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®

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Vol. 35, No. 36 **September 14, 2015**

Officials Consider Proposing Common Export Regulations

Administration officials admit that having to deal with the separate International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR) can impose unnecessary burdens on companies that straddle both lists. At an event Sept. 9 in Washington, Brian Nilsson, director of non-proliferation & export control at the White House National Security Council, said officials are considering writing a concise set of common regulations to streamline controls as another step in export control reforms.

> Instead of trying to mesh hundreds of pages of existing regulations, administration officials may start over from scratch. They would write "a common set of regulations that would be much shorter, much more in line with what the ITAR is. We don't have the legal authority to merge the agencies, but we could certainly publish a common set of regulations," Nilsson said.

"That would go a long way toward facilitating ease of compliance, ease of administration, ease of enforcement," he said. Both State and Commerce would have to propose and publish them under separate titles, but they would generally be the same regulations, he explained. The goal of reaching the third phase of reforms and completing the "four singles" of export control, including enactment of a single export control law and creating one export control agency, will need help from Congress. Nilsson acknowledged the team is "nearing the end of the administration, and so the viability of getting legislation becomes more challenging as you approach an election year."

The team is still reviewing comments from previous proposed rules, some of which may be reproposed, including controversial rules on definitions, night-vision products and toxins (see **WTTL**, Aug. 31, page 1). "We'll have to see timing-wise what our seniors decide as far as what we're going to do before the end of the administration," he said. Traditionally, administrations stop proposing and publishing new rules close to presidential elections. That would make the summer of 2016 the target for this administration completing its export control reform initiative.

Europeans May Be Slow to Renew Trade with Iran

Fear of continuing U.S. trade sanctions and the memory of large fines imposed for violations in the past may inhibit European firms from rushing to do business with Iran after

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the Iran nuclear pact goes into effect. "The impact that the U.S. Treasury has had on European businessess has been quite blunt and huge in terms of scaring the living lights out of them from doing business with them, especially with the big financial centers and the energy sector," Ellie Geranmayeh, a policy fellow with the European Council on Foreign Relations, told a Sept. 8 program on the Iran deal. The program was held two days before Senate Democrats blocked a vote on a motion to disapprove the accord, assuring that it will go into effect.

> "My prediction has been, talking with CEOs of major oil companies in Europe, is they're going to tread with a lot of caution going back to Iran," she told an Arms Control Association (ACA) program in Washington. "They took a big financial hit having to pull their resources and their projects out of Iran. They are going to want to see a year or two of successful implementation of this deal before they march back in," she added.

Geranmayeh also noted that European business with Iran hasn't increased even under the partial lifting of sanctions as part of the interim agreement between the P5+1 and Iran. "Most European companies are hands off" when it comes to Iran, she said.

Colin Kahl, deputy assistant to the president and national security advisor to Vice President Biden, reiterated warnings that remaining sanctions will still keep U.S. business from benefitting from the accord. "We have to be clear that American businesses are not going to have the same opportunities that other countries' businesses have," he told the ACA program, which was cosponsored with the Carnegie Endowment for Peace. "American businesses will not be in the same place as European businesses," he said.

Any potential change in U.S. sanctions policies and new opportunities for U.S. firms will depend on the moderation of Iran's behavior, he noted. "Those opportunities will have to emerge in the context of whether Iran changes some of its fundamental orientations and behavior," he said. Meanwhile, the U.S. will retain the right to impose new sanctions as permitted under the deal. "From a national security perspective, I don't think we want to take the view that it's not important to continue to put in place designations and sanctions against entities from this point forward in Iran that engage in terrorism and human rights abuse," Kahl said.

Kahl said the administration has been working for months on an implementation plan for the deal in parallel with the negotiations. "We will have a dedicated senior official with high-level contact to the secretary of State and the president and others" who will oversee implementation, he said. "There will be a very robust implementation team and it's already in train," Kahl said.

Lawmakers Try Taking Small Bites at Cuba Embargo

Lawmakers who support liberalizing trade with Cuba are attempting to take small bites at lifting the 50-year-old embargo on the communist island, recognizing that full repeal can't pass Congress now. The limited steps are aimed at increasing U.S. agriculture exports, expanding permitted travel and easing rules on foreign ships stopping at Cuban ports. Right now, "there is no serious discussion" about repealing the Helms-Burton Act, one of several laws restricting relations with Cuba, Sen. Jeff Flake (R-Ariz.), a leading supporter of ending the embargo, said Sept. 10. "To push that legislation at this time for

repeal wouldn't get very far," he told a Global Business Dialogue program. "Facts on the ground need to change," he said.

> The easing of farm, travel and shipping rules were included in amendments attached to a financial services appropriations bill (S. 1910) for funding Treasury and other agencies that the Senate Appropriations Committee reported out July 23. Supporters of the measure concede, however, that the provisions are likely to be stripped out of any final appropriations legislation, which faces broader problems due the political fight over spending and the likely need for a continuing resolution to keep the government funded when the current fiscal year ends Sept. 30.

Several House and Senate members are backing steps that at least would increase farm exports, which have been hampered by "cash-in-advance" payment requirements and the ban on government marketing aid. Measures under consideration, including in S. 1910, would either ease credit restrictions or allow more private-sector financing. "I think there is some interest by members of Congress in the issue of agriculture trade with Cuba," Rep. Ted Poe (R-Texas), chairman of the House Foreign Affairs terrorism and nonproliferation subcommittee, told reporters Sept. 9 after his panel held a hearing on agriculture trade with Cuba. He said a focused bill would be more likely to pass Congress. "A step-by-step approach would be the best," he said.

The Senate appropriations bill would revoke the bar to private-sector financial dealings with Cuba and the cash-in-advance rules. It would also prevent Treasury funds from being used to enforce restrictions on travel to Cuba and end maritime rules that prevent foreign ships that stop in Cuba from entering U.S. ports for 180 days.

The step-by-step approach to ending restrictions on trade and travel to Cuba has drawn mixed reactions from groups pushing for the total lifting of the embargo, which is embedded in about a dozen separate provisions across several statutes. There is concern among some that just ending restrictions on agriculture would weaken the industry coalition seeking full repeal of the embargo because it would peel off the agriculture sector, which is the main advocate for opening trade with Cuba, and farm state lawmakers who would be crucial to passing broader legislation.

Industry Has Tempered Outlook in China, AmCham Says

What a difference a year makes. In Washington for its annual "doorknock" with administration officials and members of Congress, leaders of the American Chamber of Commerce in Shanghai (AmCham Shanghai) told reporters Sept. 10 that their member companies are still optimistic about business opportunities there, but the optimism is tempered from years past. "China has never been easy for U.S. business, and that hasn't changed, but in fact, most companies are still doing well," AmCham Shanghai President Kenneth Jarrett said. China's slowing economy and the devaluation of the renminbi appear to be having little negative impact so far.

"Overall, our members are still optimistic about their prospects in China. This optimism is tempered somewhat from years in the past," he said. "Most companies are profitable, they have very healthy market share, and there are a number of long-term trends that create conditions that are favorable for U.S. business," Jarrett added. "This is not to

suggest we are blind to the problems in China," he said, referring to market access challenges and recent "body language" from Chinese government officials revealing their attitude toward foreign investment. These measures include national security review legislation, a new cybersecurity law, and proposed but suspended regulations on information technology infrastructure for the banking sector, Jarrett noted.

> One of the chamber's main objectives in Washington was to ask its friends to support a U.S. Bilateral Investment Treaty (BIT) with China, even if that's unlikely to happen before the next election. Despite a lack of a timetable, BIT talks continued the week of Sept. 7, Jarrett noted. He said there was "disappointment" in the first negative list of excluded sectors tabled by the Chinese, but another list was supposed to be offered during this round. AmCham officials haven't seen the actual list, but "we would like the list to be as short as possible," he added.

During meetings with Obama administration officials and members of Congress, the group heard "expressions of confidence" that the Trans-Pacific Partnership (TPP) would get done, with just a need to get through the remaining issues, Jarrett said. While China is not involved in the TPP, the agreement has "an impact on BIT negotiations in the sense that it creates pressure on China, which is concerned about its continued competitiveness which I would argue is what actually brought China back to the BIT negotiating table in the first place," Jarrett said.

Other groups representing U.S. firms operating in China report similar tempered optimism. According to the U.S.-China Business Council (USCBC)'s 2015 member survey released Sept. 10, 41% of responding companies reported double-digit revenue growth in the last year, and 85% reported their China operations are profitable. However, American executives' confidence in their prospects in China continues to moderate, "reflecting uncertainty about the direction of Chinese policies, limited progress on economic reforms, increased competition, and slowing growth," USCBC noted.

Court Weighs Fate of Fokker Deferred Prosecution Agreement

A panel of appellate court judges appeared reluctant Sept. 11 to interfere with the decision of U.S. District Court Judge Richard Leon to reject the government's deferred prosecution agreement (DPA) with Fokker Services for its alleged violations of U.S. trade sanctions. From the outset of oral arguments in Fokker's appeal before the DC U.S. Court of Appeals, Justice and Fokker lawyers were put on the defense to justify their request to have Leon's ruling reversed and remanded back to a different judge.

> Appellate Judge Laurence Silberman was the first to jump in with questions before Justice attorney Aditya Bamzai could begin his statement, asking what jurisdiction the appellate court has to reverse Leon's decision under the Speedy Trial Act. His questions were followed by tough questions from presiding Judge Sri Srinivasan and Appellate Judge David Sentelle, who told Bamzai "you have a very steep hill to climb."

Among the issues the judges raised was the discretion the district court has to approve or disapprove a DPA under the Speedy Trial Act, since the statute provides no conditions or factors judges must apply in their review of such deals. The judges asked whether the

only reason for reversing the lower court is if the judge made "clear and unmistakable" legal errors. The judges suggested that Congress would not have given courts authority to approve or disapprove DPAs unless they had some discretion to decide whether the agreement adequately gave a defendant the opportunity to show good behavior. "The statute has to mean something," Srinivasan said. "There is always some risk that it might be disapproved," he said.

> Sentelle raised concern that an interlocutory ruling reversing Leon at this stage would open the appellate court to more appeals every time a court rejected a Speedy Trial agreement. The three judges pressed the attorneys to explain the appellate court's jurisdiction to reverse Leon. They seemed to favor reliance on a general mandamus authority over arguments that they have power to rule on a collateral order.

Edward O'Callaghan with Clifford Chance, which represents Fokker, argued that Leon's ruling should be considered legal error because it "destabilizes an important area of law." He claimed the decision hurts Fokker's reputation and also puts the firm at risk of prosecution. Fokker admitted facts to the criminal information but has lost the protection of the DPA, he argued (see **WTTL**, March 2, page 6).

Because Justice and Fokker were both on the same side in the appeal, the defense of Leon's ruling was assigned to amicus curia, attorneys with Jenner & Block. One of the firm's partners, Adam Unikowsky, argued that the appellate court lacks jurisdiction to reverse the ruling either as interlocutory relief or mandamus. There was no clear or undisputed error in Leon's decision, he told the court.

Suit Seeks $83.9 Million for Circumvention of Antidumping Order

The alleged circumvention of the antidumping order on saccharin from China has led Justice to file suit in the Court of International Trade (CIT), seeking more than $83.9 million in lost duties and penalties from Univar USA Inc. The three-count complaint filed Aug. 5 claims the firm acted with gross negligence and "reckless disregard for the truth when it misrepresented the country of origin" on Customs and Border Protection (CBP) documents for saccharin imported purportedly from Taiwan.

> Justice alleges the company, based in Redmond, Wash., had adequate warnings about the true origin of its imports including from PepsiCo, one of its customers, a U.S. reseller, and from the Orthodox Union, a religious organization that certifies kosher products, which complained about the lack of access to the facility in Taiwan. The complaint claims Univar made 36 entries of saccharin between July 9, 2007, and April 3, 2012.

CBP's Office of Fines, Penalties and Forfeitures (FP&F) in Memphis, Tennessee, issued a pre-penalty notice in 2014 proposing to assess Univar USA $47,888,851.00, which was equal to the domestic value of the saccharin, plus a penalty of $36,088,718.03.

The company's website says it is "a world leader in the distribution of chemistry and related products and services." Univar "is more than just a distribution company; we're a global partner to our customers and suppliers," it claims. The company did not respond to a request for comment.

* * * Briefs * * *

TRADE PEOPLE: John Greenwald, partner with Cassidy Levy Kent, died Sept. 1, firm reported. Greenwald, 70, helped form firm when he retired from WilmerHale. He was a veteran of antidumping and countervailing legal bar and earlier had served as deputy general counsel at USTR's office during Tokyo Round and head of import administration at Commerce.

STEEL: In 5-0 preliminary votes Sept. 10, ITC found U.S. industry may be injured by allegedly dumped imports of cold-rolled steel flat products from Brazil, China, India, Japan, Korea, Russia and UK and subsidized imports from Brazil, China, India, Korea and Russia. It also dropped investigation into imports of products from Netherlands that were deemed "negligible." Commissioner F. Scott Kieff did not participate in these investigations.

EXPORT ENFORCEMENT: Alexander Fishenko, dual citizen of U.S. and Russia, pleaded guilty Sept. 10 in Brooklyn U.S. District Court to more than 20 charges, including conspiracy to violate International Emergency Economic Powers Act and Arms Export Control Act, and obstructing justice. He was indicted in October 2012 with 10 other Russian and U.S. naturalized citizens on charges of unlicensed export of microelectronic products to Russian military and intelligence agencies. Fishenko is president and CEO of Arc Electronics, Inc. and part owner of Apex System, LLC, Moscow firm that was also charged. Nine other defendants are Arc or Apex employees and one was employed by Atrilor, Ltd., another Russian firm. Co-defendant Svetalina Zagon pleaded guilty in May to related charges (see **WTTL**, May 25, page 11). Exported items included analog-to-digital converters, amplifiers, digital signal processors, microcontrollers, static random access memory chips and field programmable gate arrays.

FALSE CLAIMS: Two more individuals, Robert Wingfield of Texas, and Bill Ma of New Jersey, agreed Sept. 4 to pay $385,000 and $50,000, respectively, to settle government complaint in Jacksonville, Fla., U.S. District Court under False Claims Act. Suit claimed their companies made false declarations to avoid paying antidumping and countervailing duties on aluminum extrusions imported from Tai Shan Golden Gain Aluminum Products Ltd. in China. Firms allegedly claimed products were from Malaysia. Wingfield was U.S. sales representative for Tai Shan. Ma formed Northeastern Aluminum Corp. "to act as the importer of record for the goods in an attempt to shield the real importers from liability," Justice said. Three importers previously paid total of $3 million in complaint (see **WTTL**, Feb. 16, page 6). Wingfield also pleaded guilty in April in same federal court to making false statements. Whistleblower James Valenti will receive $79,000 as his share of latest settlements, Justice said.

SERVICES: Uruguay has withdrawn from WTO talks on Trade in Services Agreement (TISA), it announced Sept. 7. "TISA does not exist, this is what it should be clear for the entire population," Uruguay President Tabare Vazquez said Sept. 10 in translated statement. "There are difficulties in the treatment of the agreement between the countries participating, which to me personally makes me doubt that at some point it can realize the existence of some TISA," he said.