ISSN 0276-8275

WTTLonline.com

Washington Tariff & Trade Letter®

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

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

Vol. 36, No. 6 **February 8, 2016**

White House Confirms U.S. to Rework Wassenaar Cyber Rules

The White House confirmed in a letter made public Feb. 2 that the administration will not issue a final rule regarding implementation of the Wassenaar Arrangement without another round of public comment on a revised draft rule pertaining to intrusion software.

> Bureau of Industry and Security (BIS) kept its lips sealed following a Jan. 12 hearing before two House committees, during which lawmakers questioned the proposal drafting process (see **WTTL**, Jan. 18, page 2). Industry representatives at the time said that the BIS technical advisory committees (TACs) who reviewed the proposed rule did not include cybersecurity companies.

The White House announcement came in response to an inquiry originally submitted to National Security Advisor Susan Rice in December by Congressional Cybersecurity Caucus cochairs Reps. Jim Langevin (D-R.I.) and Michael McCaul (R-Texas) and signed by 125 House members.

"The Administration is committed to taking into account the impact that any export control rule relating to cyber technology may have on our national security and adequately considering the burden that such a rule may place on legitimate cybersecurity activities. To that end, we have intensified our engagement with experts and stakeholders from the U.S. government and industry on how to mitigate the national security risks posed by the proliferation of cyber tools in a manner consistent with promoting cybersecurity," Special Assistant to the President Caroline Tess, on behalf of Rice, wrote in her response made public by Langevin.

"It is clear that the original proposed rule would have 'come at the expense of legitimate cybersecurity activities;' closer NSC involvement will help a revised rule steer clear of these pitfalls," Langevin said in a statement.

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

"However, as we learned at the Homeland Security Committee hearing last month, the underlying problem may lie in the Arrangement language itself, meaning the only solution may be to go back to Wassenaar and renegotiate," he said.

Administration Tries to Woo Republicans After TPP Signing

With the official yet symbolic signing of the Trans-Pacific Partnership (TPP) Feb. 4 in New Zealand, the Obama administration will enter an "important phase of Congressional engagement," looking to win support from Republicans through organizations that support more conservative causes.

> While the signing does not start any official clock, it will be used as a sign to get things going in all 12 partner countries. "The signing of the agreement signals an important milestone and the beginning of the next phase for TPP. Our focus now turns to the completion of our respective domestic processes," said the joint statement of the TPP ministers after the signing.

On a conference call with reporters while he was literally en route to Auckland, U.S. Trade Representative (USTR) Michael Froman detailed the administration's four-part strategy to garner support for the deal. These include "meetings and hearings with members and committees," and additional details on how TPP's groundbreaking commitments will be enforced. In addition, the strategy includes direct work with members of Congress on "how TPP's implementation will address any concerns or challenges they've identified," and a series of detailed reports to Congress required by fast-track trade promotion authority (TPA) that include "information on how TPP meets TPA obligations and will impact U.S. policy objectives," Froman said.

Of course, wishes aren't always horses. The administration still must deal with a divided Congress and especially entrenched Republican leadership (see **WTTL**, Jan. 25, page 1). Sen. Rob Portman (R-Ohio), a former USTR, came out against the deal. "I cannot support the TPP in its current form because it doesn't provide that level playing field. I will continue to urge the Obama administration to support American workers and address these issues before any vote on the TPP agreement," Portman said in a statement. He specifically cited currency manipulation, rules of origin for automobiles, and protection for U.S. biologics in his opposition.

Senate Finance Committee Chairman Orrin Hatch (R-Utah) also continued to express doubts. "No one should be under any illusions that, because the TPP is being signed today, an up or down vote on the agreement is imminent or that our oversight responsibilities are at an end," Hatch said in a statement. "If history has taught us anything, it's that this process can, and often does, take a very long time to complete. In fact, it's not an exaggeration – or even all that remarkable – to say that it can take years to get an agreement through Congress AFTER it is signed," he said.White House Press Secretary Josh Earnest stirred controversy among Democratic groups in a press briefing Feb. 2 when he said the administration would be working with "Republican-friendly" organizations. "The good news is, is it's not just going to the Democratic President trying to appeal to Republicans in Congress to support this agreement. We're going to be relying on the United States Chamber of Commerce, the American Farm Bureau, National Association of Manufacturers and other Republican-friendly organizations to make a strong case to the Republicans that they work closely with to support this agreement," he said.

TPP opponents quickly responded to the White House statement. "It's ironic that even the Administration now admits that passage of TPP relies on the support and work of some of the most vehement opponents of real progressive policies. The lack of support from Democrats and the progressive movement clearly demonstrates the emptiness of claims that the TPP is a 'progressive' trade agreement," said Shane Larson, legislative director at the Communications Workers of America (CWA), in a statement.

Negotiators Conclude Deal on Safe Harbor Agreement

U.S. and European Union (EU) negotiators raced to complete a new transatlantic agreement on "Safe Harbor" rules for the transfer of personal data to the U.S. from Europe, concluding the framework of the deal Feb. 2, just two days past the deadline. While business groups praised the deal, privacy advocates are skeptical the deal will pass judicial muster.

With the framework approved, European commissioners will "prepare the necessary steps to put in place the new arrangement," the European Commission (EC) said in a press release. Specifically, the commissioners will prepare a draft "adequacy decision" in the next several weeks, while the accord works through approval by the member states. "In the meantime, the U.S. side will make the necessary preparations to put in place the new framework, monitoring mechanisms and new Ombudsman," it noted.

> The new deal, called the EU-U.S. Privacy Shield, has three main components: strong obligations on companies handling Europeans' personal data and robust enforcement, clear safeguards and transparency obligations on U.S. government access, and effective protection of EU citizens' rights with several redress possibilities, the EC press release said (see **WTTL**, Jan. 25, page 7).

"The new arrangement includes commitments by the U.S. that possibilities under U.S. law for public authorities to access personal data transferred under the new arrangement will be subject to clear conditions, limitations and oversight, preventing generalised access," it added. "Europeans will have the possibility to raise any enquiry or complaint in this context with a dedicated new Ombudsperson," the Commission noted.

The EU Article 29 Working Party, which is made up of representatives of member states, met the day after the deal was announced and welcomed the conclusion of negotiations. The group "looks forward to receive the relevant documents in order to know precisely the content and the legal bindingness of the arrangement and to assess whether it can answer the wider concerns raised by Schrems judgment as regards international transfers of personal data," it said. "It will especially have to consider if its concerns regarding the U.S. legal framework can be alleviated following the introduction of the EU-U.S. Privacy Shield. The WP29 will also analyse to what extent this new arrangement will provide legal certainty for the other transfer tools. The WP29 will examine whether the provisions respect the powers of data protection authorities," the groups noted.

New Safe Harbor Agreement May Face Judicial Scrutiny

Despite official assurances that the EU-U.S. Privacy Shield addresses concerns of the European court that overturned the previous Safe Harbor agreement, privacy advocates are not quite convinced. The Electronic Privacy Information Center (EPIC) called the most recent deal a "virtually identical arrangement" to the previous Safe Harbor agreement.

> In addition, Max Schrems, the plaintiff in the European court case, came out with an initial statement quickly after the deal was announced. "Today there should be some agreement, in whatever form, that ensures that EU data is not used anymore. This will be the sticking point for a new challenge before the Court in respect to national surveillance," he noted.

"We don't know the exact legal structure yet, but this could amount to obviously disregarding the Court's judgement. The Court has clearly stated that the US has to 'ensure' proper protection by means of 'domestic law or international commitments'," Schrems noted.

Information Technology Industry Council (ITI) Senior Vice President for Global Policy Josh Kallmer discounted concerns that the court would strike down the deal. "I wouldn't say we are concerned that it's going to be struck down, by all accounts, again recognizing we haven't seen the text, this is a 'meaningfully enhanced agreement' that is enhanced in ways that address the concerns of the court," he told a conference call. "Our feelings based on what we know right now is that the assurances with respect to national security authorities, the inclusion of the ombudsperson, the addition of the suite of redress rules and the other things, add up to a pretty solid package of things for addressing those concerns, he said.

U.S. Exports, Imports in 2015 Down

Just as two wrongs do not make a right, twelve months of negative growth cannot add up to positive growth at the end of the year. Total merchandise exports in 2015 fell 7.2% from a year ago to $1.5 trillion, while imports fell 4.3% from last year to $2.3 trillion, Commerce reported Feb. 5. The sharp fall in oil prices and lower consumption in the U.S., led to a 45.7% decline in imports of petroleum products. Amid lower global prices, U.S. exports of petroleum products fell more than 31%. Services exports gained 0.8% to $716.4 billion from 2014, as services imports increased 2.4% to $489 billion. “We recognize that U.S. exporters faced challenges from slowing global growth. Despite these headwinds, the volume of Made-in-America exports remained relatively unchanged, showing there is a continued demand for U.S. products,” Commerce Secretary Penny Pritzker noted in releasing the numbers.

Preliminary 2015 vs. 2014 U.S. Merchandise Trade Figures (in billions)

	2015 Exports	2014 Exports	% Change	2015 Imports	2014 Imports	% Change
Total	$1513.9	$1632.6	-7.3%	$2272.8	$2374.1	-4.3%
BY COUNTRY/REGION						
Canada	280.3	312.4	-11.4	295.2	347.8	-15.1
Mexico	236.4	240.2	-1.6	294.7	294.1	0.2
European Union (28)	272.7	276.1	-1.3	426.0	418.2	1.9
Germany	49.9	49.4	1.2	124.1	123.3	0.7
France	30.1	31.3	-3.9	47.6	46.9	1.6
United Kingdom	56.4	53.8	4.7	57.8	54.4	6.3
Japan	62.5	66.8	-6.5	131.1	134.0	-2.2
China	116.2	123.7	-6.1	481.9	466.8	3.2
NICs: HK, Singapore, Taiwan, Korea	135.3	142.2	-4.9	137.5	132.4	3.8
South/Central America	153.3	184.0	-16.7	115.9	150.7	-23.1
BY SECTOR						
Agriculture	$133.0	$150.0	-11.3%	$113.7	$111.9	1.6%
Aircraft, parts, engines	118.9	113.1	5.2	55.1	53.1	3.7
Autos, parts, engines	151.6	159.7	-5.1	348.3	327.7	6.3
Clothing	3.3	3.4	-2.9	93.6	90.2	3.8
Chemicals-Organic	34.6	39.6	-12.7	49.2	52.2	-5.7
Chemicals-Inorganic	10.4	11.4	-8.8	12.0	13.1	-8.5
Petroleum, total categories	87.3	126.9	-31.2	177.4	326.7	-45.7
Iron & steel	14.9	18.4	-19.4	36.9	46.8	-21.1
Metalworking machines	5.4	5.8	-6.6	9.8	9.9	-1.7
Pharmaceuticals	49.9	46.3	7.9	89.3	76.2	17.3
Semiconductors	42.5	43.5	-2.2	46.0	43.7	5.2
Telecommunications	41.9	40.7	2.9	66.1	58.6	12.8

As has been the pattern for all of 2015, merchandise exports in December fell almost 10% from a year ago to $121.2 billion. Services exports fell 0.15% to $60.3 billion from last December. Imports dipped 7.8% from December 2014 to $183.7 billion, as services imports decreased 0.2% to $41.2 billion.

The economic slowdown in China caused exports there to fall 6.1% in 2015, compared to 2014 when they rose only 1.9%. Imports from China rose at a slower pace than the year before, lifting by 3.2% and producing a $365.7 billion trade deficit, almost half of the total deficit of $758.9 billion.

“Most recently, China’s slowing growth has had a knock-on effect as Chinese imports of commodities decline, weighing on commodity-producing economies in South America, Africa, and elsewhere — all of which in turn import less from the United States. This trend is likely to continue at least in the near term,” Chamber of Commerce Senior VP John Murphy wrote in a blog post. The near recession in the European Union (EU) didn’t prevent a growth in exports to major markets in Germany and the United Kingdom, but

France's economic problems contributed to a 3.9% decline in U.S. exports. For the third year, U.S. imports from Japan declined, dropping by 2.2%, and exports to Japan also fell 6.5% to $62.5 billion.

The consequences of the shift of production of pharmaceuticals offshore and the growth of imports on generic drugs are seen in the 17.3% increase in drug imports. The U.S. steel industry's prior complaints about rising steel imports don't appear to be justified, at least this year, as steel imports fell 21.1%, almost returning to its 2013 levels.

House Passes Iran Terror Finance Transparency Act

In a repeat of a vote vacated in mid-January, the House passed legislation Feb. 2 that would restrict President Obama's ability to lift sanctions on Iran as outlined in the Joint Comprehensive Plan of Action (JCPOA). The Iran Terror Finance Transparency Act (H.R. 3662) passed with a vote of 246-181. The vote split overwhelmingly along party lines with only three Democrats crossing the aisle to vote with Republicans in favor of passage.

The bill bars the president from removing financial institutions from the Specially Designated Nationals (SDN) list maintained by the Treasury's Office of Foreign Assets Control (OFAC) until the administration certifies to Congress that the institutions have not "knowingly facilitated" transactions or provided financial services that benefit Iran's Revolutionary Guard, proxy terrorist organizations, or Iranian efforts to produce weapons of mass destruction. The president must also certify that the institution no longer knowingly engages in "illicit or deceptive financial transactions" or activities.

> President Obama has promised to veto the legislation, going so far as to issue a Statement of Administration Policy (SAP) from the Office of Management and Budget (OMB) decrying the bill as undermining the JCPOA (see **WTTL**, Jan. 18, page 6). The bill was sent to the Senate Banking Committee.

"The President has repeatedly said that violators on the terror and human rights sanctions lists would not gain relief due to the Joint Comprehensive Plan of Action, also known as the Iran Nuclear deal. We agree," Rep. Steve Russell (R-OK), who introduced H.R. 3662, said in a statement. "All this bill does is ask for justifications from the administration for why more than 50 entities and individuals have been selected to be de-listed from these sanctions lists, and certify they are no longer associated with human rights abuse or terror," he said.

Trade Deficit with FTA Partners Looks Worse than Reality

As the Obama administration continues its push for the Trans-Pacific Partnership (TPP), statistics released Feb. 5 show that the U.S. racked up a $60.1 billion trade deficit with the 20 countries with which it already has FTAs. While that figure seems large and trade critics will use it against implementing TPP, the explanation comes down to two sectors: oil and autos. The deficits with Canada (-$14.9 billion) and Mexico (-$58.4 billion) are the primary reason for the FTA deficit. Without those two countries, the other 18 FTAs would produce a $13.2 billion merchandise trade surplus (see chart below).

2015 Trade with FTA Countries (in millions)

	U.S. Exports	U.S. Imports	Balance
Australia	$25,037.8	$10,862.2	$14,175.6
Bahrain	1,274.1	902.3	371.7
Canada	280,326.5	295,190.3	-14,863.8
Chile	15,587.1	8,879.8	6,707.3
Colombia	16,503.1	14,056.9	2,446.2
Costa Rica	6,149.9	4,468.7	1,681.2
Dominican Republic	7,134.2	4,660.0	2,474.1
El Salvador	3,258.3	2,540.2	718.0
Guatemala	5,863.8	4,120.0	1,743.8
Honduras	5,238.4	4,758.6	479.8
Israel	13,561.5	24,452.4	-10,890.9
Jordan	1,367.9	1,493.3	-125.4
Korea, South	43,498.7	71,827.4	-28,328.7
Mexico	236,377.4	294,741.1	-58,363.7
Morocco	1,608.4	1,010.5	597.9
Nicaragua	1,256.5	3,186.1	-1,929.6
Oman	2,364.2	905.9	1,458.4
Panama	7,836.3	408.1	7,428.2
Peru	8,811.4	5,068.7	3,742.7
Singapore	28,656.7	18,235.2	10,421.5
TOTAL	711,712.2	771,767.9	-60,055.7

On the positive side, goods exports to the FTA partners reached $712 billion. "This is a remarkable performance given that these countries represent just 6% of the world's population outside the United States. On a per capita basis, these countries purchase 12 times as many U.S. goods and services as non-FTA countries," Murphy said.

Other observers are less optimistic about the trade numbers, especially with China. "Many dangers persist, including a strong dollar, China's economic weakness, and its massive industrial overcapacity. It strikes me as an inopportune time to be pushing a Trans-Pacific Partnership that is projected to cost America more than 121,000 factory jobs," Alliance for American Manufacturing President Scott Paul said in a statement.

Tariff Phase-Outs Lessen TPP Benefits, Report Shows

The Trans-Pacific Partnership (TPP) will deliver significant economic benefits to the 12 participating countries, but long tariff phase-outs and other provisions may limit the impact of these benefits, according to a new Peterson Institute for International Economics (PIIE) assessment released Feb. 2. The 117-page PIIE report, titled Assessing the Trans-Pacific Partnership: Market Access and Sectoral Issues, which builds upon a previous quantitative report released at the end of January, analyzes the impact on TPP specific sectors in member countries, such as tariffs, agriculture, autos, textiles, government procurement, services, financial services, investment and investor-state disputes (see **WTTL**, Feb. 1, page 5). Another PIIE report analyzing digital trade, state-owned enterprises, competition policy, labor, environment and general dispute settlement will be unveiled in March.

PIIE expert Caroline Freund, who focused on tariff changes, noted that Australia, Chile, New Zealand and Singapore will open and liberalize by year 8, while Canada, Japan and the U.S. will liberalize in 12-to-30 years. Malaysia, Mexico, Peru and Vietnam will liberalize in 16 years, she said at a Washington luncheon.

> Seventy-five percent of tariff lines are liberalized on entry and 99% of tariffs will liberalize when fully implemented, she said. Freund also noted that tariff elimination schedules are specific, and liberalization is partner specific.

The U.S. and Japan agreement reflects each country's desire to protect their domestic automotive industry. For example, the TPP allows the U.S. to maintain high tariffs on trucks for 30 years even though Japan has lowered tariffs on American trucks to zero.

In their conclusion, Freund, and her colleagues Tyler Moran and Sarah Oliver, wrote that "long and country-specific delays" in tariff phase-out schedules flout Article 24 of the General Agreement on Tariffs and Trade (GATT). "Large trade agreements with significant internal differentiation could become a worrisome trend, and the WTO would do well to consider limiting the period of tariff liberalization under preferential trade agreements to a decade," they warn.

* * * Briefs * * *

<u>FCPA</u>: German software manufacturer <u>SAP SE</u> agreed Feb. 1 to pay disgorgement of $3.7 million in profits to settle Securities and Exchange Commission (SEC) charges of violating Foreign Corrupt Practices Act (FCPA) to win business in Panama. Former SAP executive Vicente Garcia was sentenced in December in San Francisco U.S District Court to 22 months in prison for conspiracy to violate FCPA. He pleaded guilty in August (see **WTTL**, Dec. 21, page 16). "SAP failed to devise and maintain an adequate system of internal accounting controls sufficient to provide reasonable assurances that these improper payments to government officials did not occur," SEC order noted.

<u>EX-IM FRAUD</u>: Kermit W. Highfield of Louisville, Ky., owner of <u>Preston Farms Popcorn, LLC</u>, was sentenced Feb. 1 in Louisville U.S. District to three years' probation and $110,678.74 in restitution. He pleaded guilty in November 2015 to bank fraud (see **WTTL**, Nov. 16, page 10). He admitted to diverting funds from loan payments to use for Preston operating expenses, then defaulting on loan insured by Ex-Im.

<u>MORE EX-IM FRAUD</u>: Martin Slone of Oldsmar, Fla., owner of <u>Woolie Enterprises Inc</u>, aircraft brokerage and export business, pleaded guilty Feb. 4 in Tampa U.S. District Court to charges of defrauding Ex-Im Bank in 2007. Slone created false documents claiming that foreign buyers had purchased aircraft and parts from Woolie, and then falsely reported that buyers had defaulted on payments, causing Ex-Im Bank to pay Woolie $197,690. Sentencing is set for April 7.

ZIMBABWE: OFAC Feb. 3 removed Agricultural Development Bank of Zimbabwe (Agribank) and Infrastructure Development Bank of Zimbabwe (IDBZ) from SDN list. At same time, it removed Zimbabwe General License 1, which it had issued in April 2013 authorizing all transactions involving those two banks (see **WTTL**, April 29, 2013, page 11). "Following today's removal of Agribank and IDBZ from the List of Specially Designated Nationals and Blocked Persons, a license is no longer required to engage in transactions with those entities," OFAC noted.

EXPORT ENFORCEMENT: Mahmoud Abdel-Ghani Mohammad Assaf, Jordanian citizen in U.S. on nonimmigrant visa, was sentenced Jan. 29 in Tampa, Fla., U.S. District Court to 33 months in federal prison for conspiring to export firearms, including Glock 9mm pistol, to Jordan without State license in 2014. Firearms were allegedly concealed in vehicles that had been purchased at used car auctions in Central Florida. Assaf pleaded guilty in March 2015. Codefendant Eyad Farah of Barrington, Texas, was sentenced Dec. 16 in same court to three years and one month in federal prison for related charges (see **WTTL**, Dec. 21, page 15). Yasser Ahmad Obeid was sentenced to 51 months in prison in related case in December 2014 and also pleaded guilty.

OFAC: Johnson and Johnson (Middle East) Inc. (JJME), wholly owned subsidiary of consumer products company Johnson & Johnson, received Finding of Violation from OFAC Feb. 4 for alleged violations of Sudan sanctions in 2010. JJME allegedly coordinated and supervised shipments of consumer hygiene products from Johnson and Johnson (Egypt) S.A.E. to Khartoum, Sudan.

TRADE PEOPLE: Former New Zealand trade minister Tim Groser became country's ambassador to U.S. Feb. 1. He entered Parliament in 2005, and also represented New Zealand in TPP talks, before being appointed to new role.

BACARDI: Bacardi filed Freedom of Information Act (FOIA) request with Treasury Feb. 1, seeking all documents and communications related to recent Patent and Trademark decision to renew Havana Club rum trademark held by Cubaexport, Cuban government entity (see **WTTL**, Feb. 1, page 1). Bacardi and Pernod Ricard S.A., joint venture with Cubaexport, have been locked in litigation in D.C. U.S. District Court since 2004 over Havana Club trademark. Bacardi acquired the rights to brand from its original Cuban owners.

UK DEFENSE TRADE: Acting Assistant Secretary of State and DDTC Chief Brian Nilsson traveled to UK for routine management board meeting on U.S.-UK Defense Trade Cooperation Treaty (DTCT) Jan. 26-30. Despite critiques from industry, sources say no changes to treaty are coming and implementation is "moving along," one told WTTL.