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. 25 **June 18, 2012**

Option 4 Will Remain with Shorter Reporting Deadline

After more than a year of interagency debate, the Census Bureau intends to make only one major change to the rules for Option 4 post-departure reporting of exports through its Automated Export System (AES). In a final rule revising its Foreign Trade Regulations (FTR), the agency will shorten the deadline for filing post-departure data to five days from 10 days, Nick Orsini, chief of Census' foreign trade division, told the Bureau of Industry and Security's (BIS) Regulations and Procedures Technical Advisory Committee (RAPTAC) June 12.

> The final rule is still undergoing interagency review but should be published this summer, perhaps before the BIS annual Update conference July 17, Orsini advised the committee. "The concurring agencies are very familiar with the rule and very little review needs to be done," he said.

The limited change to the FTR puts off the fight over the future of Option 4. BIS has already advised firms they can no longer use the post-departure option for exports of items subject to validated export licenses (see **WTTL**, March 12, page 1). Over the last year, Census has floated various proposals for dealing with Option 4, including limiting its use to certain bulk commodities and creating a list on non-eligible goods. In addition to dropping those ideas, Census also won't require current Option 4 users to reapply for eligibility, Dale Kelly, assistant chief of its data collection division, told RAPTAC.

"I'll be honest with you, [Option 4] is the issue that has hung up the regs for this long," Orsini said. "You have to get away from Option 4. That is something we are going to have to do at some point," he stated. "The idea of a trusted exporter program or where some type of information is provided ahead of the export leaving the country is the direction this is going," he advised. "So when you are asking if there are any commodities out of scope for Option 4, I'll answer you by saying there are no new commodities in the scope for Option 4," he said.

U.S. Wins WTO Complaint Against Chinese Duties on Steel

In the tit-for-tat battle between the U.S. and China over trade remedy actions, the U.S. won the most recent dispute with a WTO dispute-settlement panel ruling June 15 that upheld most of Washington's complaints against the procedures Beijing used in applying countervailing and antidumping duties on imports of grain-oriented flat-rolled electrical steel (GOES) from the U.S. Among its findings, the panel found China failed to determine the accuracy and adequacy of evidence claiming U.S. exports of GOES benefitted from 11 subsidy programs. It also

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.

agreed with the U.S. that the Chinese had not provided sufficient non-confidential versions of data in the case. "This decision sends another clear signal to China that it must do more to fulfill its WTO commitments, and that it will be held accountable to play by WTO rules," USTR Ron Kirk said in a statement.

> China's Ministry of Commerce (MOFCOM) violated WTO rules in its "finding that subject imports caused material injury to the domestic industry and due to deficiencies in the related essential facts disclosure and public notice and explanation," the panel determined. In addition, MOFCOM was faulted because it "did not require the applicants to furnish non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence," the panel concluded.

New Controls on Low-Light Sensors to Be Imposed

A final BIS rule implementing changes the Wassenaar Arrangement adopted at its December 2011 plenary to multilateral export controls will also impose controls the regime agreed on in December 2007 on low-light sensors, BIS Assistant Secretary Kevin Wolf reported June 12. The implementing regulation, which is expected to be published by the end of June, would apply to Category 6 of the Commerce Control List (CCL). "After this rule, there won't be any lingering Wassenaar implementation issues from any previous years," Wolf told the agency's Regulations and Procedures Technical Advisory Committee.

> An interagency dispute over how to implement the changes to sensor controls has blocked revision of the Export Administration Regulations (EAR) for more than four years. Wassenaar in 2007 agreed to impose controls on low-light sensors, including electron multiplying charge coupled devices (EMCCD) that are used in a variety of products where low-light conditions exist, including medical devices for single molecule microscopy and cell motility viewing, as well as in astronomy for seeing distant galaxies and stars.

At one point, BIS officials said they had proposed applying to these devices controls similar to those the agency adopted in May 2009 for uncooled thermal-imaging cameras, the so-called UTIC Rule. The UTIC Rule allows subject cameras to be exported license-free to most EU members, Japan and other close U.S. allies but requires semiannual reports to BIS on exports.

Comments to Be Sought on Eliminating "Specially Designed"

In addition to proposing a new definition for the term "specially designed," BIS intends to publish a separate notice seeking public comment on the feasibility of removing the term from all places where it appears on the Commerce Control List (CCL). The agency will also use the comments its receives to prod the multilateral export control regimes that use the term to drop "catch-all" terms and to identify more specifically the parts and components they want to control, BIS Assistant Secretary for Export Administration Kevin Wolf told the Regulations and Procedures Technical Advisory Committee (RAPTAC) June 12.

> The advance notice of proposed rulemaking will be in addition to two separate proposals BIS and State's Directorate of Defense Trade Controls (DDTC) will publish in the next few days to provide a new definition for specially designed (see **WTTL**, June 11, page 1). Wolf said there are 42 places in the CCL where the term is used as a catch-all for parts and components.

"We eventually want to start moving away from the usage of the term," Wolf told RAPTAC. He said BIS can't eliminate the term now because it is used by multilateral regimes such as the Missile Technology Control Regime and the Wassenaar Arrangement. The advance notice is intended "to get the public dialogue going," Wolf said. The agency wants industry "input on

the feasibility of removing the term all together and listing out current controls on specific components in a positive fashion to eliminate ambiguity," he explained. The U.S. also would use this advice when making proposals to the Wassenaar Arrangement and other regimes during annual list reviews and seeking to replace the term with specific components. The goal would be "basically to force the governments of the regimes to really think about what they do and don't want to control with respect to these end-items," Wolf stated.

Baucus Promises to Tie Magnitsky to PNTR Legislation

To the consternation of the business community and the Obama administration, Senate Finance Committee Chairman Max Baucus (D-Mont.) says he will seek to attach legislation to impose sanctions on the Russians who were responsible for the death of Sergei Magnitsky to a bill (S. 3285) he introduced June 12 to lift Jackson-Vanik amendment restrictions on Russia and to give the president authority to grant Moscow permanent-normal-trade-relations (PNTR) status (see **WTTL**, June 11, page 1). "I will work as Chairman of the Committee to add the full text of the Magnitsky Act (S. 1039)...as an amendment to the PNTR legislation for Russia," Baucus said in a June 12 letter to Sen. Ben Cardin (D-Md.) and other Magnitsky co-sponsors. Sens. John Thune (R-S.D.), John Kerry (D-Mass.) and John McCain (R-Ariz.) co-sponsored S. 3285.

> "We welcome the introduction of this bill as Russia is poised to join the World Trade Organization (WTO) this summer," said U.S. Trade Representative (USTR) Ron Kirk in a statement. "We will continue to work with Congress so that Americans can reap the full benefits of Russia's WTO membership," he added.

In a June 12 letter to Baucus, eight GOP Finance Committee members urged him to address the issues raised in the Magnitsky bill as well as human rights and political suppression in Russia and Moscow's aid to the Assad regime in Syria. "Many aspects of the U.S.-Russia relationship are troubling. For example, public protests regarding the flawed election and illegitimate regime of Vladimir Putin continue to be suppressed through force and economic penalties by the Russian Government. Russia continues to support and enable the Assad regime in Syria through officially condoned arms sales and sustained opposition to United Nations Security Council resolutions, and continues to occupy the Democratic Republic of Georgia. In addition, Russia's most senior military officer recently threatened to preemptively strike and destroy U.S.-led NATO missile defense sites in Eastern Europe," said the letter.

ING Bank Pays $619 Million to Settle OFAC, Criminal Charges

In the largest penalty ever imposed in an export sanctions case, ING Bank N.V. agreed June 12 to forfeit $619 million as part of deferred prosecution agreements (DPAs) with Justice and the Manhattan district attorney for illegally moving more than $2 billion through the U.S. financial system for Cuban and Iranian entities. ING also entered into a settlement with the Office of Foreign Assets Control, which said its penalty was satisfied by the forfeiture to Justice.

> In more than 20,000 transactions from the early 1990s through 2007, ING eliminated payment data that would have revealed its dealings with Cuba and Iran; advised sanctioned clients on how to conceal their role in U.S. dollar transactions; fabricated ING endorsement stamps for two Cuban banks to process U.S. travelers' checks; and threatened to punish employees if they failed to remove references to sanctioned entities in payment messages.

In a statement, ING said it voluntarily disclosed the violations and has cooperated "closely and constructively" with authorities. "The violations that took place until 2007 are serious and unacceptable. The facts as compiled in the statement of the Department of Justice describe a very different ING than the company we're all working so hard for today," said Jan Hommen, CEO of ING Group, in the statement. "Since starting the investigations in 2006, ING Bank has taken decisive actions to strengthen compliance throughout the organization and heighten

employee awareness of compliance risks," he added. The settlement arose out of ongoing investigations into exports to sanctioned countries. For instance, ING processed payments on behalf of Aviation Services International B.V. (ASI), a Dutch aviation company, which was the subject of a Commerce-initiated criminal investigation (see **WTTL**, Sept. 28, 2009, page 4).

> In addition to the civil penalty, a criminal information filed June 12 in D.C. U.S. District Court charged the bank with one count of knowingly and willfully conspiring to violate the International Emergency Economic Powers Act and the Trading with the Enemy Act. ING also was charged with violating N.Y. state laws. As part of the DPA with Justice, ING waived federal indictment and accepted responsibility for its criminal conduct and that of its employees.

State, BIS Propose Controls on Military Training Equipment

In parallel Federal Register proposals June 13, BIS and State tackled revising U.S. Munitions List (USML) Category IX, which controls military training equipment and training, and transferring items to the Commerce Control List (CCL). State proposed changing the category to apply only to training equipment. "Training on a defense article would be a defense service covered under the category in which the defense article is enumerated," the State notice said.

> Items now covered in Category IX include ground, surface, submersible, space or towed airborne targets; air combat maneuvering instrumentation and ground stations; physiological flight trainers for fighter aircraft or attack helicopters; radar trainers "specially designed" for training on radars controlled by Category XI; training devices "specially designed" to be attached to a crew station, mission system, or weapon; anti-submarine warfare trainers; and missile launch trainers.

At the same time, BIS proposed creating four new Export Control Classification Numbers (ECCNs) -- 0A614, 0B614, 0D614 and 0E614 -- to cover items determined to no longer warrant control on Category IX. For example, tooling and production equipment, currently controlled in paragraph IX (c) would moved to proposed ECCN 0B614. The new ECCNs would control various "parts," "components," "accessories and attachments," inspection and production "equipment," "software" and "technology."

WTO Review of China Highlights Long List of Complaints

The World Trade Organization's (WTO) biennial Trade Policy Review (TPR) of China's trade practices June 12 and 14 gave members a chance to sound off on Beijing's continuing failure to meet its WTO obligations and signs that the Chinese are actually moving backward in some areas. The WTO secretariat-prepared report for the TPR Body attempted to be nonjudgmental in describing China's practices, but country representatives used the two-day sessions to highlight a long list of complaints. WTO members cited concerns about China's failure to protect intellectual property rights, its lack of transparency, continuing subsidies to domestic industries, favoritism to state-owned enterprises, discriminating standards for goods and agriculture products, obstacles to foreign investment in services and particularly financial services.

> The TPR report noted the lack of information about Chinese subsidies to industry. "In many cases there are no figures on the magnitude of support provided, and no information is available on subsidies and other government assistance provided at the provincial level, which are believed to be considerable," it said.

Deputy USTR Michael Punke told the meeting that China had made noteworthy progress toward trade liberalization after its accession. "However, beginning in 2006, progress toward further market liberalization in China began to slow, and a trend toward the increasing use of measures imposing new restrictions on market access and foreign investment began to emerge," he said in his prepared remarks. "We are worried...not only of China standing still, but also moving

backward," Punke stated. The EU Ambassador to WTO, Angelos Pangratis, said Europe's main concern is China's lack of transparency. "While we acknowledge China's efforts, including its increased use of public consultations, more needs to be done still to make key WTO principles like transparency and non-discrimination a norm in China's legislative system," he said.

Shapiro Foresees "Robust Consultations" with Congress

Assistant Secretary of State of Political-Military Affairs Andrew Shapiro said he "intends to have robust consultations with Congress before we issue the 38(f) notifications" under the provisions of the Arms Export Control Act (AECA). In a briefing for reporters June 14, Shapiro said administration officials are having discussions with Congress and "we intend to follow the law regarding congressional notifications and we will provide the requisite notifications for any of these changes to the United States Munitions List or Commerce Control List."

> Shapiro didn't address reports of friction between him and members of Congress (see **WTTL**, June 4, page 1). He sidestepped suggestions the administration would go ahead with category-by-category notifications without an advance agreement with lawmakers on providing more specific justifications for transfers. Officials are having discussions with Congress "on how best to provide them the information they need and solicit their input," he said.

Shapiro said the administration is committed to having all proposed USML changes and transfers to the CCL published this year and final rules "on a rolling basis." "Any speculation that export control reform is stalled is absolutely false," he declared. "My view is that by January of next year, we'll either be done or so close to the goal line that it will just be up to the next administration to dive over the goal line and then do a touchdown dance," he said.

TPP Investment Text Not Surprising, But Worries NGOs

While some nongovernment organizations expressed outrage over the draft investment chapter of the Trans-Pacific Partnership (TPP) negotiations posted online June 13, business community representatives say the text reflects investment policies the U.S. has long advocated and adopted in prior trade agreements and in its revised model Bilateral Investment Treaty (BIT). The "leaked" text, released by the Ralph Nader-related Public Citizen, shows large sections of the chapter in brackets, indicating they are still under discussion and not yet adopted. The draft doesn't reveal who proposed which provisions and how far talks have progressed.

> Business community sources say they're not surprised by the text, since its provisions are similar to the model BIT released in April (see **WTTL**, April 23, page 3). One source said industry is disappointed by the annex on balance of payments, but admitted it was the least common denominator. "Nothing in this Agreement shall be construed to prevent a Party from adopting restrictive import measures in order to safeguard its external financial position and balance of payments," the text noted.

Lori Wallach, director of Public Citizen's Global Trade Watch, called the text "outrageous." She said "U.S. officials...have agreed to submit the U.S. government to the jurisdiction of foreign tribunals that can order unlimited payments of our tax dollars to foreign corporations that don't want to comply with the same laws our domestic firms do." The text reveals that Australia, for one, will not agree to such measures, including investor-state dispute settlement provisions. U.S. industry has previously raised concerns about Australia's position.

"Our worst fears about the investment chapter have been confirmed by this leaked text," said Margrete Strand Rangnes, the Sierra Club's labor and trade director. "The language in the investment chapter echoes outdated trade agreements which put the profits of corporations over environment and public interest policy," she said in a statement.

* * * Briefs * * *

CCL: BIS plans to publish "clean up" revisions to Commerce Control List (CCL), reflecting some 1,400 pages of comments agency received concerning technical inconsistencies and inaccuracies, including for parts and components. "It is not meant to be a substantive rule; adding or renaming a control over anything. It is meant to be largely more organizational and formatting and inconsistent word usage that have crept up over the decades," BIS Assistant Secretary Kevin Wolf told RAPTAC June 12.

IRAN: State announced June 11 that seven more countries have received waivers from new NDAA sanctions because they have "significantly reduced" volume of crude oil imports from Iran. Waivers were given to India, Malaysia, South Korea, South Africa, Sri Lanka, Turkey and Taiwan (see **WTTL**, March 26, page 3). "We continue in our discussions with China," one senior administration official said.

BROKERING: In letter to President Obama June 6, President's Export Council (PEC) urged State to reconsider proposed ITAR revision for arms brokering (see **WTTL**, Jan. 2, page 2). "This proposed change is so sweeping in its scope and jurisdictional reach that we are concerned it could have unintended consequences contrary to the administration's efforts at export control reform, and it could impose significant and disproportionate burdens on the small business community," PEC wrote.

SUDAN**:** National Bank of Abu Dhabi (NBAD) agreed June 14 to pay OFAC $855,000 to settle 45 charges of violating Sudanese Sanctions Regulations from November 2004 to December 2005. Combined value of 45 electronic funds transfers was $4,389,235.42. NBAD did not voluntarily self-disclose apparent violations, but revealed that "certain of its clerical staff removed or omitted Sudan-related references in payment instructions processed on behalf of its Sudan branch for payments routed through financial institutions located in the United States," OFAC noted.

MTB: Sens. Claire McCaskill (D-Mo.) and Rob Portman (R-Ohio) June 13 introduced the Temporary Duty Suspension Process Act (S. 3292) "to streamline the process for duty-suspensions by allowing companies to submit their proposals directly to the International Trade Commission and retaining final approval for Congress," statement said. Bill would take congressional fingerprints off process, avoiding taint of "earmarks" in reducing tariffs on individual products (see **WTTL**, May 28, page 4).

ZEROING: WTO dispute-settlement panel ruled June 8 that U.S. use of "zeroing" in antidumping cases against imports of shrimp and diamond sawblades from China was inconsistent with WTO rules. U.S., which has ended practice based on previous WTO rulings, did not dispute findings.

PIPE: ITC made unanimous "sunset" review determination June 14 that revoking existing CVD order on circular welded pipe and tube from Turkey and antidumping orders on products from Brazil, India, Korea, Mexico, Taiwan, Thailand and Turkey would likely cause recurrence of injury to U.S. industry.

AUTO PARTS: CMAI Industries, LLC, doing business as CMAI North America, four related firms and two executives agreed June 4 to pay $6.3 million in civil penalties in settlement with ICE to resolve claims they violated False Claims Act by misclassifying imports of auto parts to evade $2.5 million in duties. In related case, CMAI North America was sentenced June 4 in Detroit U.S. District Court to two years' probation and $25,000 fine after pleading guilty to charges of entry of goods by means of false statement.

EXPORT ENFORCEMENT: General Technology Systems Integration, Inc., (GTSI) of Ontario, Calif., agreed to pay $300,000 to settle one BIS charge of violating EAR, and owners York Yuan Chang and Leping Huang agreed to pay $300,000 each to settle charge of conspiracy. BIS charged them with contracting with 24th Research Institute of China Electronics Technology Corporation Group to design and transfer technology for analog-to-digital converters. BIS will suspend $250,000 of each penalty for two years and then waive balance, if no further violations are committed. Under settlement, GTSI must complete three external audits of its export controls compliance program, and Huang and Chang will attend export compliance training. They neither admitted nor denied charges. Chang and Huang were arrested Oct. 11, 2010, and pleaded not guilty to related charges (see **WTTL**, Nov. 1, 2010, page 4). At press time, change of plea hearing was scheduled for June 18 in L.A. U.S. District Court.

EXTRUDED ALUMINUM: CIT Chief Judge Donald Pogue remanded to ITA preliminary antidumping decision on extruded aluminum from China. "Plaintiffs may request an administrative review, in which Commerce adjusts (or 'caps') the actual payments owed to the lesser of either 1) the cash deposit rate (set by the Preliminary Determination) or 2) the final rate determined upon review," he noted in Slip Op. 12-81. "Because of its continued applicability as a 'cap,' Commerce's preliminary provisional rate determination may qualify for reasonableness review. Accordingly, the court will consider this aspect of Plaintiffs' request for consideration when it reviews Commerce's remand determination," he added.