International Trade: Top 10 Trade Topics Since the Start of 2011

The following ten business-critical regulatory developments were implemented or proposed in the first half of 2011. This update discusses regulatory changes enacted in the areas of export controls on military and dual use items, economic sanctions and anti-money laundering, as well as guidance from relevant agencies that may have significant implications for U.S. and non-U.S. businesses operating in the global marketplace. Opportunities in Sudan may expand, as the U.S. Government seeks to support the newly independent South Sudan and agency guidance confirms that the new state is not subject to the broad sanctions that continue to be imposed on the rest of Sudan. Meanwhile, U.S. economic sanctions have expanded in other geographic areas, increasing prohibitions on business connected to Libya, Iran, Syria and North Korea. Amended Anti-Money Laundering regulations clarify the critical definition of "Money Service Business" that has confused many companies in the past. Possible further changes on the regulatory landscape propose to ease restrictions under both the Export Administration Regulations (EAR) and International Traffic in Arms Regulations (ITAR).

1. *Dual-Use Export Controls* — U.S. Department of Commerce Bureau of Industry and Security (BIS) Takes Steps to Implement Obama's Export Control Reform Initiative

i. The Strategic Trade Authorization (STA) Exception

On June 16, 2011, U.S. Commerce Secretary Gary Locke announced the STA – a new license exception under the EAR. The STA authorizes the export, re-export, and in-country transfer of specified items to low-risk destinations. As a BIS press release explained, "Items such as electronics components for use on the International Space Station, cameras for search and rescue efforts for fire departments, components for civil aviation navigation systems for commercial aircraft, airport scanners, and toxins for vaccine research will be eligible for the new license exception."

However, the exception also imposes new safeguard requirements, which in part generally reflect existing good practices. For example, the exporter must furnish to the consignee the Export Control Classification Number (ECCN) of each item to be shipped; a re-exporter or transferor must furnish to subsequent consignees the ECCN of each item; a statement must be obtained from consignees making particular acknowledgments, including that they are aware that the items shipped under STA may not be subsequently re-exported; and with each shipment, the consignee must be notified in writing that the shipment was made under STA.

ii. Shifting Items from the U.S. Munitions List (USML) to the U.S. Commerce Control List (CCL)

On July 15, 2011, BIS published a proposed rule (76 Fed. Reg. 41958) aimed at moving less sensitive defense articles from the USML to the CCL. The statutory foundation for the USML-CCL Plan appears in section 38(f) of the Arms Export Control Act, which states that the "President shall periodically review the items on the U.S. Munitions List to determine what items, if any, no longer warrant export controls under [the Act]." As part of the overall Export Control Reform Initiative, the President has announced plans to remove a significant number of defense articles – largely less significant generic parts, components, accessories – from the USML.

Many details remain to be resolved, but for instance the USML-CCL Plan includes the creation of a new 600 series of ECCNs to control the defense articles that move to the CCL from the USML (to be termed "Commerce Munitions List"). The Plan proposes that items within this 600 series require a license for export or re-export to all countries except Canada, and all 600 series items would be subject to a policy of denial for countries subject to a U.S. embargo (such as that imposed on Cuba and Iran). License Exceptions LVS, TMP, RPL, and GOV would generally be available for 600 series items.

BIS is soliciting comments on the proposed rule until September 13, 2011.

2. ***Military Items Export Controls* — ITAR Amendment Eases Restrictions for Approved End-Users' Employees Who Are Dual or Third-Country Nationals**

Effective August 15, 2011, approved end-users will no longer be required to obtain express authorization before permitting dual or third-country nationals access to items controlled by the ITAR. A new amendment to the ITAR (76 Fed. Reg. 28174 (May 16, 2011)), grants a license exemption for such foreign nationals who undergo a government security clearance or screening process by approved foreign end users. The approved foreign end user must also obtain a non-disclosure agreement from the employee and maintain records of the screening process.

Under the Amendment, the transfer of defense articles must take place completely within the physical territory of the country where the end-user is located, where the government entity or international organization conducts official business, or where the consignee operates, and be within the scope of an approved export license, other export authorization, or license exemption. The new license exemption requires detailed questioning of an employee that raises a number of thorny issues related, for instance, to the privacy laws of other countries and the degree of due diligence required by employers.

3. ***Export Controls* — USCIS Requires Petitioners for Nonimmigrant Workers to Sign Certification**

As of February 20, 2011, petitioners seeking H-1B, H-1B1, L-1, or O-1A nonimmigrant status for workers must sign a "Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States," contained in Part 6 of Form I-129. Under the new requirement, petitioners must certify that with respect to the employment of any foreign employees, the company is knowledgeable about applicable U.S. export control regulations, including whether a license is required from either the U.S. Department of Commerce or U.S. Department of State to release technology or technical data to the foreign employee. While the substantive legal compliance requirement - essentially compliance with U.S. export control laws - is not new, some companies may find themselves conducting increased diligence prior to furnishing a written certification to a U.S. Government agency regarding the company's compliance measures.

4. ***Anti-Money Laundering* — the Financial Crimes Enforcement Network (FinCEN) Clarifies Definition of Money Services Business (MSB) and Includes Foreign MSBs Doing Business in the United States**

On July 18, 2011, FinCEN released a final rule that more clearly defines what constitutes an MSB subject to anti-money laundering rules under the Bank Secrecy Act (BSA). Separately, FinCEN has proposed regulations to implement the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA) of 2010.

The new rule, which becomes effective on September 19, 2011, potentially expands coverage of U.S. anti-money laundering requirements to many companies operating outside the United States that provide internet-based money transmission services in the United States. The new rule provides that an entity qualifies as an MSB based on its activity within the United States, despite its physical location. As provided in FinCEN's press release, "This requirement arose out of the recognition that the Internet and other technological advances make it increasingly possible for persons to offer MSB services in the United States from foreign locations. FinCEN seeks to ensure that the BSA rules apply to all persons engaging in covered activities within the United States, regardless of their physical location."

Additionally, the new rule eliminates an existing $1,000 threshold for "money transmitters." Previously, conducting $1,000 worth of transactions per person per day made an MSB subject to the anti-money laundering rules under the BSA. Under the new rule, money transmitters engaging in money transmissions in any amount are subject to the BSA rules.

FinCEN also proposed new regulations, which were published on May 2, 2011 (76 Fed. Reg. 24410), to comply with the mandate established in CISADA to prevent foreign correspondent accounts from being used for the benefit of certain Iranian entities connected to Iran's proliferation of weapons of mass destruction or support for international terrorism. Under the proposed rule, all U.S. banks would be required to inquire whether their foreign bank customers maintain a correspondent account for, or have processed one or more transfers of funds within the preceding 90 calendar days, other than through a correspondent account, related to any financial institution designated by the U.S. Government in connection with these illicit activities or to the Islamic Revolutionary Guard Corps (IRGC). U.S. banks will be required to report this information to FinCEN upon receiving a written request for the information.

5. *Economic Sanctions* — Libya's Qadhafi Regime and Related Parties Cut-Off from U.S. Business

On February 25, 2011, the President issued Executive Order (E.O.) 13566, blocking the property and interest in property of Muammar Qadhafi, members of his family, the Central Bank of Libya, and the Government of Libya, its agencies, instrumentalities, and controlled entities. The E.O. furthermore empowers the Secretary of the Treasury, in consultation with the Secretary of State, to block individuals who meet certain criteria, including senior officials of the Government of Libya, children of Muammar Qadhafi, and those who are responsible for the human rights abuses related to political repression in Libya.

As a result of the E.O., any property in the United States or in the possession or control of U.S. persons in which the sanctioned individuals and entities have an interest is blocked and U.S. persons are prohibited from engaging in transactions with the blocked entities. U.S. persons include U.S. citizens, permanent residents, corporations and persons and entities located in the United States. One important exception is General License No. 4, which allows U.S. investment funds to continue to transact in those funds regardless of whether a blocked person or entity holds a non-controlling minority interest in the fund. However, U.S. persons should be aware that these general licenses can change quickly.

For example, this past June, the Office of Foreign Assets Control (OFAC) revoked General License No. 1A, which authorized transactions involving banks owned or controlled by the Government of Libya and organized under the law of a country other than Libya, provided that transactions do not otherwise benefit the Qadhafi regime or any other person whose property and interest in property is blocked. OFAC soon thereafter replaced General License 1A with General License 1B in order to exclude three banks – Arab Turkish Bank, North Africa International Bank and North Africa Commercial Bank.

Frequent changes to U.S. economic sanctions are relatively common and highlight the need for U.S. persons who have dealings in Libya, or any other areas including those discussed below, to stay current regarding sanctioned regimes.

6. *Economic Sanctions* — Old Law Given New Life Imposes Sanctions on Non-U.S. Entities Doing Business With Iran's Oil and Gas Sector

On May 24, 2011, to pressure Iran to comply with international obligations relating to nuclear non-proliferation, anti-terrorism and human rights, U.S. Secretary of State Clinton imposed sanctions on seven non-U.S. entities for their activities related to Iran's energy sector. These were the first sanctions imposed related to refined petroleum products. In particular, the entities were cited for providing refined petroleum products, reformate and oil/gas tankers to Iran.

Under the Iran Sanctions Act of 1996 (ISA), as amended by CISADA, the President of the United States has the authority to select from a menu of sanctions to impose upon entities found to violate ISA. In May, Secretary Clinton imposed sanctions ranging from a complete prohibition on transactions involving U.S. financial institutions and U.S. property to denial of eligibility for U.S. Government procurement contracts on: Petrochemical Commercial Company International (Jersey and Iran), Royal Oyster Group (UAE), Speedy Ship (UAE and Iran), Tanker Specific (Signapore), Ofer Brother Group (Israel), Associated Shipbroking (Monaco), and Petroleos de Venezuela. ISA sanctions were imposed this year for the first time ever, when Belarusneft, a state-owned Belarussian energy company, was sanctioned for its involvement with the Iranian petroleum sector.

7. ***Economic Sanctions* — Syrian Government Sanctioned For Human Rights Abuses Aimed At Opposition Movement**

In 2011, the President issued two executive orders sanctioning Syrian government officials and related organizations for their part in the crackdown and related human rights abuses aimed against Syrian citizens. On April 29, 2011, the President issued E.O. 13572, sanctioning several high-ranking officials in Syria's Army and Intelligence and Security apparatus, as well as the Islamic Revolutionary Guard Corps-Qods Force. On May 18, 2011, the President issued E.O. 13573, sanctioning several high-ranking government officials, including, the President, Vice-President, Prime Minister, Minister of the Interior, Minister of Defense, Head of Syrian Military Intelligence, and Director of Political Security Directorate.

These orders broaden prior sanctions related to Syria by prohibiting U.S. persons from engaging in any transaction or dealing that involves the property or interests in property of these officials or agencies. Further, both of these orders empower the Secretary of the Treasury, in consultation with the Secretary of State, to block additional agencies and individuals that fit certain criteria.

8. ***Economic Sanctions* — Transnational Criminal Organizations: Recent Executive Order Imposes Sanctions**

On July 25, 2011, the President issued an E.O. creating a new category of sanctionable activity by sanctioning four transnational criminal organizations – The Brother's Circle, The Camorra, The Yakuza, and Los Zetas. In addition, the Department of the Treasury's Undersecretary Cohen indicated that the President's new strategy targeting transnational criminal syndicates also will include proposed legislation to make it harder for criminal organizations, such as those sanctioned by the E.O., to hide behind front companies or shell corporations.

Any property in the United States or in the possession or control of U.S. persons in which the sanctioned organizations have an interest is blocked, and U.S. persons are prohibited from engaging in transactions with them. The legislation would "require disclosure of beneficial ownership information in the company formation process."

9. ***Economic Sanctions* — Sanctions Do Not Apply to the Newly Formed State of South Sudan**

On April 12, 2011, OFAC issued guidance regarding the application of economic sanctions to the new state formed from the former Southern Sudan territory. The new state and its government generally are not subject to U.S. economic sanctions (based on E.O. 13067 of November 3, 1997 and E.O. 13412 of October 13, 2006), with exceptions related to the interdependence between some sectors of the South Sudan economy and Sudan.

U.S. persons will continue to be prohibited for instance from engaging in the following activities: (i) dealing in property and interests in property of the Government of Sudan; (ii) engaging in transactions relating to the petroleum or petrochemical industry in Sudan; and (iii) participating in exports or imports from the new state of South Sudan that transit through Sudan.

10. ***Economic Sanctions* — Executive Order Implements Import Ban on North Korea**

Since the statutory authority for North Korean sanctions changed to the International Emergency Economic Powers Act (IEEPA) among others from the Trading With the Enemy Act (TWEA), the U.S. Government has taken several steps to clarify the sanctions. The restrictions under IEEPA however are similar to those that existed under TWEA.

Most recently, on April 18, 2011, the President issued E.O. 13570, which prohibits the importation, directly or indirectly, of any goods, services, or technology from North Korea. A final rule was issued on June 20, 2011, to implemented the E.O. (76 Fed. Reg. 35740). New sanctions regulations, found in a new Part 510 of 31 CFR and enacted to reflect the move away from TWEA, were published on November 4, 2010 (75 Fed. Reg. 67912).

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