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Export Agencies Pushing Last Rules Under Wire

Final rules on U.S. Munitions List (USML) Category XV (satellites) and its corresponding entries on the Commerce Control List (CCL) are in the middle of the formal congressional notification process and should be published right around New Year's, State's Directorate of Defense Trade Controls (DDTC) Chief Brian Nilsson told the Practising Law Institute (PLI) in Washington Dec. 15. DDTC aims to send the rule and the corresponding rule on the Commerce Control List to the Federal Register Dec. 30 with an effective date of Jan. 15, 2017, he said.

The publication of the final rule is coming down literally to the wire, Nilsson noted. The agencies published interim final rules with requests for comments in May 2014. The latest rules include "more changes than you would have expected," he added. Despite this, the regulations should not break any ban on lame-duck publications as it is "not a new initiative or a new rule," he said. Previously, BIS Assistant Secretary Kevin Wolf had said the agencies found "unintended consequences" for civil, commercial and communication satellites.

DDTC also expects a policy decision on controversial USML categories I, II and III (firearms and ammunition) "in the near-term," the agency wrote in response to several congressional letters on those categories and recent DDTC guidance on gunsmithing. Whenever that decision comes, the agencies are "ready to go" with proposed rules, Nilsson told PLI. Sen. Steve Daines (R-Mont.) in September introduced the Export Control Reform Act of 2016 (S.3405), which would move jurisdiction for commercial and sporting (non-military) firearms from State to Commerce (see **WTTL**, Oct. 3, page 10).

Boeing Reaches Deal with Iran Air, as Sanctions Extended

Boeing has reached an agreement with Iran Air to sell the Iranian airliner 80 aircraft valued at \$16.6 billion, the company said Dec. 11. In its press release announcing the

agreement, Boeing insists the deal is within the terms of the license it was issued in September. Four days later, a bill to extend Iran sanctions another decade became law without the president's signature.

The Boeing deal is based on a memorandum of agreement the Seattle-based aircraft manufacturer reached with Iran Air in June (see **WTTL**, June 27, page 2). The company "coordinated closely with the U.S. Government throughout the process leading up to the sale and continues to follow all license requirements as it moves forward to implement the sales agreement," it said. The order includes 50 737 Max 8s, 15 777-300ERs and 15 777-9s. The first delivery will be made in 2018.

While Boeing boasted of the 100,000 jobs the agreement will support, politicians who voted against the Joint Comprehensive Plan of Action (JCPOA) blasted the sale. "Boeing's actions to aid the world's foremost state sponsor of terrorism through the sale of these jets are disappointing to say the least. This announcement reminds us just how dangerous President Obama's nuclear agreement is. The President wants us to sell planes not just to this dangerous regime, but to an airline that his own Treasury Department sanctioned in 2011," House Financial Services Committee Chairman Jeb Hensarling (R-Texas) said in a statement. Nuclear-related sanctions were lifted following Iran's compliance with JCPOA, allowing for the sale of Boeing's planes.

Meanwhile the Iran Sanctions Extension Act (H.R. 6297) became law Dec. 15 without President Obama's signature. The law extends the Iran Sanctions Act by 10 years (see **WTTL**, Dec. 5, page 5). Obama exercised a rarely used portion of the Constitution that gives the president 10 days (minus Sundays) to sign or veto a bill. If the president does not sign the bill and Congress has adjourned, then the bill is by default vetoed. If a president does not sign a bill within 10 days, but Congress is in session, then the bill becomes law, as is the case here since Congress is in a pro forma session.

The last time a bill became law without a presidential signature was in 1995. White House spokesperson Josh Earnest acknowledged the moment's rarity in his daily press briefing Dec. 15. "We find ourselves in a situation that I'm not sure that we've encountered in eight years, which is that the bill doesn't meet the standard of something that we would veto, but it's also not something that the administration believes is necessary. So, the president made a decision to allow that bill to become law without his signature," said Earnest.

"But I will say that this decision to allow the bill to become law without the president's signature is also part of a message that we're sending to Congress, and it's simply this: If Congress does blow up the deal that prevents Iran from getting a nuclear weapon, they're going to have to deal with the consequences," he added.

The same day, Treasury's Office of Foreign Assets Control (OFAC) issued General License (GL) J-1, which amends GL J to allow the temporary reexport of eligible aircraft that involve code-sharing arrangements, subject to certain conditions. Effective Dec. 15, GL J-1 replaces and supersedes in its entirety GL J, which the agency issued in July authorizing reexport by non-U.S. person of "eligible aircraft" to Iran on temporary sojourn (see **WTTL**, Aug. 1, page 6).

China Files WTO Complaint Against U.S., EU

China is determined that the rest of the world treat it as a market-economy status, despite vocal opposition from the U.S., European Union (EU) and Japan. It came as no surprise then that Dec. 12, a day after China's 15th anniversary of accession to the World Trade Organization (WTO), China filed a complaint against the U.S. and EU to prevent them from using surrogate pricing when calculating antidumping duties on Chinese goods. China claims that Article 15 of its accession protocol states that the surrogate-country approach expired Dec. 11, so other countries can no longer treat it as a non-market economy (see **WTTL**, Dec. 12, page 1).

“There is an old saying in China that ‘promises must be kept and actions must be resolute,’” Chinese Commerce Minister Gao Hucheng said Dec. 12. “The so-called standard of ‘market economy’ was actually created during the Cold War, and only a few of the 164 WTO members have adopted such standards in their internal laws. As for the overcapacity issue, it is a problem faced by, and should be solved by, all countries in the world. They cannot use such excuses to postpone the fulfillment of their obligations. China firmly opposes such misinterpretation of WTO rules and multilateral trading system,” he continued.

The Obama administration has cited China's overcapacity in the aluminum and steel industries as one of the reasons it refuses to change how it calculates antidumping duties. The incoming president is unlikely to be any easier on China. For its part, the European Commission has put forward a proposal on how to treat China, but the Commission needs approval from the EU's members and its Parliament. The European Commission acknowledged it received China's request for consultations and expressed “regret” that China was taking such action in light of the proposal.

Former U.S. Trade Representative (USTR) Charlene Barshefsky, who was instrumental in China's WTO agreement, took a diplomatic tact Dec. 12 at an event at the Center for Strategic & International Studies. “It's pretty clear that the U.S., Japan, Europe take one view with respect to the continuation of China's non-market economy status and China takes a different view. And what that says is that the protocol of accession, the ultimate language agreed to in 2001 when China formally entered, is ambiguous. ... I suspect the [dispute settlement] process will proceed as usual and I think a panel will render a decision and all the parties will comply with whatever that decision is,” she said.

Wassenaar Plenary Again Addresses Technology Advances

The Wassenaar Arrangement's annual updating of its control lists Dec. 8 included dozens of changes to performance thresholds for computers, lasers and other items, but no significant change to controls on cyber security products that U.S. negotiators were hoping to get. The approved changes also prepared the lists to become more positive in keeping with U.S. export control reforms and, in many cases, to restructure and clarify sections as part of the regime's ongoing list review.

At the Wassenaar meeting in Vienna, there was no agreement over proposed changes in Category 4 controls on cyber-intrusion products and technology, which has been the source of so much controversy in the U.S. particularly among technology companies such as Microsoft. The question becomes when the U.S. will join many Wassenaar partners and implement the changes, if ever. Industry sources say negotiators will probably go back to the 2017 plenary process for another try.

Bureau of Industry and Security (BIS) proposed a rule in May 2015 implementing the controls that were first agreed at the 2013 plenary. That proposal met with more than 200 comments, almost universally negative (see **WTTL**, March 7, page 1). U.S. negotiators tried to propose changes at the plenary, but were met with one of the contingent's "lack of successes," one source said.

At the most recent plenary, changes to systems and software in Category 4 amounted to two words changed in two entries. Specifically, the words "operation" and "communication" in 4.A.5 and 4.D.4 entries were replaced with "command and control." "You will not see material change," BIS Assistant Secretary Kevin Wolf told the agency's Regulations and Procedures Technical Advisory Committee (RAPTAC) Dec. 13.

For the second year in a row, Wassenaar rewrote all of encryption controls under Category 5 part 2 to restructure provisions with the goal of a more positive list with fewer decontrol notes. Negotiators got rid of note 4, which was written into the positive list. Among several dozen other changes to the regime's list are quite a few changes in electronics (category 3), including new controls on items that perform several functions at once.

Pretty standard changes were made to computer controls in category 4, including increasing the 'Adjusted Peak Performance' (APP) to 16 weighted teraflops. According to sources, industry keeps promising where they're going to go with the technology, but Defense wants some evidence before increasing the parameters so dramatically.

Throughout the list, negotiators tried to clean up technology controls, which turned out to be more difficult than U.S. officials thought. On the Munitions List, officials added new entries for high-performance explosives and reactive materials. These items, though still in experimental stage, may have been tested on the battlefield, but not fully deployed, one source noted.

"Existing controls were further clarified regarding biological and radioactive agents, information security and the concept and use of 'technology'. Some controls were relaxed, such as for lasers used in industry, digital computers and voice coding equipment. For those products, performance thresholds were updated taking into account the rapidly evolving performance of civil market products," the plenary chair said in a statement.

The agreement also adopted several new definitions for terms including "Authentication," "Biological agents" and "MMIC," as well as updated best practices for effective legislation on arms brokering and updated best practices for effective enforcement, first issued in

2003 and 2000 respectively, and agreed on a regular procedure to review and update existing guidance documents.

U.S. Files Second WTO Complaint over Chinese Grain Policies

The Obama administration filed a second complaint with the WTO Dec. 15 over China's alleged failure to meet market access commitments for rice, wheat and corn. The next day, China blocked a separate U.S. request for the establishment of a WTO Dispute Settlement Body (DSB) panel to examine China's level of domestic support for producers of those same products.

The Agriculture Department estimates that China's tariff-rate quotas (TRQs) for those grains were worth more than \$7 billion in 2015; had the TRQs been fully used, China would have imported \$3.5 billion of additional crops last year. "China has frustrated exporters through generous price support and unjustified market restrictions. Taking action against grain price supports was one piece of the puzzle, and now we must confront China's improper administration of its TRQs to ensure that our grains have the meaningful market access that China bound itself to as a member of the WTO," Agriculture Secretary Tom Vilsack said in a statement.

In the domestic support case, the U.S. previously requested formal consultations in September, but those discussions "failed to resolve U.S. concerns," hence the request for a panel (see **WTTL**, Sept. 19, page 1). China said at the DSB meeting Dec. 16 that the support it provides its producers is consistent with WTO rules and that intends to "strongly" defend its interests.

"Unfortunately, it appears that China maintains domestic support at levels well in excess of its scheduled commitments, including with respect to wheat, Indica rice, Japonica rice, and corn. When China joined the WTO, it committed not to provide support in favor of domestic producers, expressed in terms of China's Current Total Aggregate Measurement of Support (Current Total AMS), in excess of its final bound commitment level of 'nil,'" the U.S. stated before the DSB. According to the USTR's office, from 2012-2015, China's support exceeded 8.5% of the total value of production for each product.

"I welcome this USTR action against China's misadministration of tariff-rate quotas for rice, wheat and corn. It is not the first, nor will it be the last, enforcement action brought against China, which routinely adopts protectionist policies ranging from unscientific regulations on biotech products to excessive market price supports for agriculture commodities," said Rep. Adrian Smith (R-Neb.), chair of the Modern Agriculture Caucus.

What is the Future for USTR?

President-elect Trump's choice for U.S. Trade Representative (USTR) will likely be among the last appointment announcements, a move that is not unusual during the transition

process; President Obama selected his first USTR Ron Kirk Dec. 19, 2008. What remains uncertain is whether USTR will stay a cabinet-level position or be demoted out of deference to Commerce Secretary nominee Wilbur Ross, who Trump has said will shape U.S. trade policy.

At a Dec. 15 panel on the future of trade in light of the U.S. election, Brexit and the collapse of several international trade deals, Wendy Cutler, vice president of the Asia Policy Institute and former acting deputy USTR, sounded a note of calm. “Having been around these issues for a long time working for the government I lived through many reorganization debates and I understand that this debate is rearing its head again. I will say, as a negotiator, you want your negotiator to be empowered, you want them to be senior and you want them to have the mandate to do what they need to do, so if USTR is going to be negotiating deals then we need to keep it cabinet level,” said Cutler, who spent nearly 30 years at USTR.

Cutler said she believes the Trans-Pacific Partnership (TPP) can be revived. “You need a minister to do this to meet with other ministers at that level. Particularly in the Asian region, those levels and the ranks of the people at the table are very, very important. It would be noticed around the world if we were going to demote the level of the top negotiator for U.S. trade agreements,” she said.

Foreign trade officials present for the conversation sponsored by the Washington International Trade Association took a more diplomatic tact, saying USTR has “some of the best negotiators” but if they needed to adapt then they would. It is most important to have a “negotiator in front of us who is truly indeed at an executive level and is fully empowered,” clarified Damien Levie of the EU delegation in Washington.

Trade Group Unveils Post-Election Strategy

Unveiling its “strategies for a new era” policy brief Dec. 12, the National Foreign Trade Council (NFTC) pledged to work with the president-elect to improve trade opportunities for American companies, while pushing back against the protectionism Trump espoused on the campaign trail. At the same time, NFTC President Rufus Yerxa declined to comment specifically on the president-elect’s more incendiary trade statements or on his pledge to scrap the TPP, which the NFTC supports.

Yerxa, whose long trade career included a stint with USTR and the WTO, has adopted a wait-and-see approach common among trade advocates in the weeks post-election. “The reason I want to be optimistic is because I’ve seen this before, prior incoming administrations where there’s a lot of dire predictions about what’s going to happen and in the end very positive things have happened,” Yerxa told reporters.

Yerxa said he’s spoken with members of Trump’s transition team though he also declined to name names. Progress can be made on trade agreements “once it becomes clear to people that protectionism isn’t the answer,” he said. Trump, he predicted, will support

developing rules similar to the digital protections negotiated in TPP. Of its four main policy points for the new administration, two are long-held NFTC positions: slash corporate taxes and engage in “dynamic trade policy.” Newer are NFTC’s positions on a national infrastructure program and, in a nod to the strong populist undercurrent of the election, a national workforce training program to close the skills gap in manufacturing. Yerxa said there is growing support in Congress for workforce development.

*** * * Briefs * * ***

RUSSIA: State in Federal Register Dec. 15 modified sanctions against Russia’s Rosoboronexport (ROE). Measures originally implemented in September 2015 shall not apply to U.S. government “procurement of goods, technology, and services for the purchase, maintenance or sustainment of the Digital Electro Optical Sensor OSD CAM4060, to improve the U.S. ability to monitor and verify Russia’s Open Skies Treaty compliance. Such subcontracts include the purchase of spare parts, supplies, and related services,” notice said. State added 22 entities in China, Iran, North Korea, Russia, Sudan, Syria, Turkey and UAE in September 2015 to list of parties prohibited from doing business with U.S. government, receiving aid or obtaining export licenses under nonproliferation rules (see **WTTL**, Sept. 7, 2015, page 5).

ENTITY LIST: In Federal Register Dec. 15 BIS added seven persons in Pakistan to Entity List. Agency added Ahad International; Engineering Solutions Pvt. Ltd.; National Engineering and Scientific Commission (NESCOM); three NESCOM subsidiaries: Air Weapons Complex (AWC), Maritime Technology Complex (MTC) and New Auto Engineering (NAE); and Universal Tooling Services based on “specific and articulable facts” that companies “have been involved in actions contrary to the national security or foreign policy interests” of U.S.

CONGO: OFAC Dec. 12 added two individuals from Democratic Republic of Congo (DRC) to SDN List. Specifically, OFAC designated Evariste Boshab, deputy prime minister and minister of interior and security, and Kalev Mutondo, general administrator of National Intelligence Agency, for “engaging in actions or policies that undermine democratic processes or institutions in the DRC.” OFAC added country’s armed forces commander and former national police inspector to SDN List in September (see **WTTL**, Oct. 3, page 9).

USED ELECTRONICS: Despite strenuous concerns from industry, Census and EPA are still moving toward final rule implementing “yes-no indicator” for exports of used electronics in Automated Export System (AES), Sean Kline, Supervisor, Census’ International Trade Management Division, told BIS’ Regulations and Procedures Technical Advisory Committee (RAPTAC) Dec. 13 (see **WTTL**, June 20, page 1). Final rule may be published in January, Kline said. While he could not comment on what rule will say, agencies made some changes based on industry comments, he noted. RAPTAC members also asked for substantial grace period for any system change.

EXPORT ENFORCEMENT: Mansour Moghtaderi Zadeh, Iranian national, was sentenced Dec. 14 in D.C. U.S. District Court to 18 months in prison and one year of supervised release for conspiracy to unlawfully export goods, technology and services to Iran without required licenses. He pleaded guilty in October (see **WTTL**, Oct. 31, page 6). Zadeh and company Lavantia were covered by October 2007 Temporary Denial Order (TDO) that was issued against Niels and Robert Kraaijpoel and their company, Aviation Services International. After TDO, Zadeh and other conspirators exported and attempted to export \$69,000 worth of numerous materials, including resin, sealant, paint, pneumatic grease, film adhesive and polyurethane coating and thinner.

MORE EXPORT ENFORCEMENT: Lim Yong Nam, aka Steven Lim, pleaded guilty in D.C. U.S. District Court Dec. 15 to charges related to illegal exports of 6,000 radio frequency modules from Minnesota company through Singapore to Iran, at least 16 of which were later found in unexploded improvised explosive devices (IEDs) in Iraq. Lim was extradited from Indonesia in April (see **WTTL**, April 11, page 3). He is in custody awaiting sentencing.

EVEN MORE EXPORT ENFORCEMENT: Shantia Hassanshahi, dual U.S.-Iran citizen, was sentenced Dec. 12 in D.C. U.S. District Court to 12 months in prison and one year of supervised release for conspiracy to unlawfully export goods, technology and services to Iran without required OFAC license. Charges relate to scheme in which Hassanshahi, through his California company Hasston, would purchase protection relays from Canadian manufacturer Areva T&D. Hassanshahi “then directed the shipping company to send the protection relays either to Iraq or Armenia, knowing they would be picked up by his coconspirators, who would then smuggle the goods into Iran,” according to Justice sentencing memo.

PLEASE NO MORE EXPORT ENFORCEMENT: Bassem Afif Herz was fourth member of his family to be sent to prison for his role in scheme to illegally export hundreds of firearms to Lebanon. He was sentenced in Cedar Rapids, Iowa, U.S. District Court Dec. 12 to 97 months in prison. Herz pleaded guilty in May to multiple counts including violating Arms Export Control Act, and conspiring to illegally ship firearms in interstate and foreign commerce. Ali Afif Al Herz of Iowa, Herz’s brother, was sentenced Oct. 31 to 342 months in prison (see **WTTL**, Nov. 7, page 6). Al Herz pleaded guilty in March. Sarah Majid Zeaiter, Herz’s wife, was sentenced Oct. 14 to 87 months in prison and was also ordered to relinquish \$33,869 in cash related to scheme. Al Herz’s son, Adam Al Herz, was sentenced Oct. 13 to 240 months in prison, followed by three years’ supervised release.

SANCTIONS: Kenneth Zong, U.S. citizen and resident of South Korea, was indicted Dec. 14 in Anchorage U.S. District Court on charges of violating Iran sanctions. Zong allegedly engaged in scheme to unlawfully convert Iranian-owned funds equivalent to approximately \$1 billion U.S. dollars, held in Korean banks, out of restricted accounts and into more easily tradeable currencies, such as dollars and/or euros.

FCPA: Son of former Gabon prime minister pleaded guilty Dec. 9 in Brooklyn, N.Y., U.S. District court to violating Foreign Corrupt Practices Act (FCPA) by conspiring to make corrupt payments to African government officials from 2007 to 2012. Samuel Mebiam, Gabonese national, worked as consultant to mining company that was joint venture between N.Y. hedge fund management company Och-Ziff Capital Management Group LLC, and entity in Turks and Caicos. Sentencing set for April 6, 2017. Och-Ziff agreed in September to pay over \$412 million to resolve related charges (see **WTTL**, Oct. 3, page 2).

LICENSES: BIS Dec. 15 changed standard language on validated licenses to align with changes to destination control statement (DCS) requirements. New language reads “C. Place a Destination Control Statement on all commercial invoices for shipments of items on the Commerce Control List.” BIS published final rules on harmonized DCS changes in August to become effective in November (see **WTTL**, Aug. 22, page 1).

CUBA: Google Dec. 12 reached deal with Cuba’s state-run telecommunications company ETECSA, that “will allow users in Cuba to shorten the access time to Google content on the Internet, providing greater speed and quality in the service and optimization of the capabilities of ETECSA’s international network,” ETECSA said.

NUCLEAR TRADE: Commerce Secretary Penny Pritzker Dec. 13 appointed 39 members to Civil Nuclear Trade Advisory Committee (CINTAC). Among new members are Larry Sanders, president of Accelerant Technologies; Josh Freed, VP of clean energy program at Third Way; and Brad Porlier, VP, Sales and Nuclear Power, at Fluor Enterprises.

IP ENFORCEMENT: U.S. Intellectual Property Enforcement Coordinator's (IPEC) office Dec. 12 released 2017-2019 Joint Strategic Plan on Intellectual Property Enforcement. Three-year plan includes "opportunities for state and local governments, foreign governments, and the private sector—in support of a strong policy environment for intellectual property enforcement," State said in press release. USTR welcomed plan, noting IP industries account for 27.9 million jobs.

NOMINATIONS: Exxon CEO Rex Tillerson was tapped Dec. 13 as president-elect's choice for Secretary of State. Politicians from both sides of the aisle say they will scrutinize Tillerson's ties to Russian President Vladimir Putin, concern Tillerson has shrugged off. ... Former Texas Gov. Rick Perry was nominated Dec. 14 to be Energy Secretary. Perry serves on board of directors of Energy Transfer Partners, builder of controversial Dakota Access Pipeline, and famously pledged during his failed 2012 presidential campaign that he would eliminate department.

CBP: House Dec. 6 unanimously passed Cross-Border Trade Enhancement Act of 2016 (H.R. 875) introduced in February 2015 by Rep. Henry Cuellar (D-Texas), which authorizes Customs and Border Protection (CBP) commissioner to enter into agreements "to provide customs, agricultural processing, border security, or inspection-related immigration services at a land border port of entry, subject to payment of a fee to reimburse the CBP for providing such services." Senate unanimously passed bill Dec. 10, after passing its own version Nov. 29 (see **WTTL**, Dec. 5, page 5). Legislation moved to president's desk Dec. 14.

AUSTRALIA GROUP: BIS in Federal Register Dec. 16 implemented recommendations from February 2016 Australia Group (AG) intersessional meeting and understandings from June 2016 AG Plenary meeting. Specifically, BIS updated Export Control Classification Number (ECCN) 1C351 to reflect new nomenclature for two bacteria and five toxins; removed dengue fever virus and consolidated controls for Shiga toxin and Verotoxin (and other Shiga-like ribosome inactivating proteins) under single listing. Rule also removed word "pathogenic" from the description of cross (tangential) flow filtration equipment under ECCN 2B352.

STEEL: G20 economies Dec. 16 announced formation of new Global Forum on Steel Excess Capacity. U.S. and China agreed to "to jointly promote the expeditious establishment" of forum at JCCT meeting in November, two months after G20 leaders discussed overcapacities at meeting in Hangzhou in September (see **WTTL**, Nov. 28, page 1). Forum "can serve as an example of a new kind of governance, based on cooperation, to overcome challenges in other industries affected by overcapacity," EU Trade Commissioner Cecilia Malmstrom said in statement. Forum will include more than 30 economies: all G20 members plus interested members of Organization for Economic Cooperation and Development (OECD).

AIRCRAFT: U.S. Dec. 16 formally appealed WTO panel ruling that Washington state tax break to airplane manufacturer Boeing was prohibited subsidy (see **WTTL**, Dec. 5, page 1).

EDITOR'S NOTE: In keeping with our schedule of 50 issues a year, there will be no *Washington Tariff & Trade Letter* issue Dec. 26. Our next issue will be Jan. 2, 2017. As always, we wish all our readers **HAPPY HOLIDAYS** and a **HEALTHY AND PROSPEROUS NEW YEAR**.