



# Trade Matters

## Lowenstein Sandler's Global Trade & National Security Newsletter

September 2022

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### 1. Chip Producer 'Is Informed' of New License Requirement via BIS Letter

According to a [Securities and Exchange Commission filing by NVIDIA](#), the largest producer of graphics processing units (GPUs), Commerce's Bureau of Industry and Security (BIS) has implemented new restrictions on exports of certain microchips to China and Russia. Under [Section 744.21 of the Export Administration Regulations](#), BIS may send an "is informed" letter to NVIDIA imposing a licensing requirement for certain exports, reexports, or transfers because there is an unacceptable risk of use by or diversion to a military end use or military end user in Belarus, Burma, Cambodia, China, the Russian Federation, or Venezuela. BIS rarely uses is-informed letters, which in certain circumstances allow BIS to impose licensing requirements to address specific national security or foreign policy concerns.

### 2. Uptick in CFIUS Non-Notified Inquiries Requires Careful Planning and Due Diligence

The Committee on Foreign Investment in the United States (CFIUS) has provided its [annual report](#) to Congress with details regarding 2021 CFIUS filings. One trend of note is the continual rise in the number of non-notified transactions, with CFIUS proactively inquiring about 135 transactions in 2021, up from 117 in 2020. Because CFIUS is reaching out to more companies that fail to make a filing, parties to transactions must carefully analyze CFIUS issues to avoid a CFIUS inquiry that could prove costly to the transaction.

### 3. OFAC's Crypto Sanctions Increase Liability Concerns for Those in Industry

### Contact Us

for more information about any matters in this newsletter:

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On August 8, the Department of the Treasury's Office of Foreign Assets Control (OFAC) sanctioned **Tornado Cash**, a virtual currency mixer, which allegedly has been used to launder more than \$7 billion worth of virtual currency since 2019. Rather than sanction a person or entity, OFAC sanctioned the protocol's smart contracts, a first for the agency. The sanction of a noncustodial, open-source protocol is unprecedented. Decentralized protocols, especially those that offer privacy-enhancing services, would be well advised to consider upgrading their compliance activities.

#### 4. New Rules Reflect Increased Scrutiny of Defense Contractors' Ties With China

Effective August 25, the U.S. Department of Defense (DOD) issued to the Defense Federal Acquisition Regulation Supplement (DFARS) two interim rule changes designed to track ties with China. First, contractors are required to **disclose to DOD** if they intend to use workers or facilities in China as part of any defense contract or subcontract worth more than \$5 million. In the second DFARS change, contractors are **banned from acquiring tantalum**, a metal used in the production of semiconductors and jet engine coatings, from North Korea, China, Russia, or Iran. The China disclosure interim rule and tantalum import bar go into effect immediately, with the interim rules open for comment for 60 days.

#### 5. Third-Party Carriers Held to Strict Liability for Export Violations

On **July 8**, the U.S. Court of Appeals for the District of Columbia Circuit affirmed a 2020 trial court ruling dismissing FedEx's lawsuit against BIS. FedEx claimed that the agency acted outside its authority and applied overly burdensome liability standards on carriers with no knowledge of the export control violation. The court confirmed that BIS export controls are strict liability in nature, so even if companies are unaware, they can still be held liable for a violation. While FedEx argued that the terms "aid" and "abet" in the Export Control Reform Act are terms of art that have been "understood by courts for decades to require mens rea," the court disagreed. This case serves as a reminder that the government is able to use "aiding and abetting" to go after third-party exporters and will continue to do so in the future.

#### 6. BIS Implements Export Controls on Advanced Semiconductor and Gas Turbine Engine Technologies

On August 15, BIS published an **interim final rule** introducing new controls on four emerging and foundational technologies deemed essential to the national security of the United States. These items are two substrates of ultrawide-bandgap semiconductors (gallium oxide and diamond), electronic computer-aided design (ECAD) software specially designed for the development of integrated circuits with Gate-All-Around Field-Effect Transistor (GAAFET) structure, and pressure gain combustion (PGC) engine technology for the production and development of gas turbine engines.

#### 7. AI Companies Asked to Help the U.S. Government Understand the Global Market

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The International Trade Administration (ITA) of the Department of Commerce is [seeking comments](#) on the current global artificial intelligence (AI) market and any concerns that impact U.S. exports of AI technologies. The information will help inform the ITA's understanding of the current global market, including the rapidly developing AI policy and regulatory landscape in foreign markets and the potential impact on U.S. competitiveness. Stakeholders can provide general comments or answer one of the specific questions in the initial request, such as what trade barriers currently exist in the AI space or how international AI regulations could impact future product or service design and development. Comments must be submitted by Oct. 17 via the [Regulations.gov portal](#) or by email to [artificialintelligence@trade.gov](mailto:artificialintelligence@trade.gov).

#### TRADE TIP OF THE MONTH:

With your full team back in the office after August vacations, consider assigning someone to check your IT system and determine if you can track your company's supply chain if requested by the government to do so. An audit of your supply chain will ensure you are in compliance with U.S. sanctions laws and with the ban on imports from the Xinjiang Uyghur Autonomous Region of China (XUAR). Administrative penalties for sanctions violations are enforced on a strict-liability basis. Additionally, the Uyghur Forced Labor Prevention Act (UFLPA) is broad and establishes a rebuttable presumption that any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the XUAR are supplied using forced labor, and it imposes a ban of such imports. The requirements to rebut the presumption can be difficult and burdensome, so importers need to ramp up tracking capability.

#### Additional Resources

- **Video:** "Generating Business Relationships in the Defense and Government Environment (G-BRIDGE)"  
*Lowenstein Sandler LLP*  
Doreen M. Edelman, Jeffrey B. Jones
- **Article:** "Putin's rumored girlfriend hit with latest U.S. sanctions"  
August 2, 2022  
*Associated Press*  
Christian C. Contardo
- **Article:** "Note to cities: Watch out for security gaps and hidden expenses as you acquire new IT systems"  
August 15, 2022  
*American City & Country*  
Jeffrey B. Jones



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