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. 32, No. 33 **August 13, 2012**

Japan Seen as Unlikely to Join TPP Talks

While administration officials say they are talking with Japan on its joining negotiations on a Trans-Pacific Partnership (TPP) agreement, academics and economists contend it would take too much for Tokyo to become part of a deal. "We are currently continuing our talks," Deputy U.S. Trade Representative (USTR) Demetrios Marantis told Washington's Woodrow Wilson Center Aug. 8 (see **WTTL**, June 25, page 3). "The TPP is open to whichever country is willing to meet the high standards of the TPP" on issues such as labor, the environment and investment, he said. "Each economy has to make that judgment for itself, as to whether or not the TPP makes sense for it, whether or not TPP makes sense for where that country is, in terms of its level of economic development, or the way it sees its economy going in the future," he said.

> However, Edward Lincoln, a Japan specialist and professor at George Washington University, was more skeptical. On the question of will they or won't they, "Don't hold your breath," he said. "That would require substantial concessions on their part," he added. "It's unlikely Japan will join in near future," he declared. Domestic opposition to the TPP remains strong, including within the party of Prime Minister Noda, Lincoln noted.

Meanwhile, an Economic Strategy Institute report released Aug. 8 concluded that much would have to change in the Japanese economy and the negotiations themselves for Japan to join the talks. "If the TPP were concluded on its present basis and included Japan, it would inevitably result in an increase in the U.S. trade deficit and a decline in U.S. GDP growth as well as in U.S. employment while failing to achieve any increase in Japanese imports or anything like free trade," the report stated. "A truly open market would require measures entirely antithetical to decades of Japanese industrial policy and thus would have to entail an entirely new kind of Japanese economic strategy, something that is difficult to imagine as long as negotiators insist that the Japanese market is fully open," it noted.

Comments on "Transition Rules" Object to Complexity

As with all previous export control reform (ECR) proposals that State and BIS have issued, industry reaction to the agencies' proposed "transition rules" has been a mixture of praise and concern. Comments submitted on the proposals welcomed the attempt to maintain the export license exemptions now available for items on the U.S. Munitions List (USML) as license exceptions when they are transferred to the Commerce Control List (CCL). Industry, however, complained about the complexity and burdens that will be imposed on USML items transferred

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.

to the 600 series on the CCL (see **WTTL,** June 25, page 1). The general argument from industry is that if USML items warrant transfer to the CCL, they should be treated just like all CCL items and not face a myriad of additional requirements. Exporters see the extra controls on 600-series items as more a political issue aimed at assuaging congressional objections to the reforms than a real national security issue.

> William Root, a former State official and trade consultant, criticized the multitude of different country groups that would face different controls under the revised rules. "Who are the bad guys?" "Who are the good guys?" he asked, noting the proposed changes would consider 65 countries as bad guys in some way, either through Country Group controls in the Export Administration Regulations (EAR) or through specific exclusions from license exceptions or licensing policies. Root recommended that BIS remove special EAR restrictions on the 41 countries not restricted in the International Traffic in Arms Regulations (ITAR).

A common objection in the comments was to the BIS proposal to add a new congressional notification requirement to the EAR for Major Defense Equipment (MDE) and basing the requirement on the value of the total contract rather than just the export license. "The Export Administration Regulations do not contain a Congressional Notification requirement, self imposing the requirement will further delay licenses and exports, contrary to the intent of the Export Control Reform," wrote Alliant Techsystems, Inc. GE Aviation complained that the term Major Defense Equipment is not defined.

The Council on Governmental Relations and the Association of American Universities urged BIS to revise proposed changes to License Exception TSU for technology to eliminate certain restric-tions on missile technology and encryption. "While we have not been able to assess specific potential impacts on universities, it appears these restrictions may limit the usefulness of the exemption to universities, especially as applied to the 600 series transferred items," they wrote. Saint-Gobain Corporation asked for clarification of how License Exception Strategic Trade Authorization (STA) would apply to foreign nationals of the 36 STA-eligible countries in U.S. "It appears that the STA will only be eligible for government entities of the STA 36 countries and not for companies in the STA 36," it wrote. "If so, this would be an unnecessary burden on companies that manufacture 600 Series parts and components, and would be an unnecessary licensing burden on BIS," it commented.

Pfizer Pays $60 Million Penalty for FCPA Violations

The government's crackdown on the payment of bribes to foreign healthcare officials by U.S. drug and medical device companies hit another target Aug. 7 with Pfizer's payment of $60 million in penalties in agreements with Justice and the Securities and Exchange Commission (SEC) to settle charges that it violated the Foreign Corrupt Practices Act (FCPA). In previous actions, the government has settled FCPA charges with such firms as Johnson & Johnson, Smith and Nephew, Biomet and Orthofix (see **WTTL,** July 16, page 4).

> Under a deferred prosecution agreement (DPA) with Justice, Pfizer subsidiary Pfizer H.C.P. Corporation will pay a $15 million penalty. In settlements with the SEC, Pfizer entered a consent agreement under which it will disgorge $16,032,676 in net profits and pay prejudgment interest of $10,307,268. Its Wyeth subsidiary entered a separate deal with the SEC to pay disgorgement of $17,217,831 in net profits and prejudgment interest of $1,658,793.

"Pfizer made an initial voluntary disclosure of misconduct by its subsidiaries to the SEC and Department of Justice in October 2004, and fully cooperated with SEC investigators," the SEC said. "Pfizer took such extensive remedial actions as undertaking a comprehensive worldwide review of its compliance program," it added. The two-count criminal information filed by Justice and the SEC's complaint in the D.C. U.S. District Court accused the Pfizer subsidiaries of conspiracy and violations of the FCPA in connection with improper payments to government

officials, including publicly employed regulators and healthcare professionals in Bulgaria, China, Croatia, Czech Republic, Indonesia, Italy, Kazakhstan, Pakistan, Russia, Saudi Arabia and Serbia. The bribes were paid to obtain regulatory and formulary approvals, sales and increased prescriptions for the company's pharmaceutical products and were concealed as marketing, training and entertainment expenses, the SEC said.

Industry Not Yet Satisfied with "Specially Designed" Definition

Exporters and trade associations that represent them still aren't satisfied with the government's attempt to come up with a new definition of "specially designed." Comments on the second attempt of State and the Bureau of Industry and Security (BIS) to propose a new, shorter definition commended export regulators for making progress, but said there's still work left to do to make sure the new definition is clear (see **WTTL**, June 25, page 3).

> "The proposed definition of 'specially designed' is a very good improvement over earlier versions," wrote the international law section of the American Bar Association (ABA). "With clarifications via interpretation of the new elements, this will be an even better effort," it stated.

Nonetheless, the ABA offered several scenarios where application of the proposed definition is still unclear, asking BIS and State's Directorate of Defense Trade Controls (DDTC) to explain how the proposed definition would apply in those situations. It also wanted assurances that statements and speeches by BIS and DDTC officials explaining the intent of the definition are reflected in a final rule or in published guidance. It particularly focused on the meaning of the phrase "as a result of development." The ABA section urged the agencies to confirm its understanding that the phrase means that, "during the development period, the developer takes an affirmative step with a view to achieving or exceeding the performance levels, characteristics, or functions in the relevant ECCN or USML paragraph."

The comment also noted that the preamble to the proposed definition refers to a First Circuit Court ruling in the *Lachman* case, which directly related to previous interpretations of specially designed. "If the preamble in the pending proposed rule refers to case law, perhaps it should also refer to the Seventh Circuit's decision in its *Pulungan* decision, because it raises limits under the Constitution on rules not sufficiently clear that a person knows how to avoid conduct that is in violation of the agency's rules," it suggested.

Semiconductor Equipment and Materials International (SEMI) claimed even the revised definition was too complex. The "catch-and-release" structure "is intrinsically complicated and inconsistent with the basic concept of a definition – which should simply specify the meaning of a term," SEMI noted. Rolls-Royce agreed. "Unfortunately, the proposed definition potentially could create a significant compliance burden as businesses struggle through the proposal's 'catch and release' analysis. The proposed language is subject to numerous interpretations within the supply chain, leaving companies like Rolls-Royce liable for increased compliance and potentially accountable for other companies' products and technology," it wrote.

Defense Firm Pays $7.5 Million Fine to Settle Export Charges

Two years after a multimillion-dollar settlement with State on related charges, the military contractor Academi LLC, formerly known as Xe Services, which was formally known as Blackwater Worldwide, agreed to pay a $7.5 million fine as part of a deferred prosecution agreement (DPA) filed Aug. 7 in New Bern, N.C. U.S. District Court. Under the DPA, Academi can apply up to $2.5 million of the fine toward compliance-related costs. The DPA acknowledges the $42 million penalty the firm paid in 2010 in its consent agreement with State on 288 violations of the Arms Export Control Act (AECA) and ITAR, including those described in the DPA (see **WTTL**, Sept. 13, 2010, page 4). The DPA puts in abeyance criminal charges that the firm

manufactured and shipped without licenses short-barreled rifles, fully automatic weapons, armored helicopters, armored personnel carriers, and also trained foreign nationals without licenses. Two charges relate to the 2005 export of Iridium Satellite phones and Crypto Satellite phones to Sudan without Treasury authorization. Other charges are based on the firm's proposed contract to provide security services and a threat assessment to the government of Sudan without a State license; on training military and law enforcement personnel from Canada overseas without a State license; on providing data on armored personnel carriers to individuals from Sweden and Denmark without State authorization; and exporting ammunition and body armor to Iraq and Afghanistan without a State license.

* * * Briefs * * *

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TRADE FIGURES: U.S. merchandise exports in June rose 9.15% from year ago to record $132.8 billion, Commerce reported Aug. 9. Services exports increased 2.3% to $52.2 billion from year ago. Goods imports went up 1.6% from June 2011 to $190.3 billion, as services imports gained 5.15% to $37.6 billion.

ANTIBOYCOTT: Polk Audio Inc. in Baltimore July 30 agreed to pay $8,000 to settle two BIS charges that it violated antiboycott regulations by furnishing information about business relationships with boycotted countries or blacklisted persons and failing to report receipt of request to engage in restrictive trade practice or foreign boycott against country friendly to U.S. In 2007, Polk engaged in transactions from U.S. to Oman. In settlement, Polk neither admitted nor denied charges.

EXPORT ENFORCEMENT: Global Metcorp LLC in Metuchen, N.J. Aug. 6 agreed to pay $50,000 civil penalty to settle two BIS charges of exporting of scrap steel classified as EAR99 and worth more than $290,000 to Pakistan's People's Steel Mills, which is on BIS Entity List, without required licenses in 2010. Of penalty, $40,000 will be suspended for two years and then waived provided Global Metcorp commits no further violations. Company neither admitted nor denied charges. Two N.Y. shipping companies paid penalties for related charges in July (see **WTTL**, July 30, page 4).

SYRIA: Obama administration Aug. 10 imposed sanctions on Syrian state-run oil company Sytrol for sending over $36 million of gasoline to Iran in April 2012. In addition, Office of Foreign Assets Control (OFAC) Aug. 10 added Sytrol to list of Specially Designated Nationals (SDN).

FORD: Court of Appeals for Federal Circuit Aug. 10 reversed-in-part, vacated-in-part, and remanded CIT ruling that it lacked jurisdiction to hear Ford's complaint that Customs had failed to timely liquidate entries of Jaguar cars because Ford had not exhausted its administrative remedies. CBP liquidated some entries after Ford filed its complaint at CIT. "Here, the government's post-filings actions in liquidating the entries may have opened up a new avenue for judicial review under 19 U.S.C. Section 1581(a), but the actions cannot defeat subject matter jurisdiction under Section 1581(i)," it declared.

LIQUIDATION: In separate ruling on CIT jurisdiction, Court of Appeals for the Federal Circuit, Aug. 10, in *Norman G. Jensen, inc., v. U.S.*, upheld CIT decision that it lacked jurisdiction to hear complaint against CBP's failure to rule within two years on 308 protests seeking reliquidation of 1,529 entries of softwood lumber from Canada. "Unlike in *Canadian Wheat*, jurisdiction over the present suit could be procured under another subsection of Section 1581 simply by requesting accelerated disposition under Section 1515(b) and then securing jurisdiction under Section 1581(a). As we explained in *Hitachi*, jurisdiction cannot lie under Section 1581(i) when an avenue to judicial review under Section 1515(b) exists," CAFC ruled.

FERROVANADIUM: ITC Aug. 8, on 6-0 vote, made "sunset" review determination that revoking anti-dumping order on ferrovanadium and nitrided vanadium from Russia would not cause recurrence of injury to U.S. industry. As result, existing order will be terminated.

LARGE POWER TRANSFORMERS: ITC voted 5-0 in final finding Aug. 9 that imports of dumped large power transformers from Korea are injurying U.S. industry.