

Energy Alert

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Important Clarification on Limits of Crude Oil Export Restrictions

Earlier this week, *The Wall Street Journal* published an article with the headline “U.S. Ruling Loosens Four-Decade Ban on Oil Exports.” The report announced that two energy companies, Pioneer Natural Resources Co. and Enterprise Product Partners LP, had received U.S. government “rulings” permitting them to export “unrefined American oil [for the first time] in nearly four decades.” This news sparked a flurry of interest from energy companies, both upstream and downstream, since it could have a major impact on market access and the allocation of capital. While U.S. Department of Commerce officials who administer the relevant regulations claim that these rulings do not represent a change in U.S. government policy, they nevertheless offer new guidance on the scope of the long-standing ban on exporting U.S. crude oil and may provide a path forward for the export of “petroleum products” that result from the initial stages of crude oil processing.

As background, the U.S. government has restricted the export of crude oil from the United States since the 1970s due to concerns regarding short supply of domestic crude oil. The U.S. Department of Commerce, Bureau of Industry and Security (BIS) administers the regulations, the Export Administration Regulations (EAR), that control these exports. While authorization for exports of crude oil can be obtained, the circumstances in which exports have been permitted are fairly limited. On the other hand, BIS more freely permits the export of petroleum products that have been processed.

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 to only the requestors and with respect to the specific facts of the request, and they are not made public. Nevertheless, to the extent that 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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