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. 33, No. 16 **April 22, 2013**

Export Control Reform Takes One Big Step Forward

As promised, Bureau of Industry and Security (BIS) and State's Directorate of Defense Trade Controls (DDTC) each published massive final rules April 16 to implement the first phase of the Obama administration export control reform initiative and complete the first transfers of less sensitive items, such as parts and components, from State's U.S. Munitions List (USML) to the Commerce Control List (CCL) (see **WTTL**, April 15, page 1). Each rule, which the agencies have nicknamed "The Beast," comprises five components implementing these changes (see related stories below).

> DDTC's Federal Register notice revises USML categories VIII (aircraft and associated equipment) and creates Category XIX (gas turbine engines) to make them positive lists; amends the International Traffic in Arms Regulations (ITAR) to adopted a new common definition for "specially designed;" implements the president's executive order to avoid dual licensing requirements; and amends several other ITAR sections to implement the changes.

The BIS rule creates new 600-series Export Control Classification Numbers (ECCNs) to hold transferred aircraft parts and gas turbine engines; amends the Export Administration Regulations (EAR) to adopt the framework for reforms;, amends the EAR to adopt same new common definition of "specially designed" as adopted in the ITAR (see related story, page 2); and amends the EAR to implement transition rules, including new rules covering the 600 series. The rules will go into effect Oct. 15, 2013, giving exporters six months to transition to the new system. In addition, products exported under existing State licenses will be "grandfathered" for two years after that effective date.

Final Rules Implement New Export Control Structure

In parallel final rules published April 16, BIS and DDTC have created a new structure of export controls for items still on the USML, for those transferred from the USML to the CCL, and how former USML items will be treated once they have moved to the CCL. At the heart of the new structure is the creation of a new "600 series" of Export Control Classification Numbers (ECCNs) to hold transferred items for each USML category. Under the final rules, for example, aircraft currently under USML Category VIII but

WTTL is published weekly 50 times a year except last week in August and December. Subscriptions are $697 a year. Additional subscriptions with full-priced subscriptions are $100 each. Site and corporate licenses also available.

warranting less control would land in new ECCNs 9A610, 9B610, 9C610, 9D610 and 9E610. The products remaining on the USML would include bombers, attack helicopters, military unmanned aerial vehicles (UAVs), military intelligence, surveillance, and reconnaissance aircraft; and target drones, as well as parts and components "specially designed" for stealth and low-observable aircraft.

> In its rule, State established USML Category XIX, which was reserved and empty, to cover gas turbine engines and associated equipment formerly covered in USML categories IV, VI, VII and VIII. "The intent of this change is to make clear that gas turbine engines for cruise missiles, surface vessels, vehicles, and aircraft meeting certain objective parameters are controlled on the USML," it wrote. Any products transferred to the CCL would be covered under new ECCNs 9A619, 9B619, 9C619, 9D619 and 9E619.

Under the new structure, products transferred to the 600 series would be eligible for some EAR license exceptions, most notably License Exception Strategic Trade Authorization (STA), under certain conditions. After the six-month delayed effective date, exporters can use STA for transferred products if the products are for ultimate end-use by the governments of one of 36 U.S. allies.

In the final rule, BIS added an additional criterion that would allow STA use if the U.S. government had otherwise authorized its use under a State or Commerce license for other types of activities. "There were some fact patterns in some of the commentary," Assistant Secretary for Export Administration Kevin Wolf said in a BIS webinar April 17. "We just gave the government a degree of flexibility to issue those authorizations," Wolf said; "This is new since the proposed rule," he added. In addition, any non-U.S. parties in the supply chain for an STA export must have been previously approved on a State or Commerce license, though not necessarily for that specific product, Wolf noted.

Items moved to the 600 series also will become eligible for the EAR *de minimis* rule of 25% for non-embargoed destinations instead of the zero de minimis of the ITAR. "Contrary to the comments, this change is a dramatic reduction in complexity and will significantly reduce the current incentives for buyers in such countries to avoid purchasing what were ITAR-controlled parts and components and what will, with this rule and successive implementations of additional categories, become '600 series' items subject to the EAR," BIS said. "This is a simple rule—trade in foreign-made items with non-arms embargoed countries containing U.S.-origin military items is subject to the same rule as all other items subject to the EAR and trade in such items with countries subject to arms embargoes is prohibited, as is the case today," the notice continued.

The final rules also include: new definitions of "aircraft" and "equipment;" two new Red Flags; a new country group D:5 for arms embargoed countries; and provisions to deal with dual licensing, giving State jurisdiction to continue licensing transferred parts and components for USML end-items during the transition period.

New Specially Designed Definition Expands "Release" Criteria

The new definition of "specially designed" in the final rules published April 16 continues to use a "catch-and-release" formula to determine when an item is subject to export controls. The definition went through two rounds of proposals and drew dozens

of industry comments to get to its final form. In its final form, BIS and DDTC have simplified and expanded the "release" part of the formula. While the two agencies said they had hoped to eliminate the use of the terms specially designed and specifically designed in the EAR and ITAR and move toward more "positive" lists, they found they had to maintain the term "specially designed." One reason for keeping the term is its use in Wassenaar Arrangement controls. In its notice, State "acknowledges that it has not completely ended the practice of determining export jurisdiction based on the item's design intent rather than its performance levels, characteristics, or functions, but it has endeavored to keep it to a minimum."

> An example of one key change relates to the "release" part of the formula. In the proposed rule in July 2012, one of the "release" criteria excluded a part or component that was or is being developed with a "reasonable expectation of" use in both civil and military items. In the final rule, the language excludes items developed with "knowledge that it would be for use" in those dual-use items.

In a note to the new definition, BIS said it will require this "knowledge" be supported by documents contemporaneous with the product's development including concept design information, marketing plans, declarations in patent applications, or contracts. "If documents don't exist, then you can't depend on this paragraph," BIS Assistant Secretary for Export Administration Kevin Wolf said in a BIS webinar April 17.

Another change in the definition relates to products previously classified under a commodity jurisdiction (CJ). "In the case of a CJ determination where an item was determined to not be subject to the ITAR and the CJ determination indicated a classification on the CCL other than as a 'specially designed' item, such items would remain under that classification and not be 'caught' under the 'specially designed' definition," BIS noted.

Agencies to Repropose USML Category XI Electronics

BIS and DDTC plan to publish a second proposal for amending USML Category XI (military electronics), one of the largest categories in terms of items covered and licenses required, and transferring some items in the category to the CCL, BIS Assistant Secretary for Export Administration Kevin Wolf told a BIS webinar April 17. "State, Commerce and Defense are working on putting together proposed changes based on their review of those public comments. So, electronics will be coming out again later for public comments," he said (see **WTTL**, Feb. 4, page 5).

> "You will see another electronics rule. We've had eight full-day, long-day, all-day, very productive interagency meetings going through the public comments," Wolf said. The first Category XI proposal elicited more than 200 pages of comments from industry and the public.

The comments, which were posted in January 2013, showed industry concern about the potential overlap in jurisdiction between BIS and State, a blurry line in jurisdiction, the recontrol of items that had previous been classified on the CCL or EAR99, Defense funding of research, and potential control of items that are widely available on the commercial market. Comments came from major exporters, including Airbus,

GE Aviation, United Technologies and BAE Systems, and such trade associations as the National Association of Manufacturers, TechAmerica, Semiconductor Industry Association and the American Association of Exporters and Importers.

> Wolf said BIS and DDTC are in the last stages of getting interagency clearance for publishing a proposal on Category XV (satellites) and transferring commercial satellite controls to the CCL. As part of that rule, State "is going to propose changing that definition of 'defense services' to allow for circumstances where just the mere act of integration without anything pertaining to changes to the end-item defense article won't count as a defense service," he noted.

The next congressional notifications and final rules will affect categories VI (vessels of war and special naval equipment), VII (tanks and military vehicles), XX (submersible vessels) and XXI (miscellaneous articles). "We're going to be rolling out the changes to the other categories over 2013, with effective dates in some cases going to 2014," Wolf said.

Appellate Court Upholds "Zeroing" in Administrative Reviews

Commerce provided adequate justification for continuing to apply "zeroing" in calculating antidumping margins in administrative reviews even after it discontinued the practice in original investigations, the Court of Appeals for the Federal Circuit (CAFC) ruled April 16. The court affirmed a similar finding by Court of International Trade (CIT) Judge Jane Restani in Union Steel v. U.S. The appellate decision appeared to be telegraphed by its three-judge panel during oral arguments on the case in March (see **WTTL**, March 11, page 1).

> The ruling is moot for all but a couple of dozen older antidumping orders, even Union Steel's products, because Commerce later dropped the use of zeroing in prospective administrative reviews while maintaining the practice for existing orders.

Based on an earlier CAFC remand, Commerce went back and provided justification for the different treatment of investigations and reviews, Restani found the department's explanation adequate. The circuit court agreed with her. "Commerce's explanation now on review demonstrates that its varying interpretations are reasonable given the distinction between the comparison methodologies used in investigations and administrative reviews. Moreover, Commerce attributes the differing interpretations as necessary to comply with international obligations, while preserving a practice that serves recognized policy goals." said the CAFC opinion written by Circuit Judge Evan Wallach, who was a CIT judge before being elevated to the appellate court.

"Commerce's decision to use or not use the zeroing methodology reasonably reflects unique goals in differing comparison methodologies. In average-to-average comparisons, as used in investigations, Commerce examines average export prices; zeroing is not necessary because high prices offset low prices within each averaging group. When examining individual export transactions, using the average-to-transaction comparison methodology, prices are not averaged and zeroing reveals masked dumping," Wallach wrote. Commerce changed its policies on zeroing in investigations and

reviews to comply with World Trade Organization (WTO) rulings that found the practice incompatible with U.S. trade obligations. The need to comply with WTO rulings "does not alone provide sufficient justification for the inconsistent statutory interpretations," Wallach noted. "Nevertheless, it is within Commerce's discretion to adopt reasonable practices to meet international obligations," he declared. "Certainly, this information is relevant when considered in conjunction with the other explanations offered by Commerce," he added.

U.S., EU Plan to Announce Start of Trade Talks in June

The U.S. and European Union (EU) are planning to announce the formal launch of negotiations on a Transatlantic Trade and Investment Partnership (TTIP) in mid-June, although no date has been set for the start of actual negotiations, Sir Peter Westmacott, United Kingdom (UK) Ambassador to the U.S., said April 18. The goal is to announce the talks with some fanfare during the annual U.S.-EU Summit, which could come around the same time as the annual summit of G-8 leaders set for Northern Ireland June 17-18. The timing of the announcement would be at the end of the 90-day notification period to Congress on the talks and after the European Council approves a mandate that the European Commission has proposed.

> Westmacott said officials would like to complete the talks by the end of 2014, although he conceded that many issues could delay that target. The aim would be to complete negotiations "on one tank of gas and not spin on for years on end," he told reporters. "If it goes on forever, then I think the political impetus could be lost and people will begin to think it will not go anywhere," he said. "There is going to have to be top-down political input on both sides if it is going to work," he added.

Although a U.S.-EU high-level working group had set out proposals for what should be negotiated in a TTIP, there has been no agreement yet on what will be on the table or left off, the British ambassador said. "We're not as far down the track as you think we are," he said.

Westmacott also said he recognizes that one of the expected goals of the talks, regulatory convergence, could be the hardest to achieve. In discussions with some of the strongest advocates for a deal in Congress, he said, "they have drawn attention to the fact that the regulatory convergence issue could be one of the trickiest areas." Rather than giving up sovereign authority to regulate certain industries, an agreement would aim at moving toward mutual recognition of standards, regulations and professional qualifications, he said.

"We are not under the illusion that national or sovereign responsibilities for regulating a number of sectors is just thrown away and somehow subsumed in a an international framework," he said. While some in Europe will want to have a "single transatlantic rulebook" that everyone plays by, "my guess is that's not going to fly here," he said.

Meanwhile, the International Trade Commission (ITC), at the request of the U.S. Trade Representative (USTR), announced the launch April 18 of an investigation into the probable economic effects of duty-free imports from the EU into the U.S. under a TTIP. It will submit a confidential report to the USTR by Sept. 26. "The advice will

assume that any known U.S. non-tariff barrier will not be applicable to such imports, and the USITC will note in its report any instance in which the continued application of a U.S. non-tariff barrier would result in different advice with respect to the effect of the removal of the duty," the ITC said. The ITC will hold a public hearing June 5 and will accept written public comments until June 18.

Lawyers Criticize ITC, Commerce Handling of Trade Cases

The International Trade Commission (ITC) got off easier than Commerce in a lively debate between two veteran Washington trade attorneys April 17 over the procedures and rules applied to antidumping and countervailing duty cases, but the two found both the commission and the department wanting in many ways. The commission's high marks are due to its staff and not to commissioners, argued John Greenwald of Cassidy Levy Kent. The ITC's treatment of cases "is a far cry from what we get at the Commerce Department," said Don Cameron Jr. of Morris Manning & Martin.

> The ITC process could be improved if commissioners wrote their opinions before they voted on cases, Greenwald suggested. Decisions now appear to be "impressionistic" and written to justify a vote, he said. Cameron disagreed with Greenwald's complaint that the ITC is too rigid in its consideration of business conditions. "These laws are drafted in favor of the petitioners," Cameron said.

Commerce's International Trade Administration (ITA) drew complaints from both speakers. Greenwald, who often represents petitioners in trade cases, said the agency seems to "ring thought out of analysis." It "views the outside world as an intrusion on the Commerce world," he said. Cameron, who usually represents foreign respondents, had an even harsher assessment of Commerce. "The process itself gets worse every year," he asserted. He complained that ITA hearings, when they are held, have become "an absurd process" and, as a result, parties ask for meetings instead of hearings. He especially chastized ITA handling of non-market economy (NME) cases. "There is no intellectual integrity" in its review of NME cases, he charged. The debate was sponsored by the D.C. Bar Association's international law section.

Currency Report Continues to Demur on Targeting Manipulation

Treasury's semi-annual report to Congress on international economic and exchange rate policies highlighted U.S. concerns about foreign currency trends but as in the past stopped short of naming any country as a currency manipulator. In particular, the report notes a 10% appreciation of China's renminbi (RMB) against the dollar since its peak in 2007. "While the estimated range of misalignment has narrowed, China's real effective exchange rate continues to exhibit significant undervaluation," the department said April 12.

"China's external accounts have adjusted, but we remained concerned that the shifts may not be enduring absent stronger policy actions," the report states. "China's current account surplus has declined from a peak of 10.1 percent of GDP in 2007 to 1.9 percent of GDP in 2011 and 2.3 percent in 2012. This decline partly reflects the appreciation of China's real effective exchange rate. At the same time cyclical factors,

such as weakness in demand from advanced economies and deterioration in China's terms of trade, also played a role," it explains.

> Treasury also says it is watching Japan's currency policies. "Early statements by Japanese officials suggested that policies would, in part, be directed towards 'correcting' yen strength, and there were proposals by some outside of government to ease monetary policy by purchasing foreign bonds," it says.

"However, Japanese officials subsequently disavowed these statements," it notes. Since February, Japanese officials "clearly ruled out purchases of foreign assets and have refrained from public comment on the desired level of the exchange rate," it points out. "We will closely monitor Japan's policies and the extent to which they support the growth of domestic demand," Treasury cautions.

Korean currency policies were also addressed in the report. "Even though the Korean won appreciated by 8 percent against the dollar in 2012, market participants estimate that Korean authorities intervened in both the spot and forward markets to limit the pace of won appreciation through the year," Treasury states. "Korean authorities should limit foreign exchange intervention to the exceptional circumstances of disorderly market conditions," the report advises.

Advocates for action against currency manipulation criticized Treasury for not identifying anyone as a currency manipulator and used the report to call again for legislation to take a tougher stand against such practices. "The Treasury Department's report once again acknowledges the seriousness of the problem. Action is long overdue. Currency manipulation needs to be addressed in ongoing trade negotiations, especially the Trans-Pacific Partnership talks. It is also time for the House Republican leadership to get out of the way and allow our currency bill to come to the Floor for a vote," said Ways and Means Committee Ranking Member Sander Levin (D-Mich.) in a statement.

Large Firms Still Dominate Exports, Imports

The latest annual report profiling U.S. exporters and importers continues to show that large firms with over 500 employees dominate trade, accounting for 66.7% of the known export value and 69.3% of known import value in 2011, the latest year covered in the report. The report, issued April 5 by the Census Bureau, said the top 500 largest exporters were responsible for 60.5% for total exports; the top 250 accounted for 51.1%. The top 500 importers brought in 68.9% of all imports by value, while the top 250 imported 60.9%.

> The sharp difference between large and small firms is also seen in data on firms with multiple locations versus those with a single location. In 2011, just 8.7% (26,400) of all identified exporters were multiple location companies, but they accounted for 74.4% of the known export value.

"In contrast, 275,800 single location companies that represented 91.3% of the exporting companies contributed 25.6% of known export value. At the same time, small- and medium-sized companies, which are defined as those with fewer than 500 workers, are politically popular and get a lot of verbal attention from trade officials, but still

account for a small share of trade. In 2011, they comprised 97.8 % of all identified exporters and 97.2% of all identified importers. But they accounted for 33% of exports and 30.7% of imports, Census reported.

Farm Groups Welcome Japan's Possible Entry into TPP

Despite traditional sensitivities, U.S. agriculture welcomes the Obama administration's decision to accept Japan into negotiations for a Trans-Pacific Partnership (TPP), representatives from diverse agriculture sectors told reporters April 15. "The bottom line is that TPP with Japan represents the single most important trade negotiation ever for the U.S. pork industry and for most of our colleagues in American agriculture," said Nick Giordano, National Pork Producers Council (NPPC) vice president. The Obama administration agreed to accept Japan into the trade negotiations April 12, pending consensus of the other ten countries involved in the talks.

> In addition to the NPPC, the farm groups and firms supporting Japan's participation include the American Farm Bureau Federation, Cargill, the National Milk Producers Federation, the National Potato Council, and the U.S. Dairy Export Council (DEC) (see **WTTL**, April 15, page 4).

While some have said adding Japan to the talks will hinder the goal of completing TPP negotiations by the end of 2013, Jaime Castaneda, DEC's senior vice president for trade policy, said his group strongly supports Japan's entry. He said DEC hopes "the inclusion of this country into TPP will encourage quick conclusion of the negotiations rather than slowing the process."

Devry Boughner Vorwerk, Cargill's director of international business relations and co-chair of the U.S. Business Coalition for TPP, said these negotiations are different from the last 30 years of attempted talks to open Japan's agriculture market. "What makes this agreement unique is it's regional," not bilateral, she noted.

* * * Briefs * * *

OFAC: Treasury agency announced April 18 it is now ready to process license applications electronically. Applications and instructions are posted on its website. OFAC said electronic licensing is available: "(1) to export agricultural commodities, medicine, or medical devices to Sudan or Iran pursuant to the Trade Sanctions Reform and Export Enhancement Act of 2000; (2) to travel to Cuba (for many, though not all, categories of travel to Cuba); (3) for the release of a wire transfer blocked at a U.S. financial institution; and (4) for a license or interpretive guidance in all other circumstances (referred to generally as 'Transactional')." Applicants still have option of submitting applications by mail pursuant, it said.

SUDAN: OFAC issued new general license April 15 to authorize certain academic and professional exchange activities between U.S. and Sudan that are otherwise prohibited by Sudanese Sanctions Regulations. For persons in Sudan, General License authorizes "administration by U.S. persons of professional certificate and university entrance examinations and the conduct by U.S. persons of professional training seminars in multiple subject areas on a not-for-profit basis," OFAC explained. In addition, it permits certain U.S. persons to conduct research in Sudan for noncommercial studies, authorizes certain financial transactions and, subject to specified restrictions, release of technology and software to Sudanese students attending school in U.S.

FCPA: Parker Drilling Company, drilling services and project management firm in Houston, agreed to pay SEC and Justice more than $15 million in penalties, disgorgement and pre-judgment interest for violating FCPA by authorizing payments to Nigerian agent to influence government panel reviewing Parker's adherence to Nigerian customs and tax laws in 2004. Justice filed deferred prosecution agreement and criminal information in Alexandria, Va., U.S. District Court. Court documents noted that Panalpina World Transport, which settled its own unrelated FCPA charges in 2010, worked on Parker's behalf but was not part of this settlement (see **WTTL**, Nov. 8, 2010, page 3). Parker President Gary Rich said company "fully cooperated" with investigation. "We will continue to maintain a vigorous FCPA compliance program, to emphasize the importance of compliance and ethical business conduct, and to enhance our compliance efforts," Rich said.

MORE FCPA**:** Uriel Sharef, former officer and board member of Siemens Aktiengesellschaft (Siemens), agreed to pay $275,000 civil penalty to SEC for violating FCPA in his role in Siemens' decade-long bribery scheme to retain $1 billion government contract to produce national identity cards for Argentine citizens. Sharef and six other former executives were charged in N.Y. U.S. District Court in December 2011 (see **WTTL**, Jan. 2, 2012, page 4).

MORE FCPA: Federal agents arrested French citizen April 14 on civil complaint charging him with destroying documents and inducing false statements to hinder FCPA investigation into bribes paid to officials in Republic of Guinea to win mining contracts. Frederic Cilins, 50, was arrested in Jacksonville, Fla., and will be transported to Manhattan U.S. District Court for hearing on complaint. Cilins, who allegedly worked for one of firms being investigated, was charged with tampering with witness, victim or informant; obstructing criminal investigation; and destroying, altering or falsifying records in federal investigation.

EVEN MORE FCPA: Frederic Pierucci, former executive at Connecticut subsidiary of Alstom Power Inc., French power and transportation company, was indicted in New Haven, Conn., U.S. District Court, on charges of conspiring to violate FCPA and money laundering. Indictment claims he was involved in scheme to bribe Indonesian government officials, including member of Indonesian Parliament and high-ranking members of Perusahaan Listrik Negara (PLN), state-owned electricity company. David Rothschild of Massachusetts, firm's former VP of sales, pleaded guilty in November 2012 to criminal information charging one count of conspiracy to violate FCPA in related charges. Pierucci's indictment and Rothchild's guilty plea were unsealed April 16 after Pierucci's arrest at JFK Airport. According to Pierucci's LinkedIn profile, he is currently VP in Alstom Power's Singapore office.

EXPORT ENFORCEMENT: SAN Corporation, nutritional supplement retailer in Oxnard, Calif., agreed April 12 to pay $22,500 to settle OFAC charge of violating Iranian Transactions and Sanctions Regulations by selling supplements to entity in Kuwait in 2007 with "knowledge that such goods were intended for end use in Iran," OFAC said. SAN did not voluntarily disclose this matter.

GSP: In Federal Register April 16 USTR announced "initiation of reviews to consider designation" of Burma and Laos as "beneficiary developing countries under the GSP program, and, if designated, whether either country should also be designated as a least-developed beneficiary developing country under GSP." Public comments are due May 17, and USTR will hold public hearing June 4 in Washington.

VEU: In Federal Register April 19, BIS updated list of eligible destinations for validated end-user (VEU) CSMC Technologies Corporation (CSMC) in China. Specifically, it removed Wuxi CR Semiconductor Wafers and Chips Co., Ltd. from list "as a result of the merger of Wuxi CR Semiconductor Wafers & Chips Co., Ltd. and CSMC Technologies Fab 1 Co., Ltd., which is also listed as one of CSMC's eligible destinations."