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BIS Shelves Plans for License Exception MLX for 600 Series

The Bureau of Industry and Security (BIS) has put on hold plans for establishing a new License Exception Military (MLX) that would have applied to U.S. Munitions List (USML) parts and components moved to the Commerce Control List (CCL) as part of the administration's export reform initiative, according to Todd Willis, director of the BIS Munitions Control Division (see **WTTL**, March 5, page 4). The planned license exception will not be included in a coming transition rule that will provide details on how transferred items will be treated, Willis told a May 8 audio-conference sponsored by WTTL on the new rules for items that will be moved into a new 600 series of Export Control Classification Numbers (ECCNs) on the CCL.

As originally explained by BIS Under Secretary Eric Hirschhorn, License Exception MLX was to be available for transferred parts and components that would still be needed for end-items that remain on the USML and have received licenses from State's Directorate of Defense Trade Controls (DDTC). The goal was to avoid the need for double licensing from two different agencies.

According to Willis, there was disagreement among agencies over whether such a license exception is needed. Some officials have suggested existing license exceptions such as GOV for sales to qualified government end-users and RPL for replacement parts are adequate and would serve the same purpose. Additional comments and discussion will be needed before a decision is made on whether to go forward with an MLX proposal, Willis said.

Ex-Im Reauthorization Train Derails in Senate

Just as it seemed that legislation (H.R. 2072) to reauthorize the Export-Import Bank was sailing to passage after the House passed it May 9 on a 330-93 vote, the bill hit a roadblock in the Senate May 10. With Senate Republicans objecting to a motion to vote on the House measure because they want to add amendments, the legislation was blocked, and Senate Majority Leader Harry Reid (D-Nev.) had to file a cloture motion to cut off a Republican filibuster. Reid has scheduled a vote on cloture for 5:30 P.M. Monday, May 14.

On the Senate floor, Reid offered to look at the GOP amendments, but made it clear he would oppose some of them. "There is no question, the ones I am familiar with are efforts to gut the program. One amendment would just eliminate it," Reid said. He lambasted Republican efforts to amend the legislation and repeated efforts to stymie Senate action. "Even bills they agree with, they want to mess around with," he said. Reid noted that if any amendments are added to



the bill, it would have to go to a House-Senate Conference Committee to resolve the differences between the measures passed by the two houses. He warned that such a move could put Ex-Im financing in jeopardy because the bank is nearing its \$100 billion exposure cap and its charter expires May 31. Reid pointed out that the House has been in session for two weeks in May and will be out for two weeks. The House will recess from May 21 to May 29. That will put pressure on Congress to complete action on the legislation the week of May 14.

The Ex-Im bill came to the Senate after the House passed a compromise measure reached between Republican Majority Leader Eric Cantor (R-Va.) and Democratic Whip Steny Hoyer (D-Md.) (see **WTTL**, May 7, page 1). The compromise supposedly was worked out to satisfy the objections of Republican members who are tea party supporters and strong opponents of federal subsidies. Despite Cantor's effort, 93 Republicans still voted against the bank's reauthorization.

"Make no mistake, I am no fan of government subsidies," Cantor said on the House floor before the vote. He noted requirements in the bill for negotiations to end government subsidies. "I know some suggest that we shouldn't negotiate and that we should just shutter the Export-Import Bank right now, that we shouldn't pass the bill, but I would tell my colleagues that I believe that amounts to unilateral disarmament," he said.

EU Launches Review of Trade Remedy Laws

The European Union (EU) has launched a review of its trade remedy laws, which it calls "trade defense instruments" (TDI), with the release of a 506-page evaluation, with a 986-page annex, of its current rules and practices and a May 10 conference. In a statement to the conference, EU Trade Commissioner Karel De Gucht said these rules were last amended in 1996 and a previous effort to update them failed. "I know this is an issue that stirs passion and divides opinion," he said in his prepared text. "For this reason I want to underline that what I am seeking is a modernization. That means concentrating on down-to-earth, day-to-day, matter-of-fact issues - not on an ideologically driven agenda," he said.

DeGucht identified seven core questions the review will try to answer: (1) What can we do to enhance the transparency and predictability of the system? (2) How can we address threats of retaliation? (3) What can we do to improve effectiveness and enforcement? (4) What can we do to encourage more companies to cooperate with us? (5) Can we improve reviews of antidumping or antisubsidy measures already in place? (6) Should we not be concerned about the fact that some antidumping duties last for 10 or even 15 years? and (7) In an age of complex supply chains should we refocus our approach to the Union interest test?

"Europe is the only user of trade defense instruments in the world to systematically apply a lesser duty rule to the cases it investigates," DeGucht said. "This makes sure that the duties we impose are set at a level that stops damage to European industry but no higher. We also must apply a test of whether the measures are in the broad interest of the economy as a whole. By assessing the impact on importers and consumers of the affected products, Europe is a global leader here too," he added.

The evaluation found that most EU trade practices are sound, trade litigation is low and compliance with EU laws and WTO obligations is high. It confirmed the view that TDIs generally aren't aimed at unfair trade practices but at countering competition. "The most important function of TDI appears to have been to safeguard the EU's economic interests in the wake of the integration of major emerging markets such as China into the global economy," it said. "The EU, in liberalizing emerging markets' access to its market, has *de facto* retained the right to use TDI as a form of insurance policy. This perspective on TDI reconciles trade liberalization with the simultaneous occasional recourse to protection. The fact that antidumping has been the main instrument of this insurance policy, rather than the provisions in the WTO intended for the purpose (safeguards and renegotiation of commitments), appears to reflect

weaknesses in the design of these latter instruments. At the same time, in a second best sense, it can be considered as a legitimate use of TDI,” it opined.

Action on Satellite Moves to House Floor

Due to remaining disagreements over how to treat exports of commercial satellites, the House Armed Services Committee deferred action May 9 on a possible amendment to authorize the transfer of licensing jurisdiction back to Commerce from State. Ranking Member Adam Smith (D-Wash.) was expected to introduce an amendment to give the president authority to transfer commercial satellites from the U.S. Munitions List (USML) to the Commerce Control List (CCL) during committee markup of the 2013 National Defense Authorization Act (NDAA), but Rep. Mike Turner (R-Ohio), who chairs the committee’s strategic forces subcommittee, wanted to offer a more restrictive measure (see **WTTL**, May 7, page 4).

To deflect a fight over the the conflicting amendments, Armed Services Chairman Buck McKeon (R-Calif.) agreed to delay action on an amendment in the committee. McKeon, Turner and Smith reportedly will try to iron out a compromise that could be brought to the House floor for a vote when the full House takes up the NDAA – possibly during the week of May 14.

Smith’s amendment would have tracked legislation (H.R. 3288) co-sponsored by Reps. Howard Berman (D-Calif.) and Don Manzullo (R-Ill.). Turner’s would have added extra restrictions on the transfer of satellites to the CCL. He would require pre-license certification of end-user checks and specify which defense-related satellites must remain on the USML.

Everyone Has Advice for TPP Negotiators

As the latest round of talks on the Trans-Pacific Partnership (TPP) kicked off in Dallas May 10, U.S. trade officials and President Obama continued to receive advice from members of Congress, the business community, unions and various interest groups on what the U.S. negotiating position should be in the negotiations. The advice covers such TPP agenda items as labor, the environment, intellectual property rights (IPR), investor-state dispute settlement and transparency in the negotiations (see **WTTL**, May 7, page 2).

In a May 8 letter to U.S. Trade Representative (USTR) Ron Kirk, lawyers from several countries praised Australia’s decision to reject investor-state dispute provisions in the TPP. “We are united in our view that the foreign investor protections included in some recent Free Trade Agreements (FTA) and Bilateral Investment Treaties (BIT) and their enforcement through Investor-State arbitration should not be replicated in the TPP,” they wrote.

Other stakeholders urged Kirk to make the TPP more open and transparent. “Our first and most important suggestion is to immediately begin a policy of releasing to the public the kind of reports on U.S. positions and proposals on intellectual property matters that are currently given only to Industry Trade Advisory Committee members under confidentiality agreements,” noted a May 9 letter from academics in the U.S., Canada and other TPP countries. They highlighted provisions in BITs and FTAs that affect domestic rules on transparency. “Our concerns flow from the now-established observation that ‘trade’ agreements no longer focus exclusively, or perhaps even predominantly, on the regulation of trade,” they wrote.

The heads of 33 industry trade associations wrote to President Obama May 8, urging the U.S. to seek strong IPR protections in any TPP deal. “While the benefits of strong IP protections and enforcement are widely supported throughout the United States and safeguarded in our Constitution and laws, such protections are at serious risk in the ongoing TPP negotiations,” they argued. “Some seek to enshrine low standards of protection, with limited enforcement, in the final TPP agreement, arguing that U.S. proposals would be harmful and could undermine other

interests,” the letter said. “The strong IP protections proposed by the U.S. government in the TPP negotiations do not represent, as some suggest, a threat to public health, the development and expansion of the Internet or rights of freedom of speech, but rather a much-needed response to increasingly sophisticated threats to IP protection throughout the world,” it declared.

Non-government organizations and unions say they want the TPP to include the May 10, 2007, agreement between Democrats and the Bush administration. The May 10th deal was intended to add safeguards on labor, environment and access to medicines in developing countries to free trade agreements (FTAs) being negotiated at the time with Peru, Panama, Colombia and South Korea.

“Certainly our hope in the labor movement is that the May 10th is a building block, and that we can take out the loopholes and the lack of clarity and strengthen that so that we can really have a tool we can use,” said Thea Lee, AFL-CIO deputy chief of staff, at a May 10 Democratic-sponsored event. “In terms of the labor rights language in the TPP, it seems like the TPP will move forward, will build on the May 10th language, but in fairly small ways,” she said.

Administration Opposes Changes to Lacey Act

Despite widespread complaints from retailers and the music community, Obama administration officials told a House hearing May 8 that they oppose legislation (H.R. 3210 and H.R. 4171) that would amend the Lacey Act to reduce its administrative burdens on importers and legal liability for customers. “The Department of the Interior has serious concerns with each of these bills,” Eileen Sobeck, Interior’s deputy assistant secretary for fish and wildlife and parks, told the Committee on Natural Resources’ fisheries subcommittee.

“H.R. 3210 would weaken the plant protection provisions of the Lacey Act. H.R. 4171 would remove essential authorities in the Lacey Act, one of the most important and effective conservation laws in the world and in doing so, undercut legal trade in wildlife and plants,” she said in her prepared testimony.

H. R. 3210 would exempt any plant or finished plant product imported or completed before May 22, 2008, from the law, limit its declaration requirements and provide an “innocent owner” defense to individuals. H.R. 4171 and its Senate companion, S. 2062, would remove all references to foreign laws in the act and reduce its penalty provisions.

In testimony on behalf of retailers and importers, Laurie Everill, customs compliance manager for IKEA-North America, urged Congress to streamline declaration and due process requirements. “Congress should clarify that the Lacey Act Amendments do not apply to antiques and other products containing wood or plant material harvested or manufactured prior to May 22, 2008,” her testimony said. Jeffrey Baxter, also known as Skunk Baxter, a former guitarist for Steely Dan and the Doobie Brothers, testified for musicians. “Under the current language of the Lacey Act, questionable wood and wood products are treated as contraband, in the same way that cocaine and marijuana are,” he said in his testimony. “This strict liability treatment of musical instruments and other wood products can generate serious liability for their owners, even those with no knowledge or reason to know of the product’s questionable past,” he said.

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TRADE FIGURES: Trade is returning to pre-recession levels, according to trade figures Commerce released May 10. U.S. goods exports in March rose 6.5% from March 2011 to record \$132.6 billion. Services exports reached new record of \$54.1 billion, 9.3% rise from year ago. Goods imports also hit record at \$200.3 billion, 8% increase from last March. Services imports were highest on record at \$38.3 billion, up 10% from March 2011. Merchandise deficit of \$66.6 billion was highest since October 2008.

TRADE PEOPLE: Veteran trade attorney Melvin S. Schwechter moved to litigation group at Baker Hostetler in Washington May 9 from Dewey & LeBoeuf. He can be reached at 202-861-1559.