Important Clarification on Limits of Crude Oil Export Restrictions

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Due to the recent U.S. oil and gas boom, many energy companies, particularly upstream producers, have been seeking to lift the export restrictions on U.S. crude oil to permit the sale of this now more abundant product in overseas markets. If the U.S. government were to make such a change, it would be either effected through, or accompanied by, changes in the EAR or BIS policy. Many energy industry observers were consequently quite interested when the WSJ article stated that BIS had issued these rulings "loosen[ing]" the ban on crude oil exports.

However, a high-level BIS official clarified to us that these rulings do not constitute a change in BIS policy, but do seek to provide a basic test for what falls outside the definition of "crude oil" for purposes of the export restriction. Specifically, the "rulings" that these companies received were commodity classification determinations ("CCATS"), regulatory filings under the EAR used to determine what export classification and associated controls apply to specific items. Legally, CCATS apply only to the requestors and with respect to the specific facts of the request, and are not made public. Nevertheless, to the extent their contents are shared, they can provide a basis for comparison and assessment. These rulings stated that if crude oil goes through a distillation tower, including a splitter, the result is a petroleum product not subject to the export restrictions on crude oil. Through this CCATS, BIS is apparently attempting to provide a clear test that is consistent with the EAR regulatory definition of crude oil and that responds to the large number of requests from energy companies that BIS has received on this question.

While this ruling provides some clarity, potential exporters may still not be able to determine exactly where the line is drawn between crude oil and "petroleum products" for export purposes. For instance, BIS does not provide a definition of what constitutes a "distillation tower."   A standard distillation tower would clearly pass regulatory muster under this rule, but query whether the most minimal distillation would be sufficient to permit the output to be exported. In light of such potential ambiguity, we anticipate that further engagement with BIS may be necessary for potential exporters to gain comfort prior to entering into these transactions and investing capital on operations that are based on these regulatory rulings.

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