ISSN 0276-8275

WTTLonline.com

A Weekly Report for Business Executives on U.S. Trade Policies, Negotiations, Legislation, Trade Laws and Export Controls

Washington Tariff & Trade Letter®

Publisher: Martin Kalin • Editor: Meredith Gilston • Associate Editor: Melissa Apter

Vol. 36, No. 41 **October 17, 2016**

Administration Lifts More Cuba Restrictions

U.S. fans of Cuban cigars and rum will be happy Oct. 17 as the Obama administration charts a "new directive" in the process of normalizing relations with Havana. Among other changes, Treasury's Office of Foreign Assets Control (OFAC) and the Bureau of Industry and Security (BIS) are removing limits on what authorized travelers can bring back from the island in accompanied baggage for personal use, including previous limits on tobacco and alcohol.

> The changes are part of a larger effort President Obama announced Oct. 14. "This Directive takes a comprehensive and whole-of-government approach to promote engagement with the Cuban government and people, and make our opening to Cuba irreversible," the president said in a statement. At the same time, the administration also admonished Congress to remove the remaining embargo.

In a speech in Washington the same day, National Security Advisor Susan Rice urged Congress to lift the remaining embargo. "End this outdated burden on the Cuban people. End the restriction on Americans who want to do business with them. Help us secure a better future for both countries through the exchange of resources, goods, and ideas. And if you want to start somewhere, get rid of the travel ban—a policy that almost nobody in America outside of Congress supports," she said.

BIS, OFAC Implement New Cuba Policy

In addition to removing limits on imports for personal use, BIS and OFAC updated their respective regulations to reflect other changes including: authorizing certain transactions related to Cuban-origin pharmaceuticals and joint medical research; expanding existing authorizations for grants and humanitarian-related services; facilitating authorized travel and commerce; authorizing civil aviation safety-related services; and expanding and streamlining authorizations relating to trade and commerce, the agencies said in a fact sheet on the changes.

WTTL is published weekly 50 times a year except last week in August and December. Subscriptions are $697 a year. Additional users pay only $100 each with full-priced subscription. Site and corporate licenses are also available. Phone: 301-460-3060 Fax 301-460-3086

Specifically, OFAC will allow U.S. persons to provide services related to developing, repairing, maintaining, and enhancing certain Cuban infrastructure, as well as "civil aviation safety-related services to Cuba and Cuban nationals aimed at promoting safety in civil aviation and the safe operation of commercial aircraft," the agencies said.

In addition, OFAC is removing references to "100% U.S.-origin items" from its general license authorizing certain transactions incident to exports and reexports authorized by BIS. For its part, BIS will generally authorize exports of certain consumer goods that are sold online or through other means directly to eligible individuals in Cuba for their personal use. OFAC will clarify that exports of authorized agricultural items, such as pesticides and tractors, are not subject to restrictions on payment terms, it said.

OFAC also is issuing a general license that will waive the restriction on foreign vessels entering a U.S. port for "purposes of loading or unloading freight for 180 days after calling on a Cuban port for trade purposes if the items the vessel carried to Cuba would, if subject to the EAR, be designated as EAR99 or controlled on the Commerce Control List for anti-terrorism reasons only," the agencies announced.

Standstill Ends Without New Agreement on Softwood Lumber

Though U.S. Trade Representative (USTR) Michael Froman and Canadian Trade Minister Chrystia Freeland talked a good game, pledging to meet the mandate set by President Obama and Canadian Prime Minister Justin Trudeau, the U.S. lumber industry said time's up and pledged to take action. The standstill agreement on the Canada-U.S. Softwood Lumber Accord officially expired Oct. 12 (see **WTTL**, Oct 10, page 9).

"With the expiration of the standstill and no agreement attained, the Coalition has no choice but to move to initiate trade cases against unfairly traded imports from Canada at the most effective time. The U.S. lumber industry's overarching goal is to restore an environment in which it can invest and grow to its natural size without being impaired by unfairly traded imports. This will allow the domestic industry to better supply the American market and help restore the thousands of jobs lost to unfair trade," the U.S. Lumber Coalition said in a statement Oct. 12.

> Canadian and U.S. officials continued to meet in Washington after the expiration date. The two "governments are committed to continuing negotiations in an effort to achieve a durable and equitable solution for North American softwood lumber producers, downstream industries, and consumers," Froman and Freeland said.

"Unless Canada can fulfill the principles agreed to by its Prime Minister and President Obama in July, it may soon be too late to strike an agreement on softwood lumber trade," Senate Finance Committee Ranking Member Ron Wyden (D-Ore.) said in a statement. "I have seen first-hand the impact of unfair trade on workers and families in Oregon's timber economy. I continue to believe a negotiated resolution would be the best outcome for all sides, but if an agreement cannot be reached to stem the flood of Canadian lumber, I will

ensure that this administration -- and the next -- fully enforce U.S. trade laws to crack down on unfair trade," he added.

B.C. Lumber Trade Council (BLTC) President Susan Yurkovich issued a statement in support of continued negotiations, but noted that her organization is "also fully prepared and working alongside the Canadian government to defend the industry against any potential trade actions brought by the United States, as we have done successfully in the past." British Columbia is the largest exporter of Canadian softwood lumber to the U.S.

Agencies Publish Final Night-Vision Rules

As promised, BIS and State's Directorate of Defense Trade Controls (DDTC) published final changes to U.S. Munitions List (USML) Category XII (night vision) and corresponding changes to the Commerce Control List (CCL). The agencies went through two rounds of proposed rules and public comments to get to this point, and industry groups seem pleased with the results, which will go into effect Dec. 31.

After all those attempts, the agencies were unable to articulate "objective technical criteria that would establish a bright line between military and commercial and civil systems," DDTC said in its Federal Register notice Oct. 12 (see **WTTL**, Aug. 1, page 1). So the rules depend on items being "specially designed for military end-user," and the agencies will publish a notice of inquiry (NOI) later this year to get public input on suggested control parameters for this category, if they exist.

> The final rules generally follow what was proposed in February, with a few exceptions. For example, the BIS rule proposed removing controls related to certain QRS-11 sensors and revising license requirements related to certain uncooled thermal imaging cameras (UTIC). The rule adopts the changes for sensors but does not adopt those related to UTICs, BIS said.

The agencies defended the reliance on original design intent and the broad definition of "military end-user." In its rule, DDTC noted that "several commenters stated that the phrase '. . . any person or entity whose actions or functions are intended to support military end uses' is very broad. The Department acknowledges that the definition of military end user is broad and intends it to be so."

In response to several comments on the difficulty of knowing jurisdictional status it items, DDTC acknowledged that "cooperation with the manufacturer in such cases to identify the proper jurisdiction of USML defense articles is critical for a successful compliance program. Moreover, this provision does not add new obligations on parties because most provisions of the USML in place prior to the reform effort required an investigation into the design intent behind a product's development."

While industry groups applauded the final changes, SPIE, the international society for optics and photonics, felt the additional NOI was unnecessary. "It is disappointing that

some within the agencies are once again requiring the public to respond to a federal register comment period in order to make clear that performance parameters do not work for some of the technologies listed in Category XII. This approach of performance parameters was soundly rebuked by industry," said Jim McNally, chair of the SPIE committee on Engineering, Science, and Technology Policy and vice president for strategic development at Applied Technology Associates, in a statement.

"The final rule helps ensure that unnecessary restrictions don't hamper U.S. exports of optics and photonic laser components and systems thereby helping to decrease the time to market on regulated components and reduce the cost of compliance for businesses and universities. The specially designed criteria for defense-related technologies provide the flexibility for U.S. industry to export products that are commercially available from foreign companies while protecting our national security," said Elizabeth Rogan, CEO of The Optical Society, in a statement.

WTO Adopts India-U.S. Solar Dispute Report

The long-running India-U.S. solar panel dispute at the World Trade Organization (WTO) may soon draw to a close. In a special meeting Oct. 14, the WTO Dispute Settlement Body (DSB) adopted the Appellate Body (AB) report that found India's local content requirements for solar cells and modules were inconsistent with WTO rules. The U.S. requested the special meeting in September after the ruling (see **WTTL**, Oct. 10, page 7).

> At the meeting, the U.S. said that it "strongly supports India's effort to promote the generation and use of solar power in India." However, "discriminatory policies in the clean energy sector – such as India's domestic content requirements – undermine efforts to promote the generation of clean energy by requiring the use of more expensive and less efficient equipment."

India, meanwhile, said it is "evaluating the reports of the panel and AB carefully" and that it was "committed to frame the future design of its solar mission schemes relating to domestic content consistent with the findings." India said it did not agree with the AB reports' findings, but within 30 days will inform the DSB of its implementation plans.

Unhappy with the ruling, India requested consultations in early September over alleged domestic content requirements and subsidies provided by eight U.S. states in the renewable energy sector. USTR is accepting public comments through Nov. 25.

EU Challenges Airbus Subsidy Ruling

In the other current WTO dispute, the European Union (EU) Oct. 13 appealed a compliance panel's findings on the U.S. challenge against European subsidies for Airbus large civil aircraft. In its Sept. 22 report, the compliance panel found that "launch aid," as the

U.S. calls it – the EU calls it "member state financing" – provided to aircraft manufacturer Airbus is incompatible with the WTO's Agreement on Subsidies and Countervailing Measures (see **WTTL**, Oct. 10, page 7). "The EU in particular disagrees with the legal conclusion that, even though most of the subsidies challenged by the U.S. have ended, the EU has not yet fully complied with the previous ruling," it said in a statement. "Also, the EU considers that the panel made several errors in its assessment of the alleged harm that these subsidies caused to Boeing," the EU added.

"It should also be clarified that the figure of $22 billion that has recently been cited in the press is a reflection of the face value of all repayable loans granted to Airbus and has nothing to do with the actual amount of subsidy. The WTO has unequivocally ruled that repayable loans in themselves are not subsidies. Any subsidy element would consist only of the differential between the interest paid by Airbus and the market rate, and it is absolutely clear it will not amount to anywhere close to $22 billion," the commission noted.

The appeal, the EU noted, should be seen in the context of two ongoing WTO disputes with the U.S. over subsidies given to U.S. aircraft manufacturer Boeing (see **WTTL**, Sept. 26, page 1). The next DSB regular meeting is scheduled for Oct. 26.

Apparel Industry Goes After Alibaba for Counterfeit Goods

Chinese e-commerce juggernaut Alibaba should be put back on the USTR's Notorious Market List for failure to prevent the sale of counterfeit items on its platforms, the American Apparel & Footwear Association (AAFA) said Oct. 7. The request was made as part of AAFA's submission for USTR's 2016 Special 301 Out-of-Cycle Review of Notorious Markets.

AAFA cites research from China's State Administration for Industry and Commerce report in early 2015 that found 67% of goods purchased on Taobao.com, an Alibaba website, were counterfeit. "Any review of Taobao on a daily basis will find listings for dozens of AAFA member brands at absurdly low prices – a strong indication that such merchandise is counterfeit," AAFA Executive VP Stephen Lamar wrote to USTR. The Auto Care Association likewise called on USTR to relist Alibaba and its e-commerce platforms.

> Alibaba responded with a letter to USTR. "At Alibaba, counterfeit goods are absolutely unacceptable," it read. Alibaba maintains it has removed 380 million counterfeit product listings and closed 180,000 stores hosted on Taobao that sold counterfeit goods between August 2015 and August 2016.

Taobao.com and Alibaba.com were first identified in 2008 for selling counterfeit goods. USTR removed Taobao from the list in 2012, citing the website's efforts to address rights holder and consumer complaints, but commenters during the 2015 review frequently criticized Taobao and other e-commerce websites associated with the Alibaba Group, the 2015 review notes.

Justice Guidance Clarifies Policy on Voluntary Disclosures

U.S. firms should now have more clarity on "possible benefits that could be afforded to an organization that makes a voluntary self-disclosure (VSD)" in export control and sanctions cases, Justice's National Security Division (NSD) said in guidance issued Oct. 2. The guidance "aims to provide greater transparency about what is required from companies seeking credit for voluntarily self-disclosing potential criminal conduct, fully cooperating with an investigation, and remediating," NSD wrote.

> The guidance implements changes Justice announced in November 2015 to the U.S. Attorney's Manual (USAM), its staff policy on all criminal and civil prosecutions (see **WTTL**, Nov. 23, 2015, page 9). Those changes implemented new policy directions that Deputy Attorney General Sally Quillian Yates outlined in a memo two months before.

"Where an organization does not voluntarily self-disclose, but, after learning of violations from the government's investigation, cooperates fully and appropriately remediates the practices that led to the violations, the company still may be eligible to receive some credit, to include the possibility of a deferred prosecution agreement (DPA), a reduced fine and forfeiture, and an outside auditor as opposed to a monitor. A company that does not voluntarily disclose its export control and sanctions violations will rarely qualify for an NPA [non-prosecution agreement]," the division wrote.

In the guidance, the division also provides "examples of aggravating factors that, if present to a substantial degree, could limit the credit an organization might otherwise receive, though the company would still find itself in a better position than if it had not submitted a VSD, cooperated, and remediated," it said.

* * * Briefs * * *

ANTIBOYCOTT: BIS in Federal register Oct. 14 amended EAR to permit electronic submission available to persons reporting antiboycott requests. Prior to final rule, requirements currently permit reporting such requests by mail only. "BIS is making these amendments consistent with U.S. Government policy to modernize regulatory requirements and promote efficiency," notice said.

IRAN: Four members of Congress urged USTR Froman in letter Oct. 7 to continue to oppose Iran's WTO accession. "In addition to further empowering and enriching Iran's tyrannical regime, Iranian accession to the WTO could seriously complicate our ability to combat Iran's support for terrorism, human rights violations, ballistic missile program, and other illicit activity," wrote Reps. Peter J. Roskam (R-Ill.), Dave Reichert (R-Wash.), Juan Vargas (D-Calif.) and Grace Meng (D-N.Y.). In contrast, EU supports Tehran's accession as "a necessary step for Iran to trade globally as an effective and reliable actor," EU website notes.

IMPORT RESTRAINTS: ITC is updating its report on effects of U.S. import restraints on global supply chains, agency said Oct. 11. ITC will not assess import restraints resulting from antidumping or countervailing duty investigations, Section 337 and 406 investigations nor Section 301 actions. Public hearing is scheduled for Feb. 9, 2017, and written submissions due March 1.

MTB: ITC now accepting petitions seeking temporary duty suspensions and reductions under American Manufacturing Competitiveness Act of 2016 (AMCA). "This new law will lower costs for American manufacturers who have had to pay expensive tariffs for certain products not made in the United States, unnecessarily increasing their costs and making them less competitive. The AMCA creates an open and transparent process to provide relief for such manufacturers through temporary duty suspensions and reductions, making it easier for them to sell their products, grow their businesses, create jobs, and invest in their communities," Reps. Kevin Brady (R-Texas), Sander Levin (D-Mich.), Dave Reichert (R-Wash.) and Charles Rangel (D-N.Y.) explained in letter to colleagues Oct. 14. Petitioners must file by Dec. 12 using Miscellaneous Tariff Bill Petition System portal (see **WTTL**, Sept. 26, page 9).

RAW MATERIALS: Obama administration Oct. 13 requested WTO form dispute settlement panel to examine China's export restraints, including duties and quotas, on 11 raw materials: antimony, chromium, cobalt, copper, graphite, indium, lead, magnesia, talc, tantalum and tin. U.S. requested consultations with China in July over its export duties on nine raw materials and expanded that request week later (see **WTTL**, July 25, page 2). Raw materials are "key inputs" in U.S. industrial sectors, including steel, automotive, aerospace, construction and electronics, USTR said. "China specifically committed to abide by fair, non-discriminatory access to raw materials when it joined the WTO. We intend to hold them to that commitment," said USTR Michael Froman in statement.

EXPORT ENFORCEMENT: Harold Rinko of Hallstead, Pa., was sentenced Oct. 13 in Scranton, Pa., U.S. District Court to time served for role in conspiracy to export laboratory equipment, portable gas scanner, flowmeters and other items used to detect chemical warfare agents to Syria without licenses. He pleaded guilty in September 2014. UK citizen Ahmad Feras Diri pleaded guilty in May to related charges and is awaiting sentencing (see **WTTL**, May 30, page 9). Indictment against Rinko, Diri and Diri's brother, Syrian citizen Moawea Deri, along with brothers' company, d-Deri Contracting & Trading, was unsealed in April 2014. Deri remains at large.

CURRENCY: In second report to Congress on foreign exchange policies of major U.S. trading partners Oct. 14, Treasury again found no partner met standard of manipulating currency exchange rate "for purposes of preventing effective balance of payments adjustments or gaining unfair competitive advantage in international trade." Department created "Monitoring" list in April finding that five partners– China, Japan, Korea, Taiwan and Germany – met two of three criteria (see **WTTL**, May 2, page 2). Treasury added Switzerland to list in latest report as trade was deemed "sufficiently large" to warrant inclusion.

BREXIT: "In discussions with my European colleagues this week and since the British Referendum, I have emphasized that an outcome that produces a highly integrated relationship between the EU and the UK is in the best interests of Europe, the United States and the global economy," Treasury Secretary Jack Lew said in speech to IMF and World Bank annual meetings Oct. 7.