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EXPORT CONTROLS UPDATE September 2008

This newsletter is a summary of changes to US export control regulations or other regulatory matters of interest for the month of September 2008.

REGULATORY UPDATES

The President

Sep. 17, 2008 – *73 Fed. Reg. 54055*: President Bush acted to continue the Cuban Assets Control Regulations for one year. Under the terms of the Trading with the Enemy Act, these sanctions would have terminated on September 14, 2008 if the President had not acted to continue the regulations.

Congress

Sep. 18, 2008: The U.S. Senate Foreign Relations Committee reportedly decided to defer approval of the Defense Trade Cooperation Treaties that the Bush Administration negotiated with Australia and the United Kingdom until 2009.

Department of Commerce

Sep. 2, 2008 – *73 Fed. Reg. 51217*: The Bureau of Industry and Security (BIS) amended the Export Administrations (EAR) to establish export licensing requirements for Kosovo, which the U.S. recognized as a sovereign state on Feb. 18, 2008. Specifically, the amendments added Kosovo to the Commerce Country Chart (EAR Part 738, Supp. No. 1); to Country Group B in EAR Part 740, Supp. No. 1; and to Computer Tier 3 in EAR Sec. 740.7(d)(1). Exports to Kosovo are controlled for the following reasons: CB 1 and 2; NP 1; NS 1 and 2; MT 1; RS 1 and 2; and CC 1, 2, and 3.

Sep. 2, 2008 – *73 Fed. Reg. 51271*: BIS announced the initiation of an assessment of the availability of uncooled thermal imaging cameras incorporating microbolometer focal plane arrays in China. BIS's Office of Technology Evaluation (OTE) will oversee the assessment and the Secretary of Commerce will decide by December 1, 2008 whether such cameras are available in China in sufficient quantity, and of comparable quality, so as to render current U.S. export controls ineffective. If the assessment finds that Chinese availability exists, the export license requirement may be removed. The study was initiated pursuant to a petition certified by the Sensors and Instrumentation Technical Advisory Committee (SITAC).

Sep. 5, 2008 – *73 Fed. Reg. 51718*: BIS amended the EAR by adding language to Export Control Classification Number (ECCN) 0A018.a to clarify that crew protection kits – items used as protective cabs on construction equipment in dangerous environments – are considered to be “construction equipment built to military specifications” and therefore are properly classified under ECCN 0A018.a. The amendment clarifies, but does not change, the coverage of ECCN 0A018.a.

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Sep. 22, 2008 – 73 Fed. Reg. 54499: BIS added 108 “persons” (individuals, companies, organizations, and foreign government agencies) to the Entity List (EAR Part 744, Supp. No. 4). Seventy-five are new additions and thirty-three are from General Order No. 3 (EAR Part 736, Supp. No. 1), which has now been consolidated into the Entity List. (*See August 2008 Regulatory Update for the reasons for which an entity may be added to the Entity List.*) A license is required for all exports involving any entity on the Entity List and license applications will be subject to a policy of denial.

Sep. 25, 2008: BIS announced that it is providing the opportunity for companies to have the Commodity Classification information on their websites made accessible via the BIS website. The BIS contact for this service is CommodityClassification@bis.doc.gov.

Sep. 30, 2008 – 73 Fed. Reg. 56793: BIS removed Fuchs Oil Middle East Ltd. of Sharjah, United Arab Emirates, from the Unverified List. The Unverified List consists of foreign parties where BIS has been unable to verify the existence or authenticity of the end-user, intermediate consignee, ultimate consignee, or other party in prior transactions. The involvement of a party on the Unverified List in an export transaction constitutes a “red flag” requiring heightened scrutiny by the exporter before proceeding with the transaction. Fuchs Oil Middle East Ltd. was removed from the Unverified List because BIS conducted or scheduled a post-shipment visit there.

Sep. 19, 2008 – 73 Fed. Reg. 54314: DDTC amended the International Traffic in Arms Regulations (ITAR) by adding Note 5 to the USML Category XIV (Toxicological Agents), clarifying that certain anti-tumor drugs are controlled by the Commerce Department, while also specifying that the know-how for production of nitrogen mustards or their salts is controlled under the ITAR.

Sep. 24, 2008: DDTC posted a notice that all DDTC forms having an expiration date of Sep. 30, 2008 will remain valid after that date since DDTC is unlikely to obtain renewed authorization before that date.

Sep. 25, 2008 – 73 Fed. Reg. 55439: The State Department amended the ITAR regarding registration by exporters, manufacturers, and brokers of munitions. Effective immediately, annual registration fees will be increased “to align registration fees with the cost of licensing, compliance and other related activities.” The fee will now vary according to the extent of registrants’ licensing interactions with DDTC during the 12-month period ending 90 days prior to the expiration of their current registration (the “review period”). The revised fee structure is as follows:

- \$2,250 for new registrants and registrants for whom DDTC has not reviewed, adjudicated, or responded to any application during the review period;
- \$2,750 for registrants who received a review, adjudication, or response to between 1 and 10 applications during the review period; and
- For registrants having more than 10 such determinations by DDTC during the review period, \$2,750* plus an additional fee of \$250 per application acted upon by DDTC during the review period. (*DDTC will advise exporters of the exact amount at time of registration renewal.)
- Tax-exempt registrants (including universities) will pay \$2,250/year regardless of their volume of applications during the review period.

Applications that were denied or returned without action will not be counted in determining the number of DDTC actions during the review period. (*Note: On September 25, 2008, the DDTC posted information on its website clarifying the new fee structure.*)

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Sep. 25, 2008 - 73 Fed. Reg. 55441: The State Department amended the ITAR to remove Rwanda from the list of Section 126.1(c) countries to which exports of defense articles and defense services are prohibited because of United Nations embargoes. On July 10, 2008, the United Nations Security Council terminated its partial embargo on defense exports to Rwanda.

Department of the Treasury

Sep. 2, 2008 – 73 Fed. Reg. 51343: The Treasury Department published the following list of countries that require, or may require, participation in, or compliance with, an international boycott against Israel: Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, United Arab Emirates, and Republic of Yemen.

Sep. 8, 2008 – 73 Fed. Reg. 51933: The Office of Foreign Assets Control (OFAC) issued new Economic Sanctions Enforcement Guidelines describing how it will establish penalties in the light of last year's increase of the maximum penalty to \$250,000. (See *October 2007 Regulatory Update*.) In broad description, OFAC will work from the \$250,000 amount (or more, if the transaction value is greater) if the case is "egregious", or from the transaction value in "non-egregious" cases. OFAC may deem a case "egregious" based on several factors, the most important of which are 1) willful or reckless violation of the law; 2) knowledge or reason to know about the conduct at issue; 3) harm to the objectives of the sanctions programs; and 4) specific characteristics of the entity involved. Additional factors OFAC will consider include the existence and nature of the entity's OFAC compliance program; remedial response to resolve the issues that led to the violation; cooperation with OFAC (possibly including agreement to waive the statute of limitations); the time of the violation relative to the time of the adoption of the sanction; other enforcement actions that may also apply to the same offense; and "other relevant factors" on a case-by-case basis. Submission of a voluntary self-disclosure will generally cut the penalty by half. These new Guidelines were issued as an interim final rule that became effective upon publication, but comments are invited until Nov. 7, 2008.

SANCTIONS

Department of the Treasury

Sep. 10, 15, and 16, 2008: OFAC posted a Guide to Weapons of Mass Destruction/Non-proliferation Sanctions, a Guide to Cuba Sanctions, and a Guide to Iraq Sanctions on its web site.

Sep. 10, 2008: OFAC added the Islamic Republic of Iran Shipping Lines (IRISL) -- the national ocean carrier of Iran -- and 17 related entities to the Specially Designated National List. This is significant to exporters and freight forwarders because IRISL is a leading global provider of bulk, break-bulk, cargo, and containerized shipping.

FINES & PENALTIES

Sep. 3, 2008: Dr. J. Reece Roth, a retired University of Tennessee professor, was convicted by a jury in Knoxville, TN, for conspiracy to violate the Arms Export Control Act (AECA) and 15 illegal exports. The case involved unlicensed deemed exports to Chinese and Iranian graduate students and other unlicensed exports to China of technical data relating to plasma technology that was designed to be deployed on the wings of drones. See *further details in August 2008 Regulatory Update*. Roth's attorneys filed motions for a judgment of acquittal and a new trial on September 15, 2008.

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Sep. 9, 2008: A federal grand jury in Washington, DC indicted Siddabasappa Suresh, an Indian national, and Rajaram Engineering Corporation, an Indian company, for unlicensed transshipments from Rajaram to the Vikram Sarabhai Space Center, a Government of India agency named on the Entity List. The illegal transshipments were discovered during the course of a post-shipment verification conducted by BIS as part of its Sentinel program. The transshipped items were complex electronic instruments used in high performance testing and monitoring that were essential in the research and development of launching systems.

Sep. 11, 2008: A federal grand jury in Miami, FL indicted 8 individuals and 8 corporations for conspiracy to export controlled dual-use items including field-programmable gate arrays, various integrated circuits, global positioning systems, micro-controllers, and a field communicator to Iran. These items all have potential military applications, including potential application as components of improvised explosive devices (IEDs). The defendants are in the United Arab Emirates, Malaysia, England, Germany, and Singapore, the countries from which the controlled items were diverted to Iran.

Sep. 12, 2008: Nalco Company of Naperville, IL agreed to pay \$115,000 to settle charges by BIS that it exported triethanolamine, a chemical weapons precursor controlled under ECCN 1C350, to the Bahamas, Dominican Republic, and Angola without the required export license. Triethanolamine is reagent in water hardness testing kits sold by Nalco.

Sep. 22, 2008: America II Electronics, Inc. of St. Petersburg, FL agreed to pay \$170,000 to settle charges by BIS of four unauthorized exports to Russia of analog-to-digital converters classified under ECCN 3A001.

Sep. 24, 2008: Shu Quan-Sheng of Newport News, VA, President of AMAC International, a Newport News company involved in the research and development of superconducting RF power technologies, magnetic levitation, and cryogenics in space, was arrested on charges of violating the AECA by providing unlicensed foreign technology acquisition expertise and other technical data to several Chinese government entities involved in the design, development, engineering, and manufacture of a Chinese space launch facility. Shu allegedly assisted China's acquisition of the technology of cryogenic pumps and other items critical for the use of liquefied hydrogen in a launch facility. Shu was also charged with violating the Foreign Corrupt Practices Act by bribing Chinese government officials.