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Continue to Pivot in 2021?

2020 was the year of "pivoting" in terms of international trade. COVID-19 had a devastating impact on trade. Supply chains throughout the world were faced with reduced available transportation capacity, congestion in many ports and extra related costs and surcharges. Shippers had to rethink how to safely and cost efficiently move their freight. Meanwhile, shippers had to also cope with Section 232 and 301 tariffs, CFIUS investigations, and the new USMCA regulations among other new trade related initiatives. We had to help all of our clients navigate at least one of these issues. Now with a new U.S. regime change, here are some key international trade areas shippers should consider in 2021 and whether they need to continue to pivot their trade compliance and supply chain strategies.

Continued Retaliatory Tariffs

The new administration under President-elect Biden will most likely work with U.S. allies to put pressure on China to stop its unfair trade practices. Biden has made statements that he would be tough against China and its predatory tactics on stealing U.S. technology.

So right now, there is no indication that the Biden administration will eliminate the Section 301 tariffs on Chinese goods, at least in 2021. The whole point of the Section 301 tariffs against China was because of the extensive violations on U.S. Intellectual Property, and it appears this will continue to be a concern. However, on the flip side, there are still opportunities to file lawsuits for refunds of Section 301 tariffs for List 4A. There is a two-year statute of limitations to file for refund cases under 28 USC §1581(i) so it is too late for List 3 but List 4A was not published until August 2019, so the deadline is August 2021 for items under 4A.

Brexit – New Tariffs and Requirements

The European Union imposed $4 billion in tariffs on U.S. goods on November 17th. The list includes a 15 percent tariff on Boeing airplanes and a 25 percent tariff on a range of products including tractors, whiskey, suitcases, games, and exercise equipment. These tariffs are related to a disagreement over government subsidies given to Airbus and Boeing. A full list of HTS numbers can be found here.

Note that effective 1/1/2021, companies importing goods into the UK must have a UK VAT or a Pseudo Turn number. A Pseudo Turn number is a nine-digit number issued for use on goods imported for trade purposes (for example: resale, commercial use, etc.) when the importer/exporter is not VAT registered with a legal entity. More information can be found here.

New Military End Use Regulations

The definition of military end use used to include both direct use and indirect use (such as items intended for development, production, or use of military items). As of June this year, the definition of military end use has expanded to include ancillary applications and now covers items that support or contribute to the operation, installation, maintenance, repair, overhaul, refurbishing, development, or production of military items.

The new regulations states that you may "not export, reexport, or transfer (in-country) any item subject to the EAR listed in Supplement No. 2 to part 744 to the People's Republic of China (China), Russia, or Venezuela without a license if, at the time of the export, reexport, or transfer (in-country), you have "knowledge," as defined in § 772.1 of the EAR, that the item is intended, entirely or in part, for a 'military end use,' as defined in paragraph (f) of this section, or 'military end user,' as defined in paragraph (g) of this section, in China (including Hong Kong), Russia, or Venezuela.”

BIS clarifies that there are two types of military end users. A ‘military end user' means the national armed services (army, navy, marine, air force, or coast guard), as well as the national guard and national police, government intelligence or reconnaissance organizations, or any person or entity whose actions or functions are intended to support 'military end uses'. License exception GOV is still available for exports to U.S. government entities under EAR § 740.11. So, make sure you have updated your end user statement process with these new regulations.

Committee on Foreign Investment in the U.S. (CFIUS)
CFIUS is a committee made up of sixteen inter-government agencies authorized to review certain transactions involving foreign investment in U.S. transactions in order to determine the effect of such transactions on the national security of the U.S. The sixteen agencies include the International Trade Administration (ITA) and the BIS, which throws export controls into the CFIUS decision-making process.

Effective October 15, 2020, the determination as to whether a CFIUS filing will be required is entirely dependent on whether a U.S. export authorization would be required to export the business' "critical technology" to certain foreign persons involved in the transaction, regardless of whether an actual export of the technology has or is intended to occur. The new Treasury rule eliminates the NAICS code as a trigger for reporting or investigation.

Companies are now on the hook for determining their technologies and whether they fall under the CFIUS risk profile for a mandatory filing. Note that CFIUS only considers certain license exceptions as valid - License Exception Technology and Software Unrestricted (TSU), License Exception Encryption Commodities, Software, and Technology (ENC), and License Exception Strategic Trade Authorization (STA).

ACE Reports
We are constantly amazed that when we get a new client sometimes they don’t have an ACE account. Running import/export transaction reports in ACE can help you and your company understand where you are incurring the most cost, the origin of goods if you need to change your supply chain due to retaliatory tariffs, errors in your declarations, or if there are opportunities to set up a program for a free trade agreement. It is not only a wealth of information but can also be used to calculate your trade compliance metrics.

Less exciting but important! The following are not as exciting but mandatory if they affect your company:

Encryption Reporting: Reports are due by February 1st for the annual self-classification and semi-annual ENC encryption reports. Exporters who self-classify encryption products under 740.17(b)(1) and 740.17(e)(3) (mass market) will continue to be required to submit a self-classification report on an annual basis. Exporters do not need to report exports of 740.17(b)(1) items if they have received a CCATS for these items. Note that if no information has changed since the previous report, an e-mail must be sent stating that nothing has changed or you can resend a copy of the previously submitted report. More information can be found here.

Semi-annual reporting is required for exports to all destinations other than Canada, and for reexports from Canada for items described under paragraphs 740.17(b)(2) and 740.17(b)(3)(iii). The semi-annual ENC license exception report is also due on February 1st for activity during July 1st through December 31st of 2018. Details are available here on the Bureau of Industry and Security website.

2021 HTS Classification Changes: Keep your eyes peeled for an announcement in the Federal Register. The USITC will finalize its recommended modifications to the HTS and submit a report to the President in March 2021.

Export License Renewal: If you utilize export licenses, you will want to create a schedule for renewal. This is especially important for licenses from OFAC that are not driven by quantity or dollar amount. You will want to start working at least 60 days in advance of the expiration. Hopefully, you have a pulse on your Company's business and development strategies and are aware of upcoming licensing needs. If not, it's a great time to meet with the Sales and Business Development Teams to make them aware of licensing issues such as your current licensable products and new sanctions, such as against the government (and all government agencies) of Venezuela.

Auditing Schedule: Your compliance audit schedule should be established now so that you can ensure your company's divisions or business units can plan appropriately and won't be adversely impacted. Coordinate your internal audits with your Corporate auditing team to ensure your audits do not overlap. Also include in your schedule an audit of your service providers such as your customs brokers and the freight forwarders who are filing AES declarations on your behalf. A review of their performance and compliance with your standard operating procedures should be conducted annually.

Training Schedule: On the same vein, you should be scheduling your trade compliance training sessions for the company. Make sure you have budget for this if you are looking to external resources to assist. The entire company should be trained annually on general trade compliance with an emphasis on high risk areas for you company. Certain departments will require more in-depth training such as Shipping and Order Management. Whether these are in-person or online trainings, the earlier you plan and coordinate with other company initiatives, the more successful you will be.

Recordkeeping: The next item on the checklist has to do with recordkeeping. Are there records that can move to your archives? Are there records that exceed all company recordkeeping guidelines that can be destroyed? Remember that some records need to kept more than five years. Records such as supporting documentation for certain Drawback claims might need to be retained past the five years, even up to 11 years.

Let BPE Global know if we can help you with any of these 2021 initiatives. BPE Global is a global trade consulting and training firm. Julie Gibbs is a Director of BPE Global. You can reach Julie by email at julie@bpeglobal.com or by phone at 1-415-595-8543.