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®

Editor & Publisher: Samuel M. Gilston • P.O. Box 5325, Rockville, MD 20848-5325 • Phone: 301.570.4544 Fax: 301.570.4545

Vol. 32, No. 46 **November 19, 2012**

Industry Comments Pushed Reform Proposals Past Deadline

The first notification to Congress on proposed moves of items from the U.S. Munitions List (USML) to the Commerce Control List (CCL) has been delayed because Commerce and State officials have been grappling with conflicting comments from industry on the proposals, Bureau of Industry and Security (BIS) Assistant Secretary Kevin Wolf told WTTL in an exclusive interview Nov. 13. Wolf acknowledged that drafting the package of regulations for the first notice to Congress under Section 38(f) of the Arms Export Control Act is taking longer than anticipated due to comments that led BIS to rethink some issues (see **WTTL**, Nov. 12, page 2).

> At BIS Update in July, officials said the first notice would be sent up in late summer or early fall. "We have blown past that deadline," he admitted. "In trying to be responsive to the industry comments, we've had to think of different ways to skin the cat," Wolf said. "We're still moving at a rather significant pace for the level of complexity, and we'll get there. The flip side of speed is taking into account their thoughts and concerns and trying to address them," he noted.

Wolf said the final definition of "specially designed" that will be included in the 38(f) notice "will be very, very close to what we proposed." Industry suggestions for different ways to define the phrase "whether well intentioned or not, we just couldn't accept," he said.

Draft changes to several USML categories are at the Office of Management and Budget (OMB), but should be out soon, depending on the OMB queue, Wolf said. He said he expects Category XI, which covers electronic products, to be published in a couple of weeks. BIS also plans to publish a so-called "cleanup rule," to amend the CCL to "make some of the internal word choices more consistent, like parts and components and attachments," Wolf said. Interagency discussions on the most contentious categories have not gotten any easier. "We still have some internal clearances and drafting and thinking to do" on categories XIV [biolog-ical organisms] and XII [night vision and targeting systems], Wolf said, adding he doesn't have an estimated proposal date for them. "There's still more work to be done on both of those," he said.

Panel Calls for Consideration of USTR Subpoena Powers

Congress should consider whether to give the U.S. Trade Representative (USTR) power to subpoena information from U.S. companies on their trade problems in China, a federal advisory committee recommended Nov. 14. The U.S.-China Economic and Security Review Commission also urged Congress to examine the possibility of revising rules the Committee of Foreign

Published weekly 50 times a year except last week in August and December. Subscription in print or by e-mail $697 a year. Combo subscription of print and e-mail is $797. Additional print copies mailed with full-price subscription are $100 each.

Investment in the U.S. (CFIUS) applies to investments by Chinese state-owned enterprises (SOEs) or controlled enterprises in the U.S., including the addition of a "net economic benefit test" to reviews in addition to existing national security considerations.

> The USTR's ability to compel the submission of information from companies with a subpoena would overcome the reluctance of U.S. firms to support complaints against China publicly because of their fear that the Chinese would retaliate against them. "Congress should evaluate the availability of, and access to, information necessary to address unfair trade complaints; whether it is advisable to provide USTR with subpoena authority; and, if so, the nature of such authority," the commission recommended in its 497-page annual report to Congress.

"The political influence within China of the state-owned and -controlled sector and China's ability to compete on a global scale are both on the rise," the commission stated. It contended that even Chinese firms publicly traded in the U.S. and in other markets are subject to Beijing's control and should be considered arms of the government. "The U.S. government could demand reciprocal treatment for foreign investments in China to match the treatment afforded to Chinese companies in the U.S.," it said.

U.S. Wants Common Controls on Composite Machines

U.S. officials want the Wassenaar Arrangement and the Missile Technology Control Regime (MTCR) to adopt common export controls for composite laying machinery, but first they need to reach interagency agreement on what those rules should be. In an unusual public discussion of interagency differences, BIS and Defense officials took the issue to the BIS Materials Processing Technical Advisory Committee (MPTAC), Materials TAC and Transportation TAC during the week of Nov. 12 to hear industry views on how these machines should be controlled.

> Currently, the Wassenaar Arrangement and MTCR use different terminologies and apply different controls on these products, which are controlled in category 1.B on the Wassenaar Control List. Wassenaar refers to these machines as tow-placement machines, while the MTCR calls them fiber-laying machines.

BIS staffers told the MPTAC Nov. 13 the agency wants to offer a new proposal on these products for the Wassenaar and MTCR 2013 list reviews. The draft proposal would call for regulating tow-placement machines that can apply tape that is less than 1 inch in width and tape-laying machines that can apply tape that is 1 inch to 12 inches in width. Defense officials are still questioning whether the control should be more detailed and include the types of materials being applied. One MPTAC member, however, said the BIS proposal "makes good sense" and would be "simple and useful" for industry.

Efforts Made to Improve Trade Assistance for Firms

Commerce officials defended the program aimed at providing Trade Adjustment Assistance for Firms (TAAF) at a House hearing Nov. 14, noting that changes in the management of the program in the last two years have improved the help given to firms that have suffered from import competition. The House Oversight and Government Reform Committee's government organization subcommittee hearing focused on a September report by the Government Accountability Office (GAO) that criticized TAAF's lack of effective performance measurements (see **WTTL**, Sept. 24, page 4). Since Congress amended the TAA program in 2009, Commerce has established a new TAAF division in its Economic Development Administration.

Improvements in the program's management have cut processing times for getting firms certified to receive TAAF benefits and approving adjustment plans, testified Bryan Borlik, the division's director. Over the next two years, it plans to implement additional reforms, he said. The TAAF program only receives $15.8 million annually and is administered through 11

centers that are hosted by universities and nonprofit organizations around the country under contract to Commerce. Subcommittee Chairman Todd Platts (R-Pa.) said it is "unacceptable" that Commerce has not opened bidding for the operation of the centers for 30 years. Testimony by Alfredo Gomez, GAO acting director for international affairs and trade, criticized how funds are allocated among the centers, saying funding should be based on "the needs of respective populations and should take into account the costs of providing program services."

Justice, SEC Issue Long-Awaited FCPA Enforcement Guidance

Advice that Justice and the Securities and Exchange Commission (SEC) issued Nov. 14 on complying with the Foreign Corrupt Practices Act (FCPA) provides common sense guidance on meeting the law's requirements but doesn't say anything that breaks with the government's past interpretation or enforcement of the law. Long called for by industry to clarify how the government applies the law, the 120-page "Resource Guide to the U.S. Foreign Corrupt Practices Act" includes several examples and hypothetical scenarios of situations that have raised questions in the past about how Justice and the SEC would treat such behavior.

> For example, it attempts to address questions about what kinds of gifts can be given to foreign officials without triggering a violation of the statute and who actually is a foreign official. It also explains how the government treats successor liability and compliance with records and reporting requirements.

The guide is "an ambitious effort to lay out how the government interprets and applies the FCPA, in order to educate companies about how to prevent their employees from violating the law, and educate employees about the limits of permissible conduct," Robert Khuzami, director of the SEC's enforcement division, told a press briefing (see **WTTL**, Feb. 27, page 2). "We also hope that it will clear up some myths about the type of conduct that gets prosecuted under the FCPA — that it is not the $5 cup of coffee, or the one off $50 gift to a public official, that companies need to be concerned about, but payments of real and substantial value that clearly represent an unambiguous intent to bribe a foreign official to obtain or retain business," he said.

The guide says "paying an official a small amount to have the power turned on at a factory might be a facilitating payment; paying an inspector to ignore the fact that the company does not have a valid permit to operate the factory would not be a facilitating payment." Gifts and entertainment of nominal value are acceptable and "are unlikely to improperly influence an official, and, as a result, are not, without more, items that have resulted in enforcement action by DOJ or SEC." On the other hand, "a $12,000 birthday trip for a government decision-maker...or a trip to Paris for a government official and his wife" would be considered improper.

"Such guidance from the government is always welcome," attorneys with the law firm of Baker Hostetler in D.C. said in an alert to their clients. "While the Guide is unprecedented in both its length and detail, it does not provide clear-cut answers to many of the questions regarding the FCPA," they noted. "Given the breadth and depth of the Guide, it is clear that aggressive FCPA enforcement is here to stay," the attorneys advised.

End of 2013 Is New Goal for TPP, Mexican Ambassador Says

Though talks on a Trans-Pacific Partnership (TPP) were supposed to be completed by the end of 2012, events have conspired to push that deadline off another year, according to Arturo Sarukhán, Mexico's ambassador to the U.S. "I think it's evident that we won't have that for 2012. I think everyone is looking at 2013 as the target date, the end of 2013," Sarukhan told an Inter-American Dialogue program Nov. 14. "A lot of it will depend of the pace of the negotiations now that Mexico and Canada have become full TPP partners," he noted. Mexico and Canada are slated to join their first negotiating session formally in New Zealand Dec. 1-3. The ambassador said domestic U.S. political issues may determine the schedule for completing the talks. "A lot of that will hinge on whether the U.S. and the administration get TPA [trade

promotion authority] from Congress, which will be needed at some point to put the cherry on the cake in these negotiations. That's a big question," he said. "The first advantage of TPP is it allows us to upgrade NAFTA through the back door without renegotiating NAFTA. We all know if we were to renegotiate NAFTA to modernize it, it would be like throwing a spanner in the works," Sarukhan said. New trade agreements negotiated since NAFTA include "new standards on everything from IPR to labor to environment to state-owned enterprises. This will pull up NAFTA from the bootstraps and turn it into a 3.0 free trade agreement," he stated. In addition, the larger agreement will expand the market for NAFTA-origin goods. "TPP will enhance and deepen the production and supply chains we've developed in North America since NAFTA," Sarukhan noted.

Bonded Carrier Responsible for Lost Goods in Transit

Customs and Border Protection (CBP) can impose duties, taxes and fees on a bonded carrier that could not account for a lost shipment that came into the U.S. as a transportation and exportation (T&E) entry intended for transshipment to Mexico, Court of International Trade (CIT) Judge Leo Gordon ruled Nov. 7 (slip op. 12-134). The obligations of the carrier C.H. Robinson Company under 19 C.F.R. Section 18.8(c) "go beyond the certification of proper delivery of the merchandise covered by the subject entries to include a responsibility to account for missing merchandise," Gordon wrote. "The court concludes on the record before it that it is more probable than not that the subject merchandise was not exported, as required by statute and regulation. Consequently, pursuant to 19 U.S.C. Section 1553 and 19 C.F.R. Section 18.8(c), C.H. Robinson is liable" for taxes and duties of $106,407.86, Gordon ruled.

* * * Briefs * * *

CIT: President Obama sent Senate nomination Nov. 14 of Claire R. Kelly, professor of law at Brooklyn Law School, to seat on Court of International Trade. Kelly serves as co-director of Dennis J. Block Center for the Study of International Business Law and faculty advisor for *Brooklyn Journal of International Law*. She also is on board of directors of Customs and International Trade Bar Association Before joining law school she was associate at Coudert Brothers in New York. Kelly received her J.D. *magna cum laude* from Brooklyn Law School in 1993 and her B.A. *cum laude* in 1987 from Barnard College

RUSSIA: House passed bill (H.R. 6156) Nov. 16 granting Russia and Moldova PNTR on broadly bipartisan vote of 365-43. Measure, which includes Magnitsky provisions authorizing sanctions on Russians who violate human rights, now awaits Senate action after Thanksgiving recess (see **WTTL,** Nov. 12, page 4).

STEEL PIPE: ITC in final 4-2 vote Nov. 14 determined that imports of subsidized circular welded carbon-quality steel pipe from India, Oman, and UAE and dumped imports from India, Oman, UAE and Vietnam do not materially injure or threaten U.S. industry with material injury.

WIRE HANGERS: In final 6-0 vote ITC Nov. 15 determined that imports of steel wire garment hangers from Taiwan that Commerce has determined are sold at less than fair value materially injure U.S. industry.

SECTION 337: Court of Appeals for Federal Circuit Nov. 14 upheld ITC decision that certain clamps for air conditioner systems did not violate patent. In *Norgren, Inc. v. ITC*, court split 2-1 in case that was remanded to commission in 2009. On remand, ITC's ALJ found asserted claims of '392 Patent not invalid. Commission, however, reversed ALJ, finding that patent claims were obvious and not Section 337 violation.

ZEROING: Commerce adequately defended its continued use of zeroing in old administrative reviews even though it has stopped practice in new cases, CIT Chief Judge Donald Pogue ruled Nov. 15 in decision upholding review of shrimp imports from Vietnam (slip op. 12-137). "Explanation Commerce provided in this review is the same as that previously held to be both reasonable and consistent with the Court of Appeals for the Federal Circuit's decisions" in *Dongbu Steel* and *JTEKT Corp*., Pogue wrote. He said "court will follow its recent opinions in *Grobest II* and *Far E. New Century* on the issue of zeroing and affirm Commerce's explanation as reasonable."

KAZAKHSTAN: Kazakhstan plans to complete its negotiations on WTO accession in first half of 2013, Kazakhstan's Minister for Economic Integration Zhanar Aitzhanova said Nov. 9. Kazakh press reports cite agriculture subsidies as outstanding issue (see **WTTL**, Dec. 19, 2011, page 3).