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Lowenstein Sandler

Trade Matters

Lowenstein Sandler's Global Trade & National Security Newsletter

December 2021

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1. U.S. Emerging Tech Companies Can't Work With These Chinese Entities

On November 26, the Commerce Department's Bureau of Industry and Security added 27 foreign organizations and individuals, including eight technology entities based in China, to its Entity List. The purpose of the additions is to prevent U.S. emerging technologies from being used for Beijing's "quantum computing efforts that support military applications," according to the Commerce press release. In response, a Chinese Foreign Affairs Ministry spokesperson claimed that the United States has "repeatedly stretched the national security concept and abused state power to hobble Chinese companies."

2. New Chinese Entities Targeted Via the Entity List

Investors have sued Standard Chartered PLC for misleading investors and publishing false information about its violations of U.S. sanctions on Iran. The investors allege that the bank withheld information between 2012, when it paid $670 million to settle allegations of Iranian sanctions, and 2019, when it paid another $11 billion for other sanctions violations. According to the investors, the bank knowingly and willfully violated U.S. sanctions laws, and its efforts to stop money laundering and improve its financial controls "were entirely inadequate."

3. U.S. Imposes First Penalty Against Company for Unauthorized Exports to Huawei

On November 8, the Commerce Department announced the first penalty against a company for unauthorized exports to Huawei. SP Industries, a U.S. company, agreed to an

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administrative settlement that included an $80,000 penalty and internal audit requirements related to alleged violations of the Export Administration Regulations. SP exported items to Huawei and two of its subsidiaries after they were designated on the Entity List. SP Industries voluntarily disclosed the violations and fully cooperated with the subsequent investigation, which likely factored into the low penalty assessment. The company also agreed to conduct audits of its compliance program over the next two years.

4. Economic Sanctions: Data Mining, and Hot Spots To Watch

SAAS Companies Must Review Location Data
Contracts obtained via a Freedom of Information Act request show that the Treasury Department has acquired data feeds from Babel Street, a data-to-knowledge company, for Office of Foreign Assets Control (OFAC) and IRS use. The contracts indicate that OFAC is looking at location data to "research malign activity and identify malign actors" and to "examine corporate structures, and determine beneficial ownership." SaaS companies should be aware of this compliance risk and ensure they know where their customers are located.

Cambodia in the Crosshairs?
On November 10, the Department of State, the Department of the Treasury, and the Department of Commerce jointly issued a business advisory focusing on risks for investors and companies doing business with Cambodia. According to the advisory, corruption in Cambodia is widespread and increasing, and banks are often used to launder illicit funds. The advisory warns that corruption and limited regulations and oversight extend beyond the financial sector to all business activities, including those in the casino, real estate, tourism, infrastructure, manufacturing, and timber industries. Companies and investors considering or already engaged in business in Cambodia need to review their compliance processes to ensure that they adequately address the risks involved. The U.S. government issued a similar advisory prior to taking action regarding the human rights abuses in Xinjiang, China.

Burundi Program Terminated
On November 18, President Biden terminated the executive order underlying the Burundi sanctions program.

5. Upcoming Deadline for Public Comments on Brain-Computer Interface (BCI) Technology

The December 10 deadline is approaching for public comments on the Department of Commerce's proposed rulemaking identifying BCI technology as an emerging technology under the U.S export control regime. The Commerce Department identified BCI as an emerging technology essential to U.S. national security. In its October 26, 2021 advance notice of proposed rulemaking, Commerce requested comments on the potential uses of BCI technology, its impact on U.S. national security, and how to effectively and appropriately use export controls on BCI technology to protect U.S. national security while minimizing the negative effects of export controls on commercial and scientific applications.

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6. China Issues New Encryption Import Controls Effective Immediately

The Ministry of Commerce of China (MOFCOM) has released the revised Catalogue of Technologies Subject to Import Prohibition and Restriction, effective immediately, and has included foreign "data encryption technology employing a key length greater than 256 bits" as a technology that requires an import permit. Physical encryption devices also are licensed and controlled for import by a separate arm of MOFCOM with an entirely different regulatory framework and enforcement mechanism. These two, parallel regulatory frameworks create additional complexity for multinational corporations and may significantly impact supply chain operations that involve cross-border transfer of encryption technologies.

7. FCC to Ban Covered Chinese Communications Equipment

On November 11, President Biden signed into law the bipartisan Secure Equipment Act of 2021, which requires the Federal Communications Commission to adopt rules clarifying that it will no longer review or approve any equipment license application from companies that are on the agency's "Covered List." The Covered List includes companies such as Huawei and ZTE Corporation. This legislation closes a gap that allowed equipment to be purchased with private or nonfederal government dollars and introduced to the U.S. telecommunications network, posing a national security risk. Communications equipment manufacturers and companies should ensure they know the origin of their equipment to ensure that it is not on the Covered List.

8. CIT Set to Hear Oral Arguments in Section 301 Tariff Litigation

The Court of International Trade (CIT) has scheduled oral arguments in the ongoing litigation challenging the legality of Section 301 tariffs on List 3 and List 4A imports from China for February 1, 2022. This plan follows months of procedural haggling regarding whether refunds on liquidated entries would be available if plaintiffs ultimately prevail–a disagreement that was ultimately resolved in favor of the plaintiffs–and sets the stage for a CIT decision on the merits in 2022. In February, plaintiffs' counsel will argue that the parameters of the relevant law allow only the President and the U.S. Trade Representative (USTR) to increase tariffs "when the burden on U.S. commerce has increased from the investigated practices that were the subject of the Section 301 action" and that the imposition of List 3 and 4A tariffs fell outside the scope of this power and thus are unlawful. For importers that wish to join the thousands of plaintiffs already part of the litigation, it is not too late. However, in light of the approaching oral arguments planned for February, importers should file their complaints as soon as possible to avoid missing out on potential refunds as the case nears completion.

9. State Department Conducting End-User Checks To Ensure Compliance

During the November 4, 2021 Defense Trade Advisory Group meeting, senior State Department officials shared policy revisions in the pipeline as well as 2021 licensing trends. In 2021, while the overall volume of licenses has continued to decrease, since certain items were transferred off the Munitions List, the number of defense trade registrants remains near an all-time high, at just under 14,000. In 2021, the agency also initiated more than 280 end-use checks, a three-year high, on defense exports through its Blue Lantern program. Since the transfer of certain gun controls to the Commerce Department, the agency has been able to dedicate more resources to its Blue Lantern program

Trade tip of the month: The Office of the USTR announced a six-month extension for 81 of the 99 exclusions for specific products under Section 301. The exclusions are for "certain medical-care products needed to address the COVID-19 pandemic." The exclusions were previously extended until November 14, 2021, and will now expire on May 31, 2022.

Additional Resources

- **Article:** "Take Note: Address Global Trade Issues Early in Your Negotiations To Avoid Liability and Costs (Yes, This Applies to You)."
  November 19, 2021
  Global Trade
  Doreen M. Edelman and Abbey E. Baker
- **In the Media:** "'Give Us a Break!' Cuban Activists Say U.S. Sanctions Are Blocking Them from Online Services"
  November 19, 2021
  TIME
  Doreen M. Edelman and Laura Fraedrich