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State Letter Raises Concerns of Satellite Parts Suppliers

A letter sent to more than 20 makers of parts and components for satellites from State's compliance office has raised concerns that the department is trying to bring more dual-use items under the jurisdiction of the International Traffic in Arms Regulations (ITAR). The July 23 letter from Glenn Smith, chief of the enforcement division in the Directorate of Defense Trade Controls (DDTC), requested shipment information on the export of these items, particularly semiconductors, for the last five years based on their end-use. It also suggested that some of these products might have been misclassified as dual-use goods.

Smith told WTTL he could not confirm that the letter was sent and declined to explain the reason for the letter. Other exporters who have received similar letters contend DDTC is using such letters as a form of "directed commodity jurisdiction" (CJ) that expects firms to file CJs if there are questions about whether their goods should be subject to the USML or CCL. The letter also reportedly sought information on how the firms self-classify their products and any supporting documentation, but was not linked to any investigation.

Stakeholders Skeptical about Chances for TPP

Many business and non-government organization (NGO) "stakeholders" who were briefed at the start of the latest round of negotiations on a Trans-Pacific Partnership (TPP) Sept. 8 say they are skeptical the talks will succeed or, if they do, that Congress will approve the final results. Some stakeholders who attended the briefings and one-on-one meetings with U.S. negotiators also expressed frustration at not getting more specifics about what is in the various proposals being discussed. The TPP talks were slated to run through Sept. 15.

In meetings with stakeholders, U.S. officials often heard diametrically opposing views on what should be in the agreement. Strongly opposing advice was offered on drug patent protection, investor-state dispute settlement and apparel and footwear tariffs. These have also been issues raised in the numerous letters U.S. Trade Representative (USTR) Ron Kirk has received from members of Congress. To quell concerns about changes in footwear tariffs, Kirk Sept. 12 visited a New Balance plant in Norridgewock, Maine, where he spoke to some 400 company employees. New Balance, one of the last athletic shoemakers operating in the U.S., is part of a coalition of firms, including makers of rubber and plastic footwear and their suppliers, who are fighting to keep existing U.S. tariffs, which can run from 8% to 37.5% and 10% to 20% for athletic footwear. Kirk reportedly said the Obama administration doesn't want to sacrifice



domestic jobs in the TPP, but he gave no commitment on preserving existing tariffs. “Our negotiators are working to get a strong deal for American workers and businesses, and we intend to negotiate a high-standard agreement that supports and retains American jobs,” Kirk was quoted in a New Balance release. New Balance opposes the approach used in the U.S.-Korea Free Trade Agreement, which phases out tariffs on footwear over 15 years, with most of the cuts coming in last three years. They note that Korea no longer has a competitive footwear industry, while Vietnam, one of the TPP participants, has a growing footwear industry and many U.S. firms are moving production to Vietnam from China.

Separately, at an International Trade Commission (ITC) hearing Sept. 12 on Mexico and Canada joining TPP talks, a representative of the Sweetener Users Association urged U.S. negotiators to agree on cutting restrictions on sugar imports. “We saw the predictable result of denying Australia access to the U.S. sugar market,” testified Tom Earley, vice president of Agralytica, a consulting firm. “It simply allowed South Korea to deny U.S. rice producers access to the Korean market,” he asserted. Eric Astrachan, executive director of the Tile Council of North America, raised concern about Mexico and Canada dropping their tariffs on tile imports if they join the TPP. “TPP members Malaysia and Vietnam are modest suppliers to the North American market, but both countries would likely target North America should Canada, Mexico and the United States eventually eliminate tile tariffs for all TPP countries,” he stated.

Census Plans Pilot for Post-Departure Filing

After the Census Bureau publishes final rules extending the life of the Option 4 for the post-departure reporting of export data, the agency plans to pilot test a new program that would combine Option 4 with a discontinued filing program known as Option 3. Under Option 3, exporters filed most of their export data before goods were shipped with final information filed after departure. The program was cancelled because firms were not filing post-departure information as required. Under the pilot, exporters would have to file information they have before a shipment and then file the missing information within five days after export.

The planned pilot program will be open to all exporters who meet the current criteria for participation in Option 4 plus additional security factors. Participants will have to be approved by Census before they can participate.

The final Foreign Trade Regulations (FTR), which will maintain Option 4 but reduce the time for filing to five days from 10 days post-departure, should be published in the early fall, Kiesha Pickeral of the Census Foreign Trade Division told the BIS Regulations and Procedures Technical Advisory Committee (RAPTAC) Sept. 11 (see **WTTL**, June 18, page 1). She said the final FTR rule will have an effective date of nine to 10 months after the rule is published.

Wolf Tries to Calm Fears of Export Control “Rollbacks”

Bureau of Industry and Security (BIS) Assistant Secretary Kevin Wolf is offering to discuss with exporters any concerns they have that the proposed new definition of “specially designed” would result in the re-control of an item that was treated as EAR99 or not requiring licensing in the past. Concerns about re-control have arisen in comments on the specially designed proposal and on specific proposals to transfer items from the U.S. Munitions List (USML) to the Commerce Control List (CCL) (see **WTTL**, Sept. 10, page 3).

RAPTAC members also raised questions at their Sept. 11 meeting about how BIS will treat firms that have self-classified items in the past or received commodity classification decisions through the BIS Commodity Classification Automated Tracking System (CCATS). “I have a standing offer for anyone to give me a CCATS or something that was identified as EAR99 that would somehow be controlled as a result of this definition,” Wolf told the committee. “So far, I have received none,” he said. Wolf said the clarification of any controls would be fact-specific. “There may be something we overlooked when we did the definition; maybe it was a

mistake back then; maybe they weren't precise in the information that they provided in the classification request," he explained. "Depending on the facts of any case that would come forward, we might change our thinking," he said. "I am fairly confident that I would have an answer to any fact pattern that would be presented to me," he added. Wolf said the final specially designed definition would be wrapped up in a comprehensive final regulation that would include the proposed "transition rules." The final definition is unlikely to change much from the last proposal. "A lot of what industry was seeking would be unenforceable," he told RAPTAC. "A lot of comments would have created so much flexibility and ambiguity that it would be impossible for prosecutors to be able to bring a case because you could give the same facts to 10 different people and get 10 different answers," he said.

BIS staffers also told the RAPTAC they expect the Office of Management and Budget to begin slowing down the review of new regulations and proposals as part of its policy at the end of an administration to avoid complaints about "midnight rulemaking." The slowdown will start Sept. 30 and will go through the election if President Obama is reelected, but longer if Governor Romney wins.

New Approach to End-Use Checks Finds More "Unfavorables"

A change in the way BIS targets end-users for post-shipment verifications (PSVs) and pre-license checks (PLCs) has doubled the number of "unfavorable" findings from those visits, Jose Rodriguez, director of the international operations division in BIS' Office of Export Enforcement, told the RAPTAC Sept. 11. The number of unfavorable results jumped from 9-11% to 20-21% last year, he reported. Rodriguez stressed that the findings are not a statistical sampling of end-users and don't reflect a higher rate of violations or problems.

The shift in targeting policy has directed more attention to exports that claimed to qualify as EAR99 or No License Required (NLR) and also exports to "high-risk" destinations known as transshipment or diversion hubs. An unfavorable rating can result from several factors, including the failure of an exporter to provide a customer with the conditions attached to a license or where an end-user is considered unreliable, inappropriate or doesn't even exist.

Chinese Firms Defend Themselves Against Security Charges

For perhaps the first time, executives of two Chinese companies testified in front of a congressional committee and defended their companies against charges that Beijing is exerting undue influence in their operations and that their products pose a threat to U.S. national security. At a House Intelligence Committee hearing Sept. 13, representatives of Huawei and ZTE, two Chinese telecommunication companies, addressed concerns that the Chinese government may be using their products to insert "backdoors" that can steal trade secrets from U.S. companies and national security information. Zhu Jinyun, ZTE senior vice president for North America and Europe, also confirmed that the firm is under investigation for its dealings in Iran.

"We have heard reports about backdoors or unexplained beaconing from the equipment sold by both companies," said Committee Chairman Mike Rogers (R-Mich.) in his opening statement. "And our sources overseas tell us that there is a reason to question whether the companies are tied to the Chinese government or whether their equipment is as it appears," he said.

Rep. Sue Myrick (R-N.C.) asked Zhu about the reported investigation into ZTE's violation of U.S. sanctions. Through a translator, Zhu said ZTE is "actively cooperating with branches of U.S. government to investigate this matter and get to the bottom" of it. "We are not ourselves fully clear of all the accusations in the media, and that's why we have a whole team that is working with the U.S. government to investigate this," he said. "I know that sometimes the words or the action of a single individual can affect us, and that is why in terms of dealing

with these so-called behaviors, we are cooperating with the U.S. government,” Zhu said. “We conduct normal business operations in Iran. We are gradually reducing our present operations, and we are not starting any new business operations,” he added.

Both executives touted their reputations as respected global companies that have been hurt by allegations that they are security threats. “Although we want to expand our presence in the U.S. and thus create more employment and growth opportunities, we have been hindered by unsubstantiated, non-specific concerns that Huawei poses a security threat,” said Charles Ding, Huawei’s corporate senior vice president, in his opening statement. “Let me be clear -- Huawei has not and will not jeopardize our global commercial success nor the integrity of our customers’ networks for any third party, government or otherwise. Ever,” he said.

Coinciding with the hearing, Myrick and Rep. Frank Wolf (R-Va.) wrote Sept. 13 to DLA Piper, a D.C. law firm, urging it to “reconsider its relationship” with ZTE. “By publically [sic] representing and advising the ZTE Corporation, your firm is indicating that it values the retainer of one contract over the legitimate cyber-security and supply chain concerns of the United States government, as well as the oppression and persecution of political dissidents, human rights advocates, religious groups, women, journalists, students and educators in Iran,” they declared.

* * * Briefs * * *

ENCRYPTION: Wassenaar experts are working on two proposals – one from U.S. and one from Sweden – on interpretation of rules for mass-market components for plenary meeting in December, Norman LeCroix, policy officer at National Security Agency, told RAPTAC Sept. 11. This is second year proposals have been discussed, and LeCroix said he is “cautiously hopeful” proposals will be approved.

ITC: President Obama acknowledged shift of International Trade Commission (ITC) to patent forum from trade panel with his Sept. 10 nomination of F. Scott Kieff to ITC seat. Kieff is professor at George Washington University Law School and Ray and Louis Knowles Senior Fellow at Stanford University’s Hoover Institution, where he directs Project on Commercializing Innovation and serves on Property Rights Task Force. From 2007 to 2010, he was member of Patent and Trademark Office’s Patent Public Advisory Committee. He has also served as mediator for Court of Appeals for the Federal Circuit.... Separately, Meredith Broadbent was sworn in Sept. 11 to be ITC Commissioner (see **WTTL**, Aug. 20, page 4).

TRADE PEOPLE: Linda Menghetti Dempsey has been named as vice president for international economic affairs at National Association of Manufacturers. Previously, she was vice president of Emergency Committee for American Trade (ECAT)...Ellen Terpstra has been appointed president and chief executive officer of International Food and Agricultural Trade Policy Council. Previously, she was USDA deputy under secretary for farm and foreign agricultural services, administrator of Foreign Agricultural Service and agriculture negotiator at USTR’s office. Later, she headed rice and apple trade groups.

MAGNESIUM: On 4-0 vote Sept. 12 in “sunset” review, ITC determined that ending antidumping duty order on pure magnesium (granular) from China would likely cause renewed injury to U.S. industry.

TRADE FIGURES: U.S. merchandise exports in July rose 3.3% from year ago to \$130.8 billion, Commerce reported Sept. 11. Services exports increased 1.4% to \$52.5 billion from July 2011. Goods imports went up 0.3% from last July to \$188 billion, as services imports gained 2.1% to \$37.2 billion.

PORTS: Sept. 13 report from American Society of Civil Engineers (ASCE) claims U.S. needs to invest \$30 billion between now and 2020 to upgrade aging U.S. ports and inland waterways. Current spending plans are only \$14 billion. With expansion of Panama Canal by 2015, “average size of container ships is likely to increase significantly, affecting the operations at most of the major U.S. ports that handle containerized cargo,” ASCE statement noted. “Needed investment in marine ports includes harbor and channel dredging, while inland waterways require new or rehabilitated lock and dam facilities,” it said.

UNMANNED AERIAL VEHICLES: Government Accountability Office (GAO) report (GAO-12-536) released Sept. 12 claims export licensing agencies have inadequate database of licenses and end-users for UAVs. “These limitations in the U.S. government’s licensing data impair the ability of U.S. agencies and Congress to oversee the release of sensitive UAV technology. As a result, U.S. agencies may face additional challenges in working to effectively counter UAV proliferation,” report asserts.