

Regulations and Procedures Technical Advisory Committee Minutes – December 8, 2020

Open Session

Anne Marie Griffin, chair – Welcome and introductions. The meeting was held virtually.

There was no overall BIS update.

Presentations by the Public

Bill Root – Public Comment

Bill Root presented a public comment regarding export controls and the COVID-19 pandemic. Copies of the handout and oral remarks summary that he drafted are attached.

Hillary Hess, BIS Regulatory Policy Division – Published Regulations

Enumerated rules published since last meeting (9/11/20 – 12/4/20). An interim final rule on the Section 232 Steel and Aluminum Tariff Exclusions Process is expected to be published by the end of the year, but a rule proposing revisions to routed export provisions that would be published jointly with a related Census Bureau rule will not be published this year.

Kiesha Downs – Census Bureau

The rule proposing revisions to routed export provisions and a rule regarding the U.S. Virgin Islands are expected in 2021. An Advance Notice of Proposed Rulemaking regarding Puerto Rico, published in September, received 94 comments that are currently being evaluated. Initial data from the Electronic Export Manifest pilot is being evaluated. Eventually, data from the manifest may help eliminate certain minor violations.

Work Groups

Multilateral Controls – Anne Marie Griffin

The group submitted three comments to BIS and also reviewed draft Wassenaar Arrangement implementation.

Compliance and Enforcement – Janelle Gamble

No activities to report; enforcement dialogue scheduled for closed session.

Military Controls – Janelle Gamble

Nothing to report in open session.

Encryption – Ed Gillespie

Nothing to report on U.S. controls but monitoring changes to European Union export controls. Forwarded to RPTAC a link to an upcoming E.U. export control forum.

Technology Controls – Kathleen Gebeau

Plan to resume consideration of intra-company technology transfer controls.

Automated Export System (AES) – Adrienne Braumiller

Focus has been on the draft rules regarding routed transactions.

Practices and Procedures – Naomi LaBonte and Laura Molinari

Looking at issues related to licensing practices related to Huawei, implementation of controls on military end users.

Anne Marie Griffin – 2021 Dates

The following dates were chosen for 2021 RPTAC meetings: March 9, June 8, September 14, and December 14.

Handout for RPTAC December 8, 2020 Meeting

From Bill Root, email billroot23@gmail.com; tel. 1 517 333 8707
To RPTAC

Subject Export Control Changes Related to the Fight Against COVID19 Pandemic

As the global pandemic ravages the planet, President-elect Biden has properly made fighting COVID 19 the top transition priority. RPTAC can do its part by encouraging the Transition Team to repeal export control impediments to international humanitarian cooperation.

This Handout describes a complex of four export controls in need of repeal to further this humanitarian objective. On November 13, 2020, I sent a letter to the Transition Team on this subject, as a member of an East Lansing Michigan chapter of the Friends Committee on National Legislation (FCNL). RPTAC may wish to do something similar.

The suggested repeals do not require any legislative changes. They could be accomplished either by administrative actions, or inactions, by one or more USG agencies or by new Executive Orders to revise old ones.

- 1 The International Emergencies Economic Powers Act (IEEPA) prohibits using that Act to control donations of medical items, unless the President expressly waives the prohibition. I participated in drafting that prohibition in 1977. The intent was to permit license-free donations by US-based non-government organizations (NGOs) to meet humanitarian medical needs anywhere in the world, regardless of emergencies based on other factors which might require controlling other exports.

President Trump issued waivers to overcome the IEEPA humanitarian prohibition in section 11 of Executive Order 13846, dated August 6, 2018, reimposing sanctions against Iran, and section 5 of Executive Order 1396, dated July 14, 2020, removing more favorable US treatment of Hong Kong than of mainland China on export controls and many other matters. The Iran EO should be repealed in its entirety, as part of a revival of US support of the Iranian nuclear deal. The Hong Kong EO should also be repealed in its entirety, in order to restore US support for Hong Kong autonomy. During the transition, even President Trump may find it politically desirable to demonstrate his support for humanitarian measures by repealing only Section 11 or the Iran EO and only Section 5 of the Hong Kong EO. New Executive Orders, by either President Trump before January 20 or President Biden thereafter, are needed to repeal these Sections. These waivers not only require licenses for such donations but also make it difficult for OFAC to approve any licenses for donations or commercial exports to Iran or Hong Kong related to COVID 19.

- 2 Even if the IEEPA waivers were repealed, international COVID humanitarian aid would still be impeded by temporary FEMA controls on export of COVID personal protection equipment (PPE) authorized under the Defense Production Act. In October, the

expiration date of FEMA controls was extended until December 31, 2020. The Defense Production Act was not intended to stop humanitarian aid. This impediment could be repealed simply by FEMA reversing its action to postpone the expiration date beyond October. Under no circumstances should this date be further postponed. If FEMA does nothing, its controls will be repealed on December 31, with no action by anyone needed.

- 3 DOD Instruction 5200.486, dated March 6, 2020 and reportedly implemented on November 2, 2020, requires USG approval for release to the public of data labelled CUI, for Controlled Unclassified Information. It is not now known whether any data has yet been so labelled. There is no CUI statutory authority. Indeed, CUI existence is illegal. Section 1.2 of the related Obama EO which established Top Secret, Secret, and Confidential security classifications prohibited establishing a fourth category except by statute. Moreover, 5200.486 reverses a Reagan Directive to use only those three classifications to restrict conversations at international scientific conferences. Repeal of this potential impediment to international consultation on COVID issues could be accomplished simply by asking DOD to withdraw it, rather than to be charged with an illegal act and with over-ruling a Presidential Directive.
- 4 The November 6, 2020, proposal to add to the Commerce export control list software for automated nucleic acid assemblers and synthesizers describes it as “could be exploited for biological weapons purposes.” Fortunately , we have not heard of COVID-19 being used as a biological weapon; but it certainly could be so used. Placing such information on a publicly available export control list would defeat the purpose of the control.

The Department of Energy controls the export of nuclear weapons by using Restricted Data, authorized by atomic energy legislation to avoid assisting nuclear weapons would-be proliferators by defining such weapons on an unclassified export control list. It might seem that the November 6 proposal itself makes it too late to withdraw this item from public availability. However, there are decades of history in which many nuclear items on control lists have been carefully drafted so as not to reveal “what could be exploited for nuclear weapons purposes.” It is probable that, despite its wording to the contrary, the November 6 proposal was drafted so as to avoid exploitation for biological weapons purposes. If so, repeal of the danger would consist of BIS issuing a technical correction omitting the inconsistent exploitation wording. If not, the proposal should either be withdrawn or redrafted so as to avoid such exploitation. Even in the latter case, it is not too late to limit the error by a simple BIS withdrawal. Putting an item on a public control list involves much greater publicity than a proposal in the Federal Register. For example, once on such a control list, exporters must consult with government controllers to obtain interpretations of imprecise wording. If it is determined that the proposal should have been classified, then the State Department would undoubtedly insist that this item should join many other classified items on the ITAR DDTC USMunitions List which are now related to unclassified items on the Commerce Control List.

Oral Remarks for RPTAC December 8, 2020 Meeting

From Bill Root, email billroot23@gmail.com; tel. 1 517 333 8707
To RPTAC

I believe you have access to a Handout which I prepared as backup for my presentation today on the Subject Export Control Changes Related to the Fight Against the COVID19 Pandemic.

This is certainly a timely topic. No matter how you measure it, the situation is worsening every day. Records are being shattered in terms of the number of positive results from tests or number of deaths or number in hospitals reported in one day or on a seven day average. Also the economic effects from lockdowns are worsening. It is almost impossible to discuss the topic without sliding into political controversy. But it is not my intent to be a political advocate today. Instead, my topic is limited to Export Control Changes which impede humanitarian efforts to help foreign countries cope. I would like to think that, no matter what our political persuasion might be, there is reason to hope that, deep down, nobody wants to impede humanitarian activity.

Although I am not a Quaker, I am a member of the Lansing Michigan Chapter of the Friends Committee on National Legislation. FCNL is pressing Senators and Congressmen to mandate an IEEPA emergency legislation Open General License to permit license free exports related to COVID 19. There is a history of other IEEPA general licenses related to earthquake emergencies. A COVID general license should cover not only personal protective equipment (PPE) but also vaccines. Years ago, the Australia Group explicitly excluded vaccines from its international export controls of biological agents. Vaccines do not now appear on the CCL. However, they do appear on the USML, if development had been funded by the Department of Defense.

I have urged FCNL national headquarters to recognize that new legislation is not needed for a COVID general license and that, even if achieved, it would be in conflict with four other existing US controls, which would have to be revised to remove the inconsistencies. The most direct inconsistency would be Presidential waivers of the IEEPA prohibition on controlling medical donations. These waivers replace that IEEPA prohibition with its exact opposite, namely, a prohibition on all exports of medical items, whether donations or commercial exports. One of my colleagues pursuing humanitarian goals described such waivers as a double or even triple negative. That was his way of saying that mere mortals have trouble understanding what is going on. The legislation prohibits something. If that prohibition is removed by a waiver, that does not necessarily mean that you no longer have a prohibition. But the waivers in the two Executive Orders are drafted to replace a prohibition to control a medical donation export with a prohibition to export such medical items even by donations. FCNL has responded to me to explain that a general license would be required even if Presidential waivers were removed. I recognize the need for a general license in addition to removal of the waivers but not to consider a general license as an alternative to removal of the waivers.

Fortunately, all four of these impediments can be removed without any new legislation. In that respect, it does not matter who wins in the Georgia Senatorial runoff elections on January 5.

In 1977, I was proud of my role in drafting the IEEPA prohibition on controlling donations of medical items. Its objective was to permit humanitarian exports even to countries subject to broad controls on other items imposed pursuant to an emergency declaration. Who would have thought that something which happened 43 years ago would have to be debated today. There are two existing waivers. One is in a 2018 Executive Order (EO) to reimpose sanctions against Iran. 2018 is long before anyone ever heard of COVID 19. Such EOs, although signed by the President, are drafted in OFAC, the Treasury Office responsible for sanctions controlling foreign financial assets. The Iran waiver is buried in the last section (number 11) of the EO. The President might not even be aware that the waiver exists. The waiver applies only to US assets. That is, it does not apply extraterritorially to foreign assets. That provides the basis for the Secretary of the Treasury to state to Michigan Senator Peters that the EO permits donations of medical items. The Senator's staff asked me if I was aware of any controls on medical donations to Iran. I responded that I was aware that the application of the waiver to US assets not only removed the prohibition to control donations from the United States but also replaced that prohibition with a prohibition against any exports of medical donations. OFAC provided the Treasury Secretary with the opportunity to have it both ways. He can say, as he did to the Senator, that medical donations are not controlled, omitting to say that this applies only to exports from one foreign country to another. He could also say to others intent on tightening Iran sanctions that the President even prohibits medical export donations, omitting that it does not do so if the donations are from one foreign country to another foreign country. This clever drafting permits President Trump, if so inclined, to burnish his humanitarian image by removing the Iran waiver, arguing that it was not intended to stop COVID19 donations. He could also remove the waiver in his 2020 Hong Kong EO by arguing that this was intended to apply to mainland Chinese trying to rein in Hong Kong autonomy and not to donations to Hong Kong itself. I trust that you now understand that these waivers are a prime example of how intricate well intentioned export controls can become.

The second impediment to COVID-related humanitarian exports is FEMA. Temporary FEMA controls apply specifically to COVID PPE (personal protective equipment). Unlike the first waiver impediment, they are not based on emergency IEEPA legislation. Instead, they cite the Defense Production Act of 1950. That Act was designed to give the USG authority to mandate production of items to meet national security needs in wartime. I have not researched DPA in depth. But it seems a real stretch to interpret that legislation as intended to control humanitarian exports, even though, in the vernacular, many of us describe fighting the spread of COVID 19 as a new type of "war." The nation admired the Governor of New York for his tenacity in fighting the COVID 19 spike in his state. He appealed to other states to transfer people and equipment to New York. Other states responded generously. As soon as the New York COVID statistics abated, the Governor made it crystal clear that New York would return the favor by helping other states when they experienced a similar spike. That history was no doubt the major reason that the FEMA controls are temporary. They were scheduled to expire in October, when the expiration date was changed to December 31, 2020. It will be interesting to see whether, in the next few weeks, that date will again be postponed. The current high US rates of infections and deaths could be argued as a basis for a further postponement. But

export controls were no part of the generally successful New York experience. Export controls are too blunt an instrument to guide governments in how to be humanitarian.

The third export control impediment to humanitarian impulses is DOD Instruction 5200.486, dated March 6, 2020 and reportedly implemented on November 2, 2020. You probably never heard of this one before. It requires USG approval for release to the public of data labelled CUI, for Controlled Unclassified Information. It is probably illegal, for the reasons stated in the Handout. It has an uncanny resemblance to a Department of State proposal several years ago to require USG approval of each release of unclassified information, as part of the joint efforts of State and Commerce to harmonize their definitions of terms related to the Export Control Reform transfers from ITAR USML to EAR CCL of items of little military significance. There was no comparable Commerce proposal at that time. The scientific community was outraged by the State proposal, thinking that President Reagan's directive to use top secret, secret, or confidential labels to guide them in determining what not to divulge to foreign scientists in international conferences had resolved these controversies almost 40 years ago. State did not include that proposal in its final rule on the ECR objective to harmonize definitions. But 5200.486 makes it evident that DOD continues to support State's proposal to require USG prior approval for release of unclassified information. Repeal of this potential impediment to international consultation on COVID issues could be accomplished simply by asking DOD to withdraw it, rather than to be charged with an illegal act and with over-ruling a Presidential Directive.

The fourth impediment to humanitarian improvements is documented in a November 6, 2020, proposal to add to the Commerce export control list software for automated nucleic acid assemblers and synthesizers. Google informs us that nucleic acid is a very large molecule as a basis for all life, including DNA and RNA. That is well beyond my depth of understanding.

I can better understand the statement in the proposal that it "could be exploited for biological weapons purposes." Fortunately, we have not heard of COVID-19 being used as a biological weapon; but it certainly could be so used. The Handout describes how placing such information on a publicly available export control list would defeat the purpose of the control. That is the reason for DOE use of Restricted Data, rather than unclassified export control listing, to describe the parameters for nuclear weapon export controls. The Handout suggests that the remedy be to add this emerging technology to classified items on the USML (if it is not already there), rather than in an amendment to the unclassified CCL. By definition, the public cannot know what is already USML controlled under the rubric "classified" and is, therefore, not an emerging technology not yet controlled. Nuclear weapons, although not on any publicly available control list could hardly be described as a new emerging technology. They emerged in WWII over Hiroshima and Nagasaki.