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Hirschhorn to Stay at BIS Indefinitely

A key player in the administration's export control reform initiative plans to stay at the Bureau of Industry and Security (BIS) indefinitely. "I serve at the pleasure of the president. I will stay as long as he wants me," BIS Under Secretary Eric Hirschhorn told WTTL Dec. 10. BIS Assistant Secretary Kevin Wolf has also indicated he plans to continue in his current post during President Obama's second term (see **WTTL**, Nov. 19, page 1). In addition to worrying about the election's impact on the reform effort, industry executives have been hoping that administration officials, especially Hirschhorn and Wolf, who have spearheaded the drive, would remain in place to see much of their work through to completion.

While another batch of transition proposals are expected to be published before the end of the year, Hirschhorn told the Practising Law Institute's annual export controls conference Dec. 10 that it may be "several months" before State sends Congress a formal Section 38(f) notice of the first final orders for moving items from the U.S. Munitions List (USML) to the Commerce Control List (CCL). At another program Dec. 13, Brian Nilsson, the White House honcho for export reforms, said the notice would go to Congress "in the first quarter" of 2013.

That notice, which BIS officials are calling "The Beast," is expected to include final orders moving items from USML Category VIII (aircraft) and Category XIX (gas turbine engines) to the CCL along with supporting regulations for implementing the reform process so far (see related story, page 3). The BIS portion is over 370 pages long and State's 70 pages long.

Pace of WTO Services Talks to Speed Up in 2013

Work on a new World Trade Organization (WTO) International Services Agreement (ISA) is expected to speed up in early 2013, with negotiators now briefing their home capitals on a framework for conducting negotiations and first market-opening offers being sought by May. The new year "will be starting off on a great foot for services," Peter Allgeier, president of the Coalition of Services Industries told WTTL. There is likely "more opportunity and prospects" for advancing services than in the past decade, said Allgeier, who was the U.S. ambassador to the WTO. Technical meetings starting Jan. 18 will discuss how to build up the schedules of what service sectors countries will open and how, along with the format for schedules, the use of negative or positive lists and annexes for rules. The first round of negotiations is expected to start in March. Countries have said everything is on the table, Allgeier said, referring to both the services sectors and all four modes of supply. Information services "definitely is"



included in discussions, he added. Ensuring the “freedom of cross border data flows,” making sure countries don’t introduce impediments, and allowing companies to put servers and process data where it’s most efficient “certainly will be addressed,” he stated. Negotiators have said they want to go further than what they’ve already done unilaterally and haven’t bound, Allgeier said. They’re not simply trying to consolidate what is being done on the ground, rather they want to “make it as future-oriented as possible,” he said.

One idea for the talks is to “bind, if possible, all domestic legislation,” Pascal Kerneis, managing director of the European Services Forum, told WTTL. Only binding the current market opening isn’t enough, because some countries would be giving much more than others, he explained. In addition, some bilateral trade agreements are dated and have very little on services, he said. “Much more” is sought than what’s in free trade agreements, he said. A “standard of minimum commitments” is sought for all countries in the agreement, Kerneis said.

Commodity Jurisdiction Determinations Come More Quickly

Steps to speed up the review of Commodity Jurisdiction (CJ) requests are continuing to shorten the time the Directorate of Defense Trade Controls (DDTC) takes to issue its determinations. So far in calendar year 2012, DDTC has been issuing decisions in 46 days. This is down from the 65.2 days it took in 2010 and the 196 days needed to issue CJ decisions in 2006, before the measures were taken to shorten review times. The key action that has moved CJ decisions more quickly is a National Security Council order to State, Commerce and Defense in 2009, putting a deadline in place for issuing opinions and setting up a process for escalating staff disagreements over determinations up to political-level officials.

In addition, in 2010 State required all CJ requests to be filed electronically. The quicker review of CJs has come even though the number of requests being submitted has increased. So far in 2012, DDTC has received 1,067 requests compared to all of 2011 when it received 1,260.

Kirk Admits Difficulty, but Confidence in Concluding TPP

U.S. Trade Representative (USTR) Ron Kirk says completing the Trans-Pacific Partnership (TPP) talks by the end of 2013 is a “stretch goal.” At a roundtable with industry and reporters Dec. 11, Kirk said negotiations will be “difficult to close,” but he is “confident we can work through the remaining issues.” His comments came the same day as the first round of TPP talks to include Mexico and Canada concluded in Auckland, New Zealand. A carefully worded statement from Kirk’s office said that at the end of the 15th round of negotiations, “negotiators were pleased to report further solid steps forward in closing the remaining gaps” between them.

While the end of 2012 had been a goal of ministers to conclude the negotiations, the end of 2013 is a more likely target, especially with the addition of Mexico and Canada to the talks (see **WTTL**, Nov. 19, page 3). During the 10-day round, the 11 “delegations concentrated on finding pragmatic and mutually-beneficial outcomes to remaining issues under consideration, while isolating the outstanding challenges to be addressed in the months ahead,” the USTR statement noted.

“In more complex or sensitive areas - such as Intellectual Property, Environment, and Investment - negotiators also worked to resolve a number of the more technical issues involved in these areas; and to more clearly frame up some of the substantive differences on more challenging issues that will need to be resolved as negotiations are brought to a conclusion,” the New Zealand Ministry of Foreign Affairs and Trade said in a statement. Between now and the next round, which will be held in Singapore March 4-13, 2013, negotiators will address issues that are not as far along. This includes areas such as customs, telecommunications, technical barriers to trade, and sanitary and phytosanitary issues.

Hatch Knocks USTR's Lack of Consultation on Tajikistan

Tajikistan's coming accession to the World Trade Organization (WTO) has been greeted with broad approval, but Sen. Orrin Hatch (R-Utah), ranking Republican on the Senate Finance Committee, sharply criticized the U.S. Trade Representative's (USTR) office for not consulting with Congress on the country's accession protocol. The WTO General Council approved Tajikistan's accession package Dec. 10, giving it until June 7 to ratify the deal and notify the WTO that it has enacted all laws and regulations needed to implement its membership. It would become the 159th WTO member 30 days after ratification (see **WTTL**, Nov. 5, page 3).

On the Senate floor Dec. 10, Hatch said he supports Tajikistan's WTO membership but complained that Congress wasn't consulted on the details in the accession agreement. "I was quite disturbed to receive a letter earlier last week from Ambassador Kirk informing me that the Obama Administration intends to support approval of the proposed terms for Tajikistan's accession and the invitation for Tajikistan to become a member of the WTO at the upcoming WTO General Council meeting," he said.

"What disturbs me is that the Administration had been negotiating the WTO accession package for over a year and failed to even mention it to anyone on the Senate Finance Committee," Hatch asserted. "Even more troubling is the fact that the final WTO Working Party meeting took place on October 26, 2012, at which Tajikistan's proposed protocol of accession was completed. Yet no one in the Senate received any information about the accession until last week," he stated.

Administration Sets Deadlines for 38(f) Consultations

It may be summer before the Obama administration publishes its first final rules transferring defense items from the U.S. Munitions List (USML) to the Commerce Control List (CCL) and January 2014 before exporters would have to implement those changes, according to a White House timetable for consulting with Congress on the rules and filing a formal Section 38(f) notification under the Arms Export Control Act (AECA). Once final rules are published, companies will have 180 days to come into compliance with the changes, according to Brian Nilsson, the National Security Council staffer who has been handling export control reforms.

Without an advance agreement with lawmakers on handling 38(f) notices, the White House says it will give congressional staffs between 77 and 97 days to review the changes before submitting the formal notice, which gives Congress 30 days to reverse by legislation the president's decision to transfer USML items to the CCL. The pre-notification review period will include some of the time congressional aides have already had to review draft proposals as well as final rules, Nilsson told the Washington International Trade Association Dec. 13.

Nilsson admitted congressional staffers did not agree with the White House timetable. "They have reservations," he said. The first notice will be part of a mega-package that will include final transfers for items in USML Categories VIII (aircraft) and XIX (gas turbine engines) and final reform-implementing rules (see related story, page 1).

In addition to the final list changes, the notice will include draft final BIS rules on (1) the structure for the new "600 series" in the CCL, (2) the rules for how License Exception Strategic Trade Authorization (STA) will apply to the export of 600 series items, (3) the new definition of "specially designed," (4) changes to license exceptions in the Export Administration Regulations (EAR) to make them more consistent with the exemptions in the International Traffic in Arms Regulations (ITAR), (5) a new EAR license validity term of four years and (6) the rules for transitioning or grandfathering ITAR licenses covering items that move to the CCL. Administration officials say the next USML to CCL transitions rules that could be published by the end of December are for USML categories I (firearms), II (armaments), III

(ammunition), IV (missiles) and XVI (nuclear weapons). The firearms proposal also will address Canadian exception rules and enforcement of an Organization of American States (OAS) pact on small arms. Before the mega-package of transition rules is sent to Congress, President Obama is expected to issue an executive order addressing two issues of concern to industry – double licensing and broker registration requirements for defense importers.

Brokering: The executive order will consolidate all brokering registration requirements under State jurisdiction. This “delinking rule” will deal with the situation where items transferred to the CCL from the USML are still on the U.S. Munitions Import List (USMIL) administered by Justice’s Alcohol, Tobacco and Firearms Bureau (ATF) for permanent imports. Without the order, ATF, BIS and State, which licenses temporary imports, would all have to register brokers dealing in USMIL items. At the same time, administration staffers are drafting changes to the USMIL to match USML-CCL transfers.

Dual Licensing: The executive order will also address industry concerns about the potential need for licenses from both State and BIS when items transferred to the CCL are still part of a larger export contract for end items licensed by State. The order would provide limited delegations of authority to State and BIS to license items under the other’s jurisdiction. BIS Under Secretary Eric Hirschhorn described this as “cross pollination of licenses.” The delegation would apply to items moved to the CCL 600 series that would go to countries not one of the 36 countries eligible for exports under License Exception STA, Nilsson explained.

OFAC: After focusing on export reforms dealing with State and BIS, the administration has now started a review of Treasury’s Office of Foreign Asset Controls (OFAC) export licensing process, Nilsson reported. OFAC is setting up an electronic system for tracking licenses and also planning to move to the USXport single licensing information system.

E2C2: Nilsson said the Export Enforcement Coordination Center (E2C2) has already begun to “deconflict” overlapping export enforcement investigations being conducted by more than one federal enforcement agency. Of investigations reported to E2C2 by the agencies for interagency review, 57% have identified cases where another agency was also conducting an investigation or had information to share about the case, he noted.

Legislation: The administration has a draft bill that would allow the implementation of Phase III of the export reform initiative, including creation of a single export licensing agency and a single list of controlled items and technology. “No decision has been made on when to move that,” Nilsson said. A decision on the legislation will be made in 2013, he said.

Meanwhile, it appears unlikely the administration will be able to achieve one of its eventual goals – creating a single license form for USML and CCL items and possibly for licenses filed with OFAC. “Financially and legally it will be very difficult to set up a single entry” for licensing, DDTC Managing Director Bob Kovac told the PLI conference. There are questions about “who is going to pay to set up a single licensing system” and which agency will enforce violations based on false submissions, he said. Previously, Kovac had told industry advisors that creating a single license could cost \$40-50 million. At the same time, agencies are continuing to pilot test the move to a single internal information system based on Defense’s USXport system.

Wassenaar Revises Rules on Machine Tools, Spacecraft, More

Wassenaar Arrangement members completed one of the most extensive list of changes in recent years to the multilateral regime’s control list during their annual plenary meeting Dec. 11-12 in Vienna. Driven in many cases by U.S. industries seeking a level playing field with foreign competitors, the regime agreed to ease controls on certain five-axis milling machines, gas turbine engines and components for mass-market encryption equipment. At the same time, it increased controls on military spacecraft and passive counter-intelligence equipment. After two years of debate, Wassenaar agreed to drop controls on some five-axis milling machines that have less accuracy because comparable equipment is now available from several non-Wassenaar countries, including China. Controls remain on extremely accurate machines, including some four-axis machines. In a new addition to the Wassenaar Munitions List, the regime for the first

time agreed to control military spacecraft, including satellites and probes. The change will not affect U.S. controls because these items are now controlled on the USML. "It's all for our partners," one source told WTTL. Pending legislation to give the president authority to move commercial satellites to the CCL would still be permitted, with remaining controls in USML Category XV matching the new Wassenaar control parameters.

New controls under Wassenaar Category 5 would impose licensing requirements for the export of certain equipment that can monitor or jam mobile telecommunications product. The U.S. has imposed similar controls to prevent human rights abuses. New controls also were imposed on certain very sensitive deep ocean sonar equipment under Category 6.

In addition, new controls were added for certain electro-optical materials. Several years of negotiations were needed to produce a new cryptography note adopted at the plenary. The change will decontrol certain parts and components used in mass-market encryption equipment, including routers. Controls also were relaxed for certain electronic products in Category 3, including for frequency synthesizers and for semiconductor manufacturing equipment.

A technical change to the way gas turbine engine technology is calibrated is intended to level the playing field among engine manufacturers in the U.S., Europe and other countries, including Ukraine. Manufacturers have used different methods, which meant some products were controlled while others were not. The change will require producers to recalibrate their equipment using the new metrics. As a result, some currently controlled engines may become decontrolled, while some that are not controlled will fall under controls for the first time.

Standard Chartered Paying \$327 Million for Sanction Violations

Four months after it paid \$340 million to settle charges issued by New York State banking regulators, London-based Standard Chartered Bank (SCB) agreed Dec. 10 to pay another \$327 million to settle separate charges of violations of U.S. sanctions laws in agreements with Justice, Treasury's Office of Foreign Assets Control (OFAC), the Federal Reserve Bank of New York, and the Manhattan district attorney. SCB was charged with handling transactions in violation of Iranian, Sudanese, Burmese and Libyan trade sanctions from 2001 to 2007.

As part of a deferred prosecution agreement (DPA) with Justice and the Manhattan DA, the bank will forfeit \$227 million for illegally moving millions of dollars through the U.S. financial system on behalf of customers in those countries (see WTTL, Aug. 20, page 1). "Standard Chartered's conduct was flagrant and unacceptable," said Assistant Attorney General Lanny A. Breuer.

The Federal Reserve Bank of New York issued a cease and desist order and a \$100 million civil penalty against the bank plus Standard Chartered PLC, London and SCB's New York branch. "The orders address unsafe and unsound practices related to inadequate and incomplete responses to examiner inquiries as well as insufficient oversight of its compliance program for U.S. economic sanctions, Bank Secrecy Act, and anti-money-laundering requirements," the Federal Reserve Bank said.

OFAC imposed a \$132 million fine on SCB for what it called the bank's egregious violations. The penalty was "deemed satisfied by the bank's payment of a forfeiture to the Department of Justice for the same pattern of conduct," OFAC noted. As part of the DPA, Justice waived a criminal information that was filed in D.C. U.S. District Court charging Standard Chartered Bank with one count of knowingly and willfully conspiring to violate the International Emergency Economic Powers Act.

"The payment is for past violations of sanctions laws and the lack of transparency in connection with certain former payment practices which were terminated in 2007," Standard Chartered PLC said in a statement. "The Bank ceased its Iranian USD payments business in late 2006 and

in the following year stopped transacting any new business with Iranian entities, well before such actions were required by U.S. authorities. In the more than five years since the events giving rise to today's settlements, the Bank has completed a comprehensive review and upgrade of its compliance systems and procedures," it noted. Steps taken include strengthening sanctions and customer due-diligence screening systems, the addition of N.Y.-based sanctions-compliance and financial-crime reporting staff, the hiring of an independent consultant to assess its Bank Secrecy Act/anti-money laundering (BSA/AML) program, and the establishment of robust BSA/AML testing, audit and quality assurances policies and procedures, it said.

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AFGHANISTAN: As U.S. prepares for withdrawing from Afghanistan, Defense officials are holding meetings, including Dec. 10 session led by Deputy Secretary Ashton Carter, on what military items should be left behind when Americans leave and how well Kabul will be able to protect controlled equipment, Tim Hoffman, DTSA deputy director, told Practicing Law Institute export control conference Dec. 10. Of particular concern are night-vision devices, he said. Coalition partners also are asking about rules for transferring controlled equipment to Afghans. State also working on guidance on transfers.

SENATE: New Democratic members of Senate Finance Committee in next Congress will be Sens. Sherrod Brown (D-Ohio) and Michael Bennet (D-Colo.). They fill seats left by retirements of Sens. Kent Conrad (D-N.D.) and Jeff Bingaman (D-N.M.). Brown is one of sharpest critics of trade agreements in Congress.

ENCRYPTION: Since BIS revised encryption regulations in EAR to allow self-classification of encryption products under License Exception ENC, 3,212 companies have registered to take advantage of provision, Matthew Borman, BIS deputy assistant secretary for export administration, told Practicing Law Institute export conference Dec. 10. There has been 20% reduction in number of technical reviews requested.

OFAC: Bank of Tokyo-Mitsubishi UFJ, Ltd. (BTMU), Tokyo, Japan, agreed Dec. 12 to pay \$8,571,634 to settle apparent violations of OFAC's Burmese Sanctions Regulations; Iranian Transactions Regulations; Sudanese Sanctions Regulations; and Cuban Assets Control Regulations (CACR) involving at least 97 funds transfers, with aggregate value of approximately \$5,898,943 between April 2006 and March 2007. "BTMU employees systematically deleted or omitted from payment messages any information referencing U.S. sanctions targets that would cause the funds to be blocked or rejected prior to sending the transactions through the United States," OFAC noted. BTMU voluntarily disclosed practices to OFAC.

EXPORT ENFORCEMENT: Capintec, Inc., supplier of energy measurement products and services in Ramsey, N.J., agreed to pay \$23,000 civil penalty to settle one BIS charge of unlicensed export to entity list organization in Pakistan, BIS announced Dec. 7. In May 2010, firm allegedly exported dose calibrator, designated EAR99 and worth approximately \$5,120, to Pakistan Atomic Energy Commission, which is on BIS Entity List, without Commerce license. Capintec neither admitted nor denied agency's charge.

TRADE FIGURES: U.S. goods exports in October declined 0.35% from October 2011 to \$127.5 billion, Commerce reported Dec. 11. Services exports increased 4.36% to \$53.0 billion from 2011. Goods imports dropped 0.97% from October 2011 to \$186.6 billion, as services imports gained 0.35% to \$36.1 billion.

MEXICO: EU firms will be able to take quicker advantage of Mexico's January 2012 membership in Wassenaar Arrangement than U.S. firms because EU has issued open general licenses for exports to Mexico (see **WTTL**, Jan. 30, page 3). U.S. expects to revise its controls "possibly in next couple of months," Eileen Albanese, director of BIS' national security office, told Practicing Law Institute export conference Dec. 10. U.S. had delayed change because "we wanted to see what the track record was... see implementation of procedures" to comply with Wassenaar rules, she said.

SPECIAL 301: In Out-of-Cycle Review announced Dec. 13, USTR removed eight online and physical sites, including Taobao in China and MegaUpload in U.S., from list of "notorious markets" due to "law enforcement actions against those markets, or significant voluntary actions by market operators," USTR said. "The Notorious Markets List does not purport to reflect findings of legal violations, nor does it reflect the United States Government's analysis of the general climate of IPR protection and enforcement of in the countries concerned," it said.

EDITORS' NOTE: In keeping with our regular schedule of 50 issues a year, there will be no issue of *Washington Tariff & Trade Letter* Dec. 24 and 31. Our next issue will be Jan. 7, 2013. As previously announced, WTTL will start electronic delivery via e-mail to all subscribers with the Jan. 7 issue. Until then, we wish all our readers a **HAPPY HOLIDAY** and a **HEALTHY AND PROSPEROUS NEW YEAR**.