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

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BIS Corrects "Unintended Consequence" for Deemed Reexports

To keep its promise not to impose more restrictive controls on items transferred from the U.S. Munitions List (USML) to the Commerce Control List (CCL), the Bureau of Industry and Security (BIS) issued new guidance Oct. 31 to avoid adding new licensing requirements on "deemed reexports." The advice allows the release of technology or source code subject to the Export Administration Regulations (EAR) outside the U.S. without a license to a dual or third-country national under certain conditions.

> "BIS has concluded that an unintended consequence of changing the jurisdiction over military items before harmonizing the Commerce Department and State Department treatments of dual and third country nationals is that the BIS policy in place prior to this revision would impose individual licensing obligations on certain deemed reexports that did not exist for the same items in the same circumstances when they were subject to the ITAR [International Traffic in Arms Regulations]," says the BIS advice.

BIS says an exporter now may use either the current BIS deemed reexport guidance or the comparable ITAR rules or State Department guidance for determining when an individual BIS license or other EAR authorization is needed.

BIS advice says: "In the absence of a license issued by BIS or the application of an EAR license exception, you (e.g., an entity outside the United States) may release (i.e., reexport) outside the United States technology or source code that would otherwise require such a license or license exception to a dual or third country national if any of three situations is applicable – the reexport is within the scope of (A) legacy BIS guidance, (B) the ITAR's provisions in section 124.16 in effect on the publication date of this guidance, or (C) the ITAR's provisions in section 126.18, including country-specific agreements based on section 126.18, or relevant DDTC guidance in effect on the publication date of this guidance."

U.S. Offers "Flexibilities" to Bridge Textile Issues in TPP

While the U.S. will remain adamant in demanding a "yarn-forward" rule of origin for textiles and apparel in any Trans-Pacific Partnership (TPP) agreement, it may agree to

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flexible interpretations of short-supply rules in an effort to satisfy the U.S. domestic textile industry and TPP apparel-producing countries. So far, such proposals have drawn a negative reaction from U.S. retailers and apparel importers who say those changes don't go far enough to reduce tariffs and other restrictions on the majority of apparel imports from the TPP region.

> The U.S. is offering to include in a TPP deal the 217 products currently on the Short-Supply List (SSL) maintained by Commerce plus two more currently being vetted with the textile industry, Kim Glass, deputy assistant secretary of Commerce for textiles, consumer goods and materials, told the U.S. Fashion Industry Association Nov. 6. "This very innovative approach that we took from day one is to build negotiation flexibility into the rule of origin while navigating domestic textile industry sensitivities," Glass said.

"Under the yarn-forward construct, we believe this will help create new supply chains in the TPP," she said. "There are also levels of flexibility in this agreement to ensure that supply chains that are in existence can remain where there is a short supply availability of yarns or fibers or fabrics," she added.

The U.S. proposal calls for the creation of a short-supply list that will have two parts, one a permanent list and one a temporary list. There is no agreement yet on which list short-supply items will go on. The U.S. position has been to limit the permanent SSL to items not produced for geographic reasons in any TPP countries, such as silk and linen. In addition to the products the U.S. has proposed, other TPP countries have proposed their own candidates for the lists. "There will be only one short-supply list for every country," Glass said. "There will be no chance to amend the list after the agreement is signed unless you want to renegotiate the agreement," she noted. TPP negotiators "agree on full cumulation so all will have the same benefits," Glass said.

Although TPP countries are pressing to reach a final agreement by the end of the year, Glass said she still wants to hear from U.S. industries on which products should be on the SSL in the pact. "So what we are asking folks now is to take the long view; give us feedback on the short-supply list now," she said. Glass also said the U.S. short-supply proposal tries to build in flexible tolerances to make it easier for manufacturers to take advantage of the list. "When applicants or importers have asked us for certain things on short supply and have narrowly defined a product request, we have often times tried to broaden that in order to insure that there is not trouble down the road," she stated.

The apparel and retailing industries are still not satisfied with the U.S. short-supply proposal, which sources say will open less than 10% of apparel imports to the duty-free benefits of TPP. Other existing restrictions, particularly requirements for the use of U.S. cotton, are likely to remain in place and inhibit expansion of trade. Importers want broader acceptance of regional materials and changes in the rule of origin to allow cut-and-sew operations to qualify for TPP benefits.

Former U.S. Chief Textile Negotiators David Spooner, who is now a partner with the law firm of Squire Sanders in Washington, told the conference that he sees chances for modification of the yarn-forward rule in the TPP. "The USTR will have to call it a yarn-forward rule in the end, but there are still opportunities for significant abrogations from the rule if Vietnam continues to hold firm," he said. Spooner also noted that U.S. offensive interests, such as pork producers and banks, "have started to complain that they are

not getting the market access they need because of the yarn-forward rule." Another chief textile negotiator, Jennifer Hillman, who is now a partner with Cassidy Levy Kent in Washington, said the TPP talks "are too far down the road" to get any change in the yarn-forward rule. Instead of a change in the rule, negotiators may seek higher trade preference levels, to expand the SSL and to allow greater cumulation. She said there will be a greater opportunity to change the rule in talks on a Transatlantic Trade and Investment Partnership (TTIP) agreement because of the large textile and apparel industries in Europe. "For TTIP, I don't think it's too late," she said.

Most EU Members Have Implemented Dual-Use Export Measures

European Union (EU) countries have been slow to implement the common export control regime the EU adopted in 2011 for dual-use exports and their enforcement of the new regulations has also been limited, according to an EU report on the dual-use controls posted Nov. 8. In the two years since the EU introduced five new general export, authorizations, most member states have implemented registration requirements and other obligations, but only some use the relevant customs data, the report said.

> The EU parliament introduced the five new EU General Export Authorizations (EUGEAs) for the export of some items to certain destinations in November 2011 (see **WTTL**, Nov. 7, 2011, page 2). The new regulations also introduced "reinforced provisions for reporting and transparency," the report said.

While the goal of the EUGEAs was to harmonize export requirements across the 28 EU member states, not all countries have fully implemented the rules. "Most Member States have introduced registration requirements and also require *a posteriori* notification after first use although some Member States require prior notification. Most Member States require exporter information, item description & category, value & volume of transactions, destination and end-user information," the report found.

"Some Member States also make use of relevant customs data. Furthermore, most Member States have introduced regular reporting requirements, though the frequency varies, and some also have record-keeping and auditing obligations in place," the report noted. "In total, over 4,000 notifications of use of EUGEAs have been received by competent authorities, and it is estimated that approximately 3,500 companies use EUGEAs. All EUGEAs are being used by economic operators, though EUGEA 001 is the one most in use. Economic operators use EUGEAs in virtually all Member States, but economic operators in a few Member States have not yet used the new EUGEAs introduced in 2011," the report stated.

Exports under EUGEAs are largely destined to the U.S. and other 'EU001 countries' (Australia, Canada, Japan, Switzerland, Norway, New Zealand), but other destinations also benefit from EUGEAs, such as Brazil, China, South Korea, Russian Federation, South Africa and Turkey, the report said.

As far as enforcing export violations, Member States "have introduced a range of diverse national administrative and criminal sanctions, typically including fines and confiscation of goods as well as imprisonment," the report said. "National authorities are primarily responsible for the enforcement of export controls. Over the reporting period, a few

violations were reported e.g. for unlicenced export of items, resulting in the imposition of fines and/or seizure of the items, while a few cases were referred to courts," it noted. The report also acknowledged some difficulty in classifying all exports of dual-use items.

> "It is difficult to get reliable information on dual-use exports as there is no correspondingly defined economic sector, nor has a specific methodology been developed thus far for recording data and calculating statistics on the trade of dual-use items," it said. "However, the Commission and Member States do collect data that allow for approximate estimates of exports of dual-use goods based, on the one hand, on customs commodities identified by the *correlation table* which *include* dual-use goods and, on the other hand, on specific data collected by competent authorities," it said.

West Coast Ports Could Face Labor Trouble Next Summer

Shippers are being warned to expect a slowdown in cargo handling next summer at West Coast ports as port operators and the longshoremen's union face off over an expiring union contract. While a strike is not expected, members of the International Longshore and Warehouse Union (ILWU) are likely to follow a "work-to-rule" approach that will slow the loading and unloading of cargo ships, according to Robin Lanier, executive director of the Waterfront Coalition, which represents shippers and transportation firms.

> Lanier said she does not expect negotiations between the ILWU and the Pacific Maritime Association (PMA), which represents port operators, to begin in earnest until next April or May or after the current contract expires June 30, 2014. It may be mid-July before the two sides "get down to the nut of the issues," she told the U.S. Fashion Industry Association annual meeting Nov. 6 (see related story page 7).

The two sides have totally different issues at stake in the negotiations. The main concern for PMA members is the prospect that they may get hit with a penalty under the Affordable Care Act because its current union contract provides what the law deems to be "cadillac" health insurance policies to workers. They want concessions from the union to avoid that, Lanier explained. For the ILWU, the issue is its jurisdiction and representation for workers involved in port activities but not located at ports or nearby facilities. Due to increased automation, a growing number of clerical and operational functions can be performed far from the ports and union wants to make sure those employees come under ILWU jurisdiction and hired through the ILWU labor hall.

CIT Judge Kelly Resets Clock for Customs Ruling

In her first ruling since being confirmed by the Senate May 23, Court of International Trade (CIT) Judge Claire Kelly reset the clock on the effective date of a Customs and Border Protection (CBP) ruling to account for the government shutdown. In *Best Key Textiles v. U.S.* Nov. 4, Kelly ordered the start of the 60-day effective date for the Customs ruling to begin Oct. 17 when the government reopened even though the agency had the ruling in paper version ready Oct. 2 (slip op. 13-135). The delay will give Best Key extra time to consider a challenge of the ruling. Best Key had sued earlier to get Customs to issue its decision on the company's requested change to a previous Customs

Ruling. After several delays, CBP had the ruling ready for publication in the Oct. 2 Customs Bulletin just as the government was closing due to the budget fight between the House and President Obama. Because of the shutdown, the bulletin was not accessible on the Government Printing Office (GPO) website. "Unfortunately, nothing about the publication of this decision was normal," wrote Kelly, who was a professor at the Brooklyn Law School before she was nominated for the CIT seat (see **WTTL,** Jan. 7, page 8).

> "While it may be the case that some members of the public who had previously subscribed to the Customs Bulletin would have had their issues mailed to them by a private contractor who was not affected by the government shutdown, real and continual access by the public was not available until October 17, 2013. On October 2, 2013, if a member of the public sought to access the GPO website to obtain a copy it could not. The GPO website did not function in a manner that would allow a member of the public to retrieve the Revocation Letter during the shutdown," she wrote.

"While the plaintiff's claim that CBP has unlawfully withheld or unreasonably delayed agency action has been mooted by the issuance of the Revocation Letter, plaintiff's claim that the Revocation Letter fails to meet the statutory notice requirements survives," Kelly stated. "A member of the public might have guessed that it could try to reach court libraries to obtain a copy but imposing such a burden on the public to speculate on how and where they might search out a copy of a ruling would distort the very purpose of the notice requirement, *i.e.*, easy and continuing access to information," she added.

"Ruling otherwise would not only conflict with congressional intent on the continuing accessibility of notice but it would lead to the anachronistic and inefficient result of requiring prospective importers to maintain paper subscriptions to government publications just in case the government shuts down," she ruled.

TPP Negotiators Seek to Identify Sensitive Footwear Sectors

The U.S. is not alone among Trans-Pacific Partnership (TPP) negotiating countries in wanting to protect some footwear sectors from tariff cuts. Mexico, Japan, Canada, Peru and other TPP countries have shoe industries they want to preserve, according to U.S. negotiators. To bridge demands from countries such as Vietnam for tariff elimination and domestic industries, TPP negotiators are trying to develop lists of "sensitive" and "non-sensitive" footwear that will get different treatment under the pact. Athletic footwear, waterproof boots and higher priced leather shoes are likely to be on the sensitive list, while lower-priced women's shoes may be considered non-sensitive.

> U.S. Trade Representative (USTR) Michael Froman has been under pressure from U.S. athletic footwear firms, particularly New Balance, and lawmakers from the Northeast to maintain high tariffs on those products (see **WTTL,** Aug. 5, page 3). But Vietnam, which wants to expand its exports of these products to the U.S., has insisted on cuts in U.S. protection for them.

"Mexicans are the most protectionist" of TPP countries on footwear, one source noted. "Mexico does not want to open its market and also doesn't want to lose its market in the U.S.," another source said. In 2011, for example, Mexico exported $411 million in footwear, with $339 million going to the U.S. Its other major export markets are Japan

and Canada. Canada exported $224 million worth of footwear in 2011, with $203 million going to the U.S.

> The U.S. has been trying to open the Japanese leather footwear market since the early 1980s. Tokyo agreed to adopt a tariff-rate quota (TRQ) for leather shoe imports in 1986, but its application of the TRQ has remained a subject of complaints from U.S. footwear brands and has been highlighted repeatedly in the USTR's annual trade barriers report. If the U.S. doesn't open its footwear market, Japan will have an excuse not to open its, one source said. "If the U.S. makes good offers, it will invite counter offers," the source said. "We need to show that we are ready to put our sensitive products on the table," the source added.

Obama to Name Bank of America Executive to Commerce Post

President Obama turned to Wall Street for his latest nominee, announcing his intent Nov. 7 to nominate Stefan Selig, currently executive vice chairman of global corporate and investment banking at Bank of America Merrill Lynch, to be Commerce under secretary for international trade. Selig would succeed Francisco Sanchez, who stepped down Nov. 6 after announcing his resignation in September (see **WTTL**, Sept. 9, page 1).

> Prior to his current role, Selig held various positions at Banc of America Securities and UBS Securities. He received his B.A. from Wesleyan University and a M.B.A. from Harvard Business School.

"Stefan Selig is a tremendous talent and we'll be lucky to have him join the Commerce Department," Commerce Secretary Penny Pritzker said in a statement. "He has the global experience, management skills and understanding of how to put deals together to ensure that we will be able to continue our critical work to expand trade and exports, grow our economy and create jobs," she added.

Sanchez had agreed to stay through the much-heralded Select USA summit Oct. 31-Nov. 1. Unlike many of his predecessors, Sanchez played a small role in trade negotiations or policy, spending most of his time promoting U.S. exports in speeches in the U.S. and abroad. From his background, it appears Selig would follow the same pattern as Sanchez, focusing on deals rather than policy.

* * * Briefs * * *

SATELLITES: President Obama Oct. 25 signed Presidential Determination delegating next steps in moving satellites from USML to CCL (see **WTTL**, Sept. 23, page 5). These include: sending one-time determination to Congress from secretary of State that "the removal of satellites and related items from the USML is in the national security interests of the country;" sending one-time report to Congress from secretary of State analyzing final regulations of satellite transfers; and sending annual report to Congress from Commerce secretary "summarizing all export licenses and other export authorizations for satellites and related items subject to the Export Administration Regulations every year until 2020," White House said.

EXPORT ENFORCEMENT: Nicholas Kaiga of Brussels and London was indicted by federal grand jury Oct. 24 in Chicago U.S. District Court with one count of violating International Emergency Economic Powers Act (IEEPA) and two counts of making false statements on U.S.

export forms. Kaiga allegedly attempted to export aluminum tubes controlled for nuclear nonproliferation purposes from company in Schaumburg, Ill., through Belgium, to company in Kuala Lumpur, Malaysia, without Commerce license. Court documents alleged Malaysian business was front company operated by individual in Iran.

TTIP: Second round of talks on Transatlantic Trade and Investment Partnership (TTIP) agreement to be held Nov. 11-15 in Brussels. Original talks were postponed due to U.S. government shutdown (see **WTTL**, Oct. 7, page 1).

HOLY MACKEREL: Faroe Islands Nov. 4 requested WTO consultations against EU over measures restricting entry of herring and mackerel caught under islands' control. Dispute comes from disagreement over 2013 allocation of "Total Allowable Catch" of Atlanto-Scandian herring among Faroe Islands, Iceland, Norway, Russian Federation and EU. Request also says EU has prohibited entry of any vessels flying Faroe Islands flag.

HARDWOOD PLYWOOD: In 5-0 final negative vote, ITC Nov. 5 determined that dumped and subsidized imports of hardwood plywood from China do not injure U.S. industry. As a result, no antidumping or countervailing duty orders will be issued, ITC said.

TRADE PEOPLE: Former Assistant Secretary of Commerce for Market Access & Compliance Michael Camunez joined firm of Manatt, Phelps & Phillips, firm announced Nov. 4. Camunez will hold dual roles of president of ManattJones Global Strategies LLC and partner in Manatt's Government & Regulatory Policy Division.

MORE TRADE PEOPLE: Jason Park has joined Democratic Senate Finance Committee staff as international trade counsel focusing on Trade Adjustment Assistance customs and other trade issues, Committee Chairman Max Baucus (D-Mont.) announced Nov. 4. Prior to Finance, Park served as revenues counsel for majority staff of Senate Budget Committee.

STEEL PIPE: ITC made "sunset" determination on 5-0 vote Nov. 7 that ending antidumping and countervailing duty orders on circular welded carbon-quality steel pipe from China would likely cause renewed injury to U.S. industry. Commissioner F. Scott Kieff did not participate.

PAPER PUNCHES: Court of Appeals for Federal Circuit (CAFC) Nov. 5 affirmed Court of International Trade ruling that upheld Customs classification of decorative paper punches from Taiwan as perforating punches and similar handtools. In *Wilton Industries v. U.S.*, CAFC said products were properly classified under HTSUS 8203.40.60 with duty of 3.3% and not duty free under HTSUS 8441.10.00 as "cutting machines of all kinds."

RESIDENTIAL WASHERS: CIT Judge Claire Kelly refused Nov. 6 to issue stay in suit by LG Electronics to overturn ITC injury determinations in antidumping and countervailing duty cases against imports of large residential washers from Korea and Mexico (slip op. 13-136). LG asked for stay while CIT weighs separate suit brought by Samsung Electronics against Commerce's AD and CVD decisions (see **WTTL**, Jan. 28, page 7). LG claimed outcome of Samsung case could affect its suit. "The problems for plaintiffs are the speculative nature of their argument and the duration of the proposed stay," Kelly wrote.

RIBBONS: CIT Judge Leo Gordon upheld Commerce's administrative review of narrow woven ribbons with woven selvedge from Taiwan Nov. 8, saying department was justified in imposing adverse facts available (AFA) of 137% (slip op. 13-137).

FASHION INDUSTRY: On its 25th anniversary Nov. 6, United States Association of Importers of Textiles & Apparel adopted new name: United States Fashion Industry Association. "Our new brand includes a new mission statement and values statement that more clearly communicates our purpose and direction for the future," association said. Group, whose members include textile and apparel brands, retailers, importers and wholesalers, was founded in 1989 to fight for end of textile and apparel quotas, which were phased out under Uruguay Round.