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# Washington Tariff & Trade Letter®

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## Administration Ready to Move on USML Categories I, II, III

After more than a two-year delay, the Obama administration reportedly is ready to try again to propose transfer regulations for U.S. Munitions List (USML) Categories I (firearms), II (guns and armament) and III (ammunition). The decision to go forward with proposals to revamp the three categories and move some products to the Commerce Control List (CCL) was reportedly made at an interagency meeting the week of April 20.

> According to sources, the proposals will be nearly identical to draft versions that were ready for publication in December 2012 but pulled back after the tragic shootings at the Newtown, Conn., elementary school. The White House sidelined the proposals because of concern that they might face criticism as the administration launched an effort to tighten gun controls in the wake of the killing of 20 children and six teachers and staff at the school.

Administration officials are expected to brief stakeholders on the proposals before they are published in the Federal Register. After the proposal and comment period, it may be a year before a final rule is issued. In March, State and Commerce officials calmed industry fears about rumors that they were considering a reversal of reforms by moving some CCL rifles and scopes to the USML (see **WTTL**, March 30, page 3).

With the planned publication of reform proposals for USML Category XII (optical range finders) the week of May 4 and the coming publication of changes to Category XIV (toxins), categories I, II and III were the last major rules needed to complete the cornerstone of export control reform and the effort to convert the USML into a positive list and move thousands of items from the USML to the CCL (see related story page 2).

## Nose Counting on Fast-Track Legislation Intensifies

Both supporters and opponents of fast-track trade promotion authority (TPA) are keeping the number of votes they have in the House and Senate on the legislation close to their vests to avoid losing votes from members who think their vote won't count. Every vote will count. In the House, the vote is likely to be as close as the one for U.S.-Central America Free Trade Agreement (U.S.-CAFTA), which passed by only a two-vote margin in 2005. The expected tight vote in the House is one reason the Senate may vote first on



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the measure, probably in May. "It sounds like the Senate will go first," Rep. Erik Paulsen (R-Minn.) said April 30. "Part of the reason is that they got bipartisan support for sure there, and if they move that forward there, it will show bipartisans in the House that it can be done as well," said Paulsen, who is a member of the House Ways and Means Committee (see **WTTL**, April 27, page 3).

> Paulsen acknowledged the opposition that some Republicans have to TPA. "One of the challenges we've had among some more conservative Republicans is to make sure we alleviate the myth that we are giving the president more authority and power," he said. TPA supporters have tried to show them that this is a way to assert congressional authority over the executive branch. "That argument is selling and winning," Paulsen said at a press conference where a report on U.S.-European trade was released.

He also noted that pro-trade working groups in the House have been meeting and reaching out to members who have never voted on trade bills before and also coordinating with Obama administration officials. "We're sharing notes," he said. "We have identified and make sure we identify members of Congress who were not here when we've had trade votes in the past. We're touching base with those individual members and then we reshuffle the deck and have someone else touch base with those members," he said.

"There are many members of Congress that were not here the last time we had TPA votes. There are only 35 Republicans who are in Congress right now who voted for the last TPA vote in 2002," he noted. "So we are talking about a big number of members who have never voted on TPA before. Some of these members have never voted on a trade agreement before," he added.

Paulsen also praised President Obama for continuing to meet and make phone calls to members. "Ambassador Froman has been up on the Hill and has been very responsive," he said. Part of the president's outreach was a meeting at the White House April 30 with some 40 Democrats who belong to the New Democrat Coalition. When asked about the meeting, White House Spokesman Josh Earnest said "building support for trade promotion authority is among the top priorities that the president has when it comes to his legislative agenda." He ducked the question on how many Democratic votes TPA has. "At this point, I would not hazard a guess about the number of Democrats who will ultimately support this proposal," he said.

## Proposed Night Vision Rules to Offer "Bright Line" on Controls

Proposed changes to USML Category XII and Commerce Control List (CCL) Category 6, which are expected to be published in the Federal Register the week of May 4, will offer industry a "bright line" between military and commercial uses of thermal imaging products but won't see many licenses moving from State to Commerce. While clarifying USML controls, it also will add new licensing and reporting requirements for items under Export Control Classification Numbers (ECCN) 6A002 and 6A003 as well as under a new 615 category for items moving from the USML to the CCL plus some restrictions on the use of license exceptions (see **WTTL**, March 16, page 4).

Less than 1,000 licenses a year are expected to move from State to Commerce under the proposed changes, Matt Borman, deputy assistant secretary at the Bureau of Industry

and Security (BIS) told the Sensors and Instruments Technical Advisory Committee (SITAC) April 28. "There is really not that much that we anticipate literally moving from the USML, unlike other categories," Borman said. "This is more an exercise in the bright line so people have clarity to what's actually on the USML and CCL," he said. The benefit to industry will be the "bright line" being provided by the more detailed parameters for controls that will be in the two lists, he suggested.

> "What we are trying to do here is address the marketplace and the reality of the battlefield," he said. Although USML controls on focal plane arrays have been the subject of intense debate for over 10 years, Borman noted that those are not the only products that will have controls changed under the proposals. The changes affect all items under Category XII, which also covers fire control, range finder, optical guidance and control equipment.

Borman urged industry to look carefully at the two proposals. He said "it is really critical for folks to look very carefully at these two proposals and give us very specific detailed comments." The government wants comments on whether that bright line "is drawn in the right place," he added. "Does it really only capture items that are truly military or does it also capture items that are in normal commercial use?" he asked. "You really have to give us the specific products that it captures and also in addition, if there are products that are captured that are made outside the United States," he said.

## Crisis Over, USTR Returns Ukraine to Special 301 Report

While Ukraine got a get-out-of-jail-free card in 2014 due to unrest in the country, the U.S. Trade Representative's (USTR) office renewed its focus on the country in its annual Special 301 Report released April 30 on intellectual property rights (IPR) protection in foreign countries. Kiev was given special treatment in 2014 because of the political crisis it faced, but this year it was put on the Priority Watch List.

> That's still better than 2013 when it was named as a Priority Foreign Country (PFC). While those problems haven't been resolved, the country has made progress, this year's report said. "In contrast to the period of time leading up to the PFC designation, in the past year the Government of Ukraine has invested additional effort in tackling these problems, in conjunction with other economic reforms," the report noted.

The office also moved Ecuador to the Priority Watch List from the Watch List, due to its 2014 repeal of its criminal IPR provisions. It urged Ecuador "to complete its work in reversing the repeal, or to achieve this effect through other means." The lack of criminal procedures and penalties "invites transnational organized crime groups that engage in copyright piracy and trademark counterfeiting to view Ecuador as a safe haven," it said.

The USTR's office previously elevated Kuwait to the Priority Watch List in November 2014 after an out-of-cycle review of the country's IPR protections found it did not adopt needed reforms to copyright laws and enforcement (see **WTTL**, Nov. 17, 2014, page 9). The U.S. "awaits the introduction to Kuwait's National Assembly of long-overdue copyright legislation that is consistent with Kuwait's international commitments. The United States stands ready to work with Kuwait towards resolving these important issues," the report said. USTR dropped Finland from the 2015 Watch List (WL). "The

regulatory framework in Finland regarding process patents filed before 1995, and pending in 1996, denies adequate protection to many of the top-selling U.S. pharmaceutical products currently on the Finnish market. Given that the term for such patents is set to expire shortly, Finland is removed from the WL in 2015," the report said.

> The USTR's office reviewed 82 trading partners for this year's report and placed 37 on the Priority Watch List or Watch List. No country was named a PFC. The agency also announced that it will conduct Out-of-Cycle reviews of Honduras, Ecuador, Paraguay, Tajikistan, Turkmenistan and Spain.

Several countries, including India, remained on the Priority Watch List in 2015. Senate Finance Committee Chairman Orrin Hatch (R-Utah) called this lack of movement "disappointing." "After squandering the opportunity to crack down on India's rampant IP violations in their Out of Cycle review last year, they have now issued a report that fails to fully recognize the seriousness of India's harmful IP policies. This is major step back in America's efforts to end such unfair trading practices," Hatch said in a statement.

Regarding China, a long-standing presence on the watch lists, USTR refers to "reports of intimidating and non-transparent investigative conduct" against foreign firms. On a call with reporters, USTR officials would not give specifics. "We are hearing reports on this issue," one said. "I'll leave it at that."

## Proposal of Cybersecurity Rules Continues to Face Delays

In March, administration officials said they had resolved the disagreement that had delayed publication of new rules the Wassenaar Arrangement adopted in December 2013 to control cybersecurity products and network intrusion software (see **WTTL**, March 30, page 9). Now it seems that year-long disagreement still hasn't been settled.

> "We were absolutely certain that the proposal would have been published by now, but we were wrong," Randy Wheeler, director of the BIS Information Technology Controls Division, told the agency's Information Systems Technical Advisory Committee April 29. "I think that we're almost there," she said. "I would hope that the proposed rule will be published within another month, barring any unexpected revelations or new ideas," she said.

When BIS published rules implementing the 2013 Wassenaar changes in August 2014, it said it would publish a separate rule on cybersecurity in September, but the disagreement on licensing policy delayed those changes to the Commerce Control List for at least seven months. The current plan calls for changes to the Export Administration Regulations to be published as a proposed rule, with a 45-60 day comment period, probably closer to 60, Wheeler said.

BIS officials acknowledged that they unsure where the "bright line" should be drawn for technology that should be controlled and what is publicly available. "The proposed rule will put something out there, and we expect to adjust it, based on the comments," Wheeler said. "The main issue that we have been grappling with is the scope of the entries and what is controlled in them. And of course the whole point of the multilateral control list is that several countries have the same items controlled, so we do want to make sure that we are implementing the entries with the same scope as our Wassenaar

counterparts," she said. While other countries have implemented the changes in their control lists, the EAR is a more complex process. "That involves determining the reason for control, the licensing policies and also, the availability of license exceptions," Wheeler said. The other complexity is "the U.S.-based issue of trying to place a product under one and only one control list entry, understanding other countries because they don't have the somewhat complex [system]. They're not as concerned about being able to say a product is under one or another control entry," Wheeler noted.

## Abe Doesn't Bring Deal but Boosts TPP

While nothing Japanese Prime Minister Shinzo Abe said publicly during his visit to Washington April 28-29 revealed the private conversations he had with President Obama on bilateral trade talks aimed at bringing Japan into the Trans-Pacific Partnership (TPP), the Japanese leader gave the negotiations a boost with candid statements about the need for industrial and agriculture reform in his country. Although the trade community focused on the trade discussion, it was clear that trade took a back seat to Japan's greater concerns about security, as seen in the issuance of new bilateral guidelines on defense cooperation April 27.

> Whatever Abe and Obama discussed, they may have given momentum to TPP. Right after Abe left, the U.S. Trade Representative's (USTR) office said USTR Michael Froman is headed to Kuala Lumpur, Malaysia, May 4-8, for TPP talks. With fast-track legislation moving in Congress, expectations have risen for a TPP deal in June (see **WTTL**, April 27, page 1).

The new defense guidelines replace earlier ones approved in 1978 and revised in 1997. Among the many areas of intensified defense cooperation under the new policies is a strong statement on the U.S. commitment to defend Japan, including disputed territories in the South China Sea.

"The Ministers also reaffirmed that the Senkaku Islands are territories under the administration of Japan and therefore fall within the scope of the commitments under Article 5 of the U.S.-Japan Treaty of Mutual Cooperation and Security, and that they oppose any unilateral action that seeks to undermine Japan's administration of these islands," the U.S. and Japan said in a joint statement. Although U.S. officials have said this before, the new guidelines are intended to draw a brighter red line against Chinese efforts to take over these disputed islands.

Abe clearly was not ready to make any public concessions in the ongoing trade talks. In his address to a joint session of Congress April 29, he said "TPP goes far beyond just economic benefits. It is also about our security. Long-term, its strategic value is awesome. We should never forget that." Abe also repeated statements he has made in Japan about the need for economic reform, although he has continued to face strong opposition in his country to many of these changes.

Abe noted Uruguay Round negotiations 20 years ago. "I was much younger, and like a ball of fire, and opposed to opening Japan's agricultural market. I even joined farmers' representatives in a rally in front of the Parliament," he told Congress. "However, Japan's agriculture has gone into decline over these last 20 years. The average age of our farmers has gone up by 10 years and is now more than 66 years old. Japan's agriculture

is at a crossroads. In order for it to survive, it has to change now," he declared. On the industrial side, corporate governance in Japan is now fully in line with global standards, because we made it stronger, he asserted. "Rock-solid regulations are being broken in such sectors as medicine and energy. And I am the spearhead," he added. "Japan will not run away from any reforms. We keep our eyes only on the road ahead and push forward with structural reforms," he claimed.

> One change already is a sharp rise in the level of U.S. foreign direct investment (FDI) in Japan, a market that was inhospitable to foreign investors for many years. According to a White House fact sheet released with Abe's visit, U.S. FDI in Japan has reached $123 billion, while Japanese FDI in the U.S. is nearly $350 billion, making Japan the second largest foreign investor in the U.S., but still small compared to FDI from Europe (see story below).

## Investment, Not Trade, Drives Transatlantic Commerce

An annual report released April 30 on U.S.-Europe economic ties indicates that foreign direct investment (FDI) across the Atlantic is much more important than trade in the current Transatlantic Trade and Investment Partnership (TTIP) talks. The sales and profits of U.S. and European affiliates in each market far exceeds imports and exports between the two trade partners.

> That cross-border investment "is not going anywhere else," said Daniel Hamilton, one of the authors of the report, which was sponsored by the Trans-Atlantic Business Council, the Center for Transatlantic Relations and the American Chamber of Commerce in Europe. More FDI from the U.S. and Europe go to each other annually than go to China or Mexico, he noted.

"Trade alone is a misleading benchmark of international commerce; mutual investment dwarfs trade and is the real backbone of the transatlantic economy," the report says. "The U.S. and Europe are each other's primary source and destination for foreign direct investment," it adds. "U.S. foreign affiliate sales in Europe in 2013 topped $2.9 trillion, greater than total U.S. exports to the world of $2.3 trillion and 47% of total U.S. foreign affiliate sales globally," it says. "Majority-owned European affiliate sales in the United States ($2.3 trillion) in 2013 were more than triple European exports to the United States," the report stated.

Given the high level of FDI, especially in the services sector, TTIP negotiations on regulatory convergence are especially important, Hamilton suggested. He said he does not expect any deal to include great changes in regulatory practices. "It's a process," he said. With an agreement, the U.S. and Europe will be "positioning ourselves for the future," he said. Hamilton said he expects the accord to allow regulators in each market to append their own agreements to the pact.

FDI drives related-party trade across the Atlantic to subsidiaries from parent companies. The report calculates that 61% of U.S. imports from Europe in 2013 were intra-company transfers from the parent in Europe to the U.S. affiliate. "Intra-firm trade also accounted for one-third of U.S. exports to Europe and nearly half of total U.S. exports to Belgium and the Netherlands, 32% of exports to Germany and 26% of exports to the U.K.," it said. The report estimates that there was $13.6 trillion in U.S. assets in Europe in 2013

and $9 trillion in European assets in the U.S. The report includes an extensive discussion of tax inversion practices in which U.S. companies move their corporate headquarters to Europe to get a better tax rate. In a section titled, "I'll Have the Double Irish with a Dutch Sandwich," the report claim taxes are less a driver of U.S. FDI in Europe than commer-cial reasons. Hamilton admitted taxes were a reason for some corporate moves to Europe, especially Ireland, but noted the level of tax inversion investment varies country to country, with inversions accounting for just 10-15% of U.S. FDI in Europe. Ireland, a main beneficiary of these transfers, has other things going for it, including its access to the European Union, its English-speaking workforce, its use of the euro and its welcoming attitude toward foreign investment, Hamilton argued.

## Divided Appellate Court Rejects Appeal for Byrd Money

The legal fight over the distribution of duties under the Continued Dumping and Subsidy Offset Act (CDSOA), better known as the Byrd Amendment, drew a divided opinion April 24 from the Court of Appeals for the Federal Circuit (CAFC). In a 2-1 decision, the court rejected a 14-year effort by Giorgio Foods, Inc., to receive some of the duties on mushroom imports from several countries (see **WTTL**, Nov. 1, 2010, page 1).

> The Supreme Court in October 2014 denied without comment the appeal of two other companies, Ashley Furniture and Ethan Allen, to get a share of Byrd distribution on bedroom furniture imports from China. That decision may have signaled the end of Giorgio's long battle as well.

In an opinion written for two members of the CAFC panel, which also awarded costs to appellees, Appellate Judge Timothy Dyk said Giorgio "sat on the sidelines and refused to take an open and active role in support of the government." Byrd money was intended for companies that help the government enforce trade remedy laws. "There is nothing in the First Amendment that requires the government to accommodate Giorgio's 'business reasons' for not making a public statement in support of the petition," Dyk wrote in *Giorgio Foods, Inc. v. U.S.*

Giorgio had first sought Byrd payments in October 2001 when it asked the International Trade Commission (ITC) to put it on the list of affected domestic producers. After the Court of International Trade (CIT) upheld the ITC's rejection of the request, Giorgio pursued several suits and appeals. The litigation was tied to at least two other Byrd cases, including *SKF USA, Inc. v. U.S.* in 2009 and *PS Chez Sidney v. ITC* in 2012.

In its legal battles, Giorgio argued that it had not taken a position for or against parts of the mushroom petition but provided "behind the scenes" support. "Thus the question here is whether a statement of support is necessary to secure compensation under the Byrd Amendment. On that question, we do not write on a blank slate; three prior decisions of this court have addressed the support requirement," Dyk wrote. "There is nothing in the Byrd Amendment, or its legislative history, that indicates congressional intent to compensate all parties, including those who did not make an explicit statement of support for the petition," he ruled.

In a 21-page dissent that was longer than the majority opinion, CAFC Judge Jimmie Reyna argued that nothing in the statute says how support for a case has to be expressed. "Congress only required that an interested party 'indicate' support," he wrote. "The

CDSOA does not specify which agency's questionnaire responses must include the indication of support. Nor does it specify whether the questionnaire is the preliminary questionnaire or the final questionnaire. Most important, the CDSOA does not specify how a producer must indicate support — it only requires that the producer 'indicate' support through the questionnaire response," Reyna argued.

> "In passing the CDSOA, Congress did not refer to the ITC questionnaire, much less the ITC support boxes. Nor did Congress provide any guidance, for example, as to what happens if a U.S. producer checks the take no position box," he noted. "This is important because the majority opinion focuses on whether a box was checked or not. It is clear, however, that Congress could not have intended that the petition support requirement would hinge one way or another on the boxes," he continued.

"I respectfully dissent from my colleagues' rewriting of the statute to require a statement of 'explicit' support. The statute does not contain such a requirement, just as the statute does not mandate that a specific box be checked. To the contrary, the plain language of the statute on its face requires the producer to 'indicate' support through questionnaire response. The Supreme Court has repeatedly cautioned against departing from the plain language of a statute," Reyna contended.

## * * * Briefs * * *

ANTIBOYCOTT: Morex, Inc. in Charlotte, N.C. agreed to pay BIS $22,500 civil penalty April 22 to settle six charges of violating antiboycott regulations. It allegedly furnished information about business relationships with boycotted countries or blacklisted persons and failed to report receipt of requests to engage in restrictive trade practice in transport certificates from UAE, Qatar and Pakistan from 2009 to 2011. Morex neither admitted nor denied charges. "We have reached a settlement with the Commerce Department on antiboycott charges to our satisfaction and that would be the extent of our response on the case," Morex President Rudolph Mazigi wrote in email to WTTL.

SANCTIONS: BNP Paribas S.A. (BNPP), global financial institution in Paris, was sentenced May 1 in Manhattan U.S. District Court for violating sanctions against Sudan, Cuba and Iran. BNPP pleaded guilty in July 2014 to violating International Emergency Economic Powers Act and Trading with the Enemy Act, agreeing to pay $8.9736 billion in forfeiture and fines (see **WTTL**, July 7, 2014, page 4). Bank also agreed to five years' probation.

OCTG: In 6-0 "sunset" vote April 28, ITC said revoking antidumping and countervailing duty orders on oil country tubular goods (OCTG) from China would renew injury to U.S. industry.

MORE OCTG: In 73-page ruling April 22, CIT Senior Judge Kenton Musgrave remanded to Commerce countervailing duty order on oil country tubular goods from Turkey. Turkish exporters challenged claims on subsidies provided for input of hot-rolled steel (slip op. 15-36).

POLYVINYL ALCOHOL: ITC voted 6-0 in "sunset" review April 28 that revoking antidumping duty orders on polyvinyl alcohol from China and Japan would renew injury to U.S. industry, while revoking existing antidumping duty order on product from Korea would not.

EXPORT ENFORCEMENT: Yueh-Hsun Tsai, of Glenview, Ill., also known as "Gary" Tsai, was sentenced to three years' probation April 24, 2015, in Chicago U.S. District Court for fraud related to illegal export of U.S.-origin machinery used to fabricate metals and other materials. Tsai, who was released on bond after he was arrested in May 2013, pleaded guilty in December

2014. Tsai's father, Hsien Tai (Alex) Tsai, former resident of Taiwan, was sentenced in March to 24 months in prison in Chicago U.S. District Court for conspiracy to violate U.S. restrictions on designated proliferators of weapons of mass destruction (see **WTTL**, March 23, page 7). Alex Tsai and two companies -- Global Interface and Trans Merits -- were designated in January 2009 as proliferators of weapons of mass destruction.

MORE EXPORT ENFORCEMENT: Federal jury in San Diego U.S. District Court convicted Arash Ghahreman of Staten Island, N.Y., naturalized U.S. citizen and former Iranian national, April 23 on seven counts of attempted export to Iran of marine navigation equipment and military electronic equipment. He is scheduled to be sentenced July 17. Co-defendant Ergun Yildiz, resident of UAE, pleaded guilty to conspiracy to export to Iran in October 2014 and is scheduled to be sentenced May 8. Yildiz was president of Tig Marine, Dubai company that co-defendant Koorush Taherkhani, Iranian national and resident, allegedly used as "front company." Taherkhani remains at large.

EVEN MORE EXPORT ENFORCEMENT: Florida businessman Russell Henderson Marshall and his company Universal Industries Limited Inc. were sentenced in West Palm Beach, Fla., U.S. District Court April 24 for violating export regulations and Commerce denial order. He was sentenced to 41 months in prison and will be deported upon completion of his sentence. Universal Industries was sentenced to one year probation, but is currently listed as inactive. Both Marshall and Universal pleaded guilty in February 2015. Marshall engaged in negotiations to export three temperature transmitters used on F-16 fighter jets to Thailand in 2012 and saddle part for J-69 engine used on T-37 military trainer aircraft to Pakistan in 2013, Justice sentencing memo noted.

HONEY: CIT Judge Richard K. Eaton granted motion April 27 for preliminary injunction barring Customs from liquidating entries of honey from China until pending appeals have been completed (slip op. 15-39).

COATED PAPER: CIT Senior Judge Kenton Musgrave remanded for third time Commerce antidumping duty order on certain coated paper from China April 22 (slip op. 15-37). Judge told department again to resolve dispute over use of market economy purchase prices for certain inputs from Thailand and application of targeted dumping methodology.