



Trade Matters

Lowenstein Sandler's Global Trade & National Security Newsletter

November 2022

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1. New Controls Targeting Chinese Semiconductor and Supercomputer Sectors

The U.S. Department of Commerce's Bureau of Industry and Security (BIS) recently issued an **interim final rule** that significantly expands export controls on advanced computing materials and semiconductors. These controls are intended to prevent China's use of such materials to produce advanced military weapons and commit human rights abuses. The rule imposes restrictive export controls on certain advanced computing semiconductor chips, supercomputer end uses, and transactions involving certain entities on the Entity List. Further, the rule adds new Export Control Classification Numbers (ECCNs) to the Commerce Control List (CCL) controlling the export of certain advanced computing chips, semiconductor manufacturing equipment, and other associated technologies; revises existing ECCNs; establishes new end-use controls for certain items on the CCL; and expands the scope of the Foreign Direct Product Rule. The new controls are part of the ongoing review of BIS's export control policies toward the PRC announced by Under Secretary Estevez during congressional hearings in July 2022 and follow several regulatory and enforcement actions taken over the past few months.

2. U.S. Lawmakers Encourage Companies to Use OFAC License to Export Communication Services and Products to Iran

U.S. lawmakers are encouraging U.S. tech companies to take advantage of a license issued by the Office of Foreign Assets Control (OFAC) that authorizes certain transactions involving communications tools and services. General License D2, issued in September 2022, authorizes the exportation or re-exportation, directly or indirectly from the United States or by a U.S. person wherever located, to Iran of:

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- Fee-based or no-cost services incident to the exchange of communications over the Internet, such as instant messaging, chat and email, social networking, sharing of photos and movies, web browsing, blogging, social media platforms, collaboration platforms, videoconferencing, e-gaming, e-learning platforms, automated translation, web maps, and user authentication services, as well as cloud-based services in support of authorized or exempt transactions
- Fee-based or no-cost software or foreign origin software located outside the United States, related to the above services, provided that the software is designated EAR99 or ECCN 5D992.c
- Internet connectivity services and telecommunications capacity, including cloud-based services and the provision, sale, or leasing of capacity on telecommunications transmission facilities incident to communications
- Publicly available no-cost services and software

A bipartisan group of legislators sent a letter to several U.S. technology companies, including Google, Amazon, Apple, Meta, and Microsoft, recommending they be more proactive in using the authorization to make sure communications technologies and services are available in Iran.

3. New CFIUS Penalty and Enforcement Guidelines

Recently, the U.S. Department of the Treasury's Committee on Foreign Investment in the United States (CFIUS) released the first-ever [CFIUS enforcement and penalty guidelines](#). This announcement sends a clear message: compliance with CFIUS regulations and mitigation agreements is not optional. CFIUS is putting industry on notice that it will not hesitate to take action and use all the tools at its disposal to ensure prompt compliance and remediation, including through the use of civil monetary penalties and other remedies. Conduct subject to CFIUS penalties include the failure to file a mandatory declaration or notice; noncompliance with CFIUS mitigation agreements, conditions, or orders; and any material misstatement, omission, or false certification of information filed with CFIUS. The guidelines discuss the factors that CFIUS will consider in making penalty determinations, such as accountability and incentivizing future compliance with CFIUS regulations and mitigation agreements; harm to U.S. national security; whether the party acted negligently or with awareness or intent; the length of time between awareness of the violation and when CFIUS learned of it; the frequency and duration of the conduct; whether the subject self-disclosed the violation, cooperated with CFIUS, and took prompt remediation; and the sophistication of the company and its record of compliance.

4. States Block Business With Ties to Russia

Companies should identify whether they have in their corporate filings any officers or directors associated with addresses in Russia. The Delaware Division of Corporations has blocked dozens of U.S. companies registered in Delaware from receiving corporate services, including registered agent services and the filing of required documents with the state, claiming that such services are covered by an OFAC rule prohibiting the provision of corporate formation services to persons located in the Russian Federation. Based on this rule, Delaware is refusing to service companies if it identifies

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addresses indicating that officers or directors reside in Russia. As a result, these companies are effectively prevented from raising financing or issuing stock. To get unblocked, companies must demonstrate to the Division of Corporations that none of their officers or directors are residing in Russia.

The Delaware action is one of several similar legal or policy positions taken by states in response to Russia's invasion of Ukraine. These restrictions range from prohibitions on Russia-made and Russia-branded alcohol in state-owned liquor stores to broader restrictions, including:

- A New York law prohibiting state entities from contracting with or investing in businesses headquartered or with their principal place of business in Russia, or contracting with entities conducting business in Russia
- A California executive order prohibiting state agencies from contracting with Russia, and requirements that all grantees and contractors with agreements valued at \$5 million or more report on steps taken in response to the Russian invasion of Ukraine
- A New Jersey law prohibiting state contractors from receiving any contracts if they or any affiliated company (1) have any contracts with Russia or Belarus, (2) are headquartered or have their principal place of business in Russia or Belarus, (3) are supporting or facilitating the invasion of Ukraine, or (4) in which Russia or Belarus have a direct equity share

Similar laws prohibiting or restricting contracting with state agencies or investment by state agencies have been issued in other states, including Colorado, Georgia, Indiana, Massachusetts, Ohio, and Vermont.

The Supreme Court previously held in *Crosby v. National Foreign Trade Council* that such laws are preempted and unconstitutional under the Supremacy Clause. Thus, there may be avenues for companies to challenge state laws prohibiting businesses based on activities involving Russia that are not restricted by OFAC sanctions.

5. Opportunity for Companies to Seek Relief From 301 Tariffs

As part of the four-year Section 301 tariff review required by law, the U.S. Trade Representative (USTR) **recently announced** there will be an opportunity to comment on the effects of the Section 301 tariffs and argue for their removal. Comments can be submitted on the **USTR Comments Portal**, which opens November 15 and closes January 17. USTR has published the specific questions on which it will seek comments ahead of the opening of the comment window so that companies can begin to prepare their responses. Companies will be able to comment on the effects of the Section 301 tariffs on an economy-wide level, sector/industry level, and tariff code-specific level and propose modifications. This comment period is the only avenue for companies to seek tariff relief for the foreseeable future.

6. Commerce Official Tapped as New Made in America Director

On October 12, the Biden administration announced that **Livia Shmavonian** will be the Office of Management and Budget's new Made in America Director, having previously served as the Director of Legislative and Intergovernmental Affairs and Senior

Advisor to the Under Secretary at the International Trade Administration of the Department of Commerce. The Made in America office was established to boost domestic manufacturing and increase the use of U.S.-made products and services in federal procurement processes. In March of this year, a [final rule](#) was published that will increase the domestic content threshold for federal procurements from 55 percent to 75 percent by 2029. As of October 25, the threshold is 60 percent. Shmavonian's appointment is just one of many actions that the Biden administration has taken to demonstrate a continued focus on expanding U.S. manufacturing.

7. CBP Plans New Entry Requirement Applicable to All China Imports

U.S. Customs and Border Protection (CBP) recently posted on its [website](#) the latest [ACE Development and Deployment Schedule](#), which contains a new requirement that will impact all importers of China-origin articles. Specifically, CBP intends to require importers of China-origin articles to declare the Chinese postal code associated with the company identified by the Manufacturer Identification Code (MID). CBP will use this data as a screen to determine whether the imported article was produced in Xinjiang and is thereby subject to the Uyghur Forced Labor Prevention Act (UFLPA). While this change was originally scheduled to go into effect in November, CBP has postponed it without setting a new date for rollout. This upcoming requirement underscores that UFLPA enforcement is continuing to ramp up and companies need to be prepared to meet this or a similar requirement in the near future.

TRADE TIP OF THE MONTH: Antiboycott Enforcement Remains Relevant

On October 6, 2022, Assistant Secretary for Export Enforcement Mathew Axelrod published a [policy memo](#) describing enhancements to BIS's antiboycott enforcement policies. These enhancements include reprioritization of violation categories, enhanced penalties, the requirement to admit misconduct, and a renewed focus on foreign subsidiaries of U.S. companies.

Additional Resources

- **Upcoming Webinar:** "G-BRIDGE Lunch & Learn Series - Session 2: How International Trade Laws Can Impact Your Business: What Even Domestic Companies Need to Know" November 16, 2022
Lowenstein Sandler LLP
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[*RSVP HERE](#)

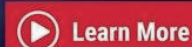


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