criminal case, Unitel pleaded guilty in Manhattan U.S. District Court to conspiracy to violate the FCPA, and VimpelCom entered into a deferred prosecution agreement (DPA) for conspiracy to violate the anti-bribery and books and records provisions of the FCPA, and a separate count of violating the internal controls provisions of the FCPA.

The companies were charged with making more than \$114 million in corrupt payments to officials in the government of Uzbekistan and instrumentalities thereof “to affect or influence acts and decisions of Uzbek government officials or instrumentalities in order to assist the telecom companies in entering and operating in the Uzbek telecommunications market, including by influencing government officials at the Uzbek Agency for Communications and Information,” the criminal complaint said.

“The corruption proceeds were laundered through a complex series of monetary transactions, including through bank accounts in Switzerland and the transfer of funds into and out of correspondent banking accounts at financial institutions in the United States,” the complaint noted.

Under the DPA, VimpelCom agreed to pay a criminal penalty of \$230.1 million to the United States, including \$40 million in criminal forfeiture. Under a separate settlement with the Securities and Exchange Commission (SEC), VimpelCom agreed to a total of \$375 million in disgorgement of profits and prejudgment interest, to be divided between the SEC and the Dutch Public Prosecution Service (Openbaar Ministerie, or OM). VimpelCom also agreed to pay OM a criminal penalty of \$230.2 million, which Justice agreed to credit as part of its agreement with the company.

“These cases combine a landmark FCPA resolution for corporate bribery with one of the largest forfeiture actions we have ever brought to recover bribe proceeds from a corrupt government official,” said Assistant Attorney General Leslie Caldwell said in a statement.

“Resolving this has been a top priority for VimpelCom. While this has been a very challenging experience for our business and our employees, we are pleased to have now

reached settlements with the authorities. The wrongdoing, which we deeply regret, is unacceptable,” VimpelCom CEO Jean-Yves Charlier said in a statement. “We have taken, and will continue to take, strong measures to embed a culture of integrity across the group. We have significantly strengthened our internal controls and compliance program,” Charlier added.

President Obama Launches “New Trajectory” with Southeast Asia

While most of the U.S. press pool was concerned about the presidential election and the vacancy on the Supreme Court, President Obama used a meeting of the Association of Southeast Asian Nations (ASEAN) Feb. 16 to announce the launch of ASEAN Connect. The new initiative features a “network of hubs across the region to better to coordinate our economic engagement and connect more of our entrepreneurs investors and businesses with each other,” Obama told reporters at the two-day U.S.- ASEAN Summit in Rancho Mirage, California.

“I believe this summit has put the U.S.-ASEAN partnership on a new trajectory that will carry us to even greater heights in the decades ahead,” said Obama. “America’s foreign policy rebalance to the Asia Pacific, including Southeast Asia, will continue to be a foreign policy priority of my presidency.”

The president will visit Vietnam in May and attend the East Asia Summit in Laos in September, becoming the first U.S. president to visit that country. Separately, U.S. Trade Representative (USTR) Michael Froman and Lao Minister of Industry and Commerce Khemmani Pholsena Feb. 18 signed a bilateral Trade and Investment Framework Agreement. This agreement creates a forum “to engage on bilateral trade and investment issues, such as intellectual property, labor, environment, and capacity building; as well as to coordinate on multilateral and regional issues,” USTR said in a statement.

ASEAN Connect has four organizing pillars pertaining to business, energy, innovation and policy. The three Connect Centers will be established in Jakarta, Singapore and Bangkok. The Jakarta center will be part of the U.S. Mission to ASEAN and support the goal of “centrality in the regional architecture.” The Singapore hub will focus on the financial sector and the Bangkok center will focus on “project preparation, development assistance, business advocacy, and investment support in the region,” the mission said.

At the conclusion of the summit, the representatives from the 10 ASEAN nations issued a “Sunnylands Declaration,” calling for “mutual respect for sovereignty, territorial integrity, equality and political independence of all nations by firmly upholding the principles and purposes of the Charter of the United Nations, the ASEAN Charter and international law.” But the statement lacked language the U.S. wanted to rebuke China’s aggressive pursuit of territory in the South China Sea. ASEAN members of Malaysia, the Philippines, Brunei and Vietnam have challenged China’s claims. ASEAN, which is the seventh largest world economy, accounted for \$227 billion in two-way goods trade with the U.S. in 2015, supporting more than 370,000 American jobs, according to USTR statistics.

*** * * Briefs * * ***

EXPORT ENFORCEMENT: Former soldier Hunter Perry pleaded guilty Feb. 12 in Louisville U.S. District Court to exporting defense articles, including night-vision goggles, scopes and binoculars to UK, Poland and Japan without licenses. Equipment payments were made through PayPal and bank wire transfers, criminal information noted. Sentencing is set for May 18.

MORE EXPORT ENFORCEMENT: Richmond Akoto Attah of Charlotte, N.C. was indicted Feb. 16 in Charlotte U.S. District Court on charges of illegally attempting to export munitions to Ghana. Attah allegedly hid 27 firearms, including semi-automatic pistols and revolvers, inside washing machine and dryer, and 3,500 rounds of ammunition inside barrel, then attempted to ship containers from Charlotte to Ghana. Attah remains in federal custody.

FCPA: Ignacio Cueto Plaza, CEO of South America-based LAN Airlines, agreed Feb. 4 to pay \$75,000 to settle SEC charges of violating Foreign Corrupt Practices Act (FCPA) by authorizing \$1.15 million in improper payments in connection with union dispute between LAN subsidiary, LAN Argentina S.A., and its employees in 2006 and 2007, SEC charged.

WTO: Turkmenistan is taking steps toward joining WTO. Country's Foreign Minister Rashid Meredow met with WTO Director General Roberto Azevêdo in Geneva Feb. 8. According to tweets from Azevêdo following the meeting, WTO team will head to Ashgabat in May to continue dialogue on country's potential accession. EU first proposed central Asian country join WTO in 2011.

SINGAPORE: TPP will open up new aerospace trade opportunities, Assistant Commerce Secretary for Industry and Analysis Marcus Jadotte predicted at Singapore Airshow Feb. 15. TPP partners Singapore, Canada, Japan, Australia, Mexico, Malaysia and New Zealand have been identified by Commerce as "top markets for aerospace parts producers." In 2015, \$48 billion in U.S. aviation exports went to customers in Asia-Pacific region, according to Jadotte.

BACARDI: Bacardi Limited requested Feb. 16 that OFAC reverse its decision allowing Pernod Ricard S.A., joint venture with Cuban government-owned Cubaexport, to renew and maintain U.S. trademark for Havana Club rum (see **WTTL**, Feb. 8, page 9). "OFAC has acted in violation of well-settled U.S. law and Congressional intent in a covert action that is unjustified in law. We request that OFAC revoke License 837-1 retroactively to prevent Cuba – and its business partner Pernod Ricard – from their continued trafficking in illegally confiscated property," Eduardo Sánchez, brand's legal counsel, said in statement.

TIRES: In 6-0 preliminary votes Feb. 19, ITC found U.S. industry may be injured by allegedly dumped and subsidized imports of certain new pneumatic off-the-road tires from India and Sri Lanka, but that imports of same product from China are negligible.

STEEL PIPE: In 6-0 "sunset" vote Feb. 19, ITC said revoking antidumping and countervailing duty orders on seamless carbon and alloy steel standard, line and pressure pipe from China would renew injury to U.S. industry.

NORTH KOREA: President Obama signed Feb. 18 North Korea Sanctions and Policy Enhancement Act of 2016 (H.R. 757). House adopted Feb. 12 Senate amendment to bill, which Senate voted 96-0 two days before (see **WTTL**, Feb. 15, page 7). House passed legislation, introduced by Rep. Ed Royce (R-Calif.) in response to Pyongyang nuclear test and missile launch. "I look forward to the full and aggressive implementation of this new law," Royce said in statement.