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BIS to Drop Option 4 Option for Licensed Exports

The Bureau of Industry and Security (BIS) will eliminate the process that gives firms permission to use post-departure Option 4 reporting in the Automated Export System (AES) for products subject to licensing under the Export Administration Regulations (EAR). The agency could jump the gun on the Census Bureau, which also intends to end the availability of Option 4 for most exports (see **WTTL**, Dec. 12, page 1). A final rule amending Census' Foreign Trade Regulations (FTR) remains tied up in talks with Customs and Board Protection (CBP).

BIS sent letters to 13 companies that use Option 4 for licensed exports to inform them of plans to eliminate EAR Section 758.2(b), which sets the procedures for getting permission from the agency to report post-departure. Firms were asked to comment on the change by March 1, but no comments have come in, Gerry Horner, acting director of the BIS office of technology evaluation, told the BIS Regulations and Procedures Technical Advisory Committee (RAPTAC) March 6.

Horner said BIS is still considering what to do with exports shipped under license exceptions through Option 4. The rules for post-departure reporting will come under Section 30.4 of the FTR. BIS and Census officials provided no response to questions from RAPTAC members about the treatment of encryption products under License Exception ENC or those shipped to Validated End Users. Nick Orsini, chief of Census' foreign trade division, told RAPTAC that the latest draft of the final FTR is being reviewed by Commerce's legal staff. When the final rule is published, Census intends to allow a period of informed compliance before the changes are enforced, he noted. This grace period may be between six and 12 months, he said.

China Finds Few Friends in Congress on CVD Votes

Chinese firms charged with dumping exports in the U.S. or selling at subsidized prices could find few friends in Congress to halt the whirlwind passage of legislation granting Commerce authority to impose antidumping (AD) and countervailing duties (CVD) on the same goods. By unanimous consent, which required no vote, the Senate March 5 passed its version of the legislation (S. 2153), and the House the next day approved an identical bill (H.R. 4105) by a vote of 370 to 39, with only Republicans voting against the measure (see **WTTL**, March 5, page 1). The two bills had bipartisan support in both house and from the White House. "By passing this law, Congress has taken a clear stand against the unfair trade practices that have put countless American jobs in jeopardy," said Vice President Biden in a statement. Even staunch free-traders like House trade subcommittee chairman Kevin Brady (R-Texas) backed the



measure. “If you don't believe the American government should pick winners and losers in the marketplace, you certainly don't support the Chinese government doing the same,” he told the House. “There is an important distinction between the duties that seek to protect companies that are afraid to compete in the marketplace--those I oppose--and in this case duties assessed against those who try to distort the free market through unfair government subsidies,” he added.

Rep. Dana Rohrabacher (R-Calif.), a fierce critic of China, expressed the sentiment of many in Congress about China. “It remains an aggressive, communist dictatorship that supports every rogue enemy of the United States. It is the world's number one proliferator of nuclear technology and the number one abuser of human rights. It is a land of cronyism, corruption, and repression,” he said.

U.S. Asks India for WTO Consultations on Chicken Ban

China isn't the only emerging market country the U.S. has targeted for trade complaints. The U.S. asked India March 6 for consultations at the World Trade Organization (WTO) on its ban on imports of U.S. agricultural products, including poultry, meat and chicken eggs. The consultation process gives the U.S. and India 60 days to resolve the dispute before Washington can ask for the establishment of a WTO dispute-settlement panel to hear the case.

The U.S. disputes India's claim that the ban, which was imposed in February 2007, aims to prevent the spread of avian influenza, arguing that there is no scientific evidence to support that claim. “Over the last few years, the United States has repeatedly asked India to justify its claim that a ban on products from the United States is necessary,” said a release from the U.S. Trade Representative's (USTR) office. “To date, India has not provided valid, scientifically-based justification for the import restrictions,” it stated.

Industry Concerned about Voluntary Disclosures for 600 Series

Exporters of defense items that will be transferred from the U.S. Munitions List (USML) to the Commerce Control List (CCL) are concerned that they may face harsher treatment for voluntary self-disclosures from the BIS than the liberal treatment they receive from State's Directorate of Defense Trade Controls (DDTC) for such reports. State receives more than 1,000 voluntary disclosures annually and reaches few consent agreements, although it often imposes fines in the millions of dollars in those enforcement actions. BIS issued warning letters or took no action for 95% of the 262 VSDs it closed in fiscal 2011. The agency, however, reached 47 administrative settlements and imposed \$8.5 million in penalties.

That is something “we are fretting and thinking about quite a lot,” Mark Menefee, special assistant to BIS Assistant Secretary for Export Enforcement David Mills, told the RAPTAC March 6. “The challenge is to treat the 600 series in the appropriate way relative to national security,” he said.

Menefee noted that most of the disclosures filed with DDTC for 600 series items now on the USML are for exports to U.S. allies and not to “bad guy countries.” “We understand the ratio of voluntary self-disclosures to warning letters that they have historically over at the State Department,” Menefee said. “We are very mindful of that,” he added.

“The good thing is there is a recognition that there ought to be fair treatment to the 600 series, especially if you are going to an allied country and this is in the nature of a technical or inadvertent mistake; if it's of they type of misclassification or harmless pattern,” he said. “The bad part is we're going to apply all of our enforcement resources to policing them. We will be looking very closely at the exports of 600 series exports and reexports. Agents will be looking closely at the Automated Export System. So I predict that the Commerce Department will be finding on its own quite a lot of these violations,” Menefee said.

Obama Trade Agenda: No Surprises, No Timelines

USTR Ron Kirk has laid out the Obama administration's 2012 trade agenda, which sounds similar to agendas of previous years. In nearly identical testimony to the Senate Finance Committee March 7 and House Ways and Means Feb. 29, Kirk identified the administration's key initiatives, but offered no deadlines for achieving them. Among the items on the agenda are:

- **FTAs:** "The U.S.-Korea trade agreement will come into force on March 15," Kirk said. President Obama issued an executive proclamation March 6 implementing the accord. "At the same time, we are working with the governments of Colombia and Panama to fulfill their commitments so that those agreements can take effect as soon as possible," Kirk reported.
- **Trans-Pacific Partnership (TPP):** Kirk said his office is "moving full speed ahead" on TPP. "We are seeking to conclude a landmark TPP agreement this year," he said. "As we consider the entry of additional countries, we will continue to coordinate closely with you to ensure that new participants meet TPP's high standards and address issues of concern.
- **Trade Promotion Authority (TPA):** "As we move toward negotiating outcomes, the administration will explore issues regarding additional trade promotion authority necessary to approve the TPP and future trade agreements," he said.
- **Interagency Trade Enforcement Center:** The center "will challenge even more aggressively the kinds of unfair trade practices we fight fiercely everyday – from China's improper restrictions on industrial raw materials, to improper subsidies by the EU and other partners," Kirk testified. He thanked committee members for passing China CVD legislation. "You stood up for [U.S. firms and workers] by working to pass the GPX bill this week," he said (see story page 1).
- **Russia Permanent-Normal-Trade-Relations Status:** "We must work together to terminate Russia's Jackson-Vanik status as soon as possible. Only then can American firms enjoy the same benefits of Russia's WTO membership as our international competitors," he stated.
- **Third-Country Fabric:** "We are eager to work with Congress to make immediate progress with sub-Saharan Africa and CAFTA countries on issues like third-country fabric and textile and apparel rules of origin," he testified.
- **Services:** At the WTO, "We continue to look for fresh, credible approaches to market-opening trade negotiations in the Doha Round and along with it – including plurilateral options such as services," he said.

At the Finance Committee, Kirk's testimony sparked debate on Russian PNTR and when the White House will seek TPA or fast-track negotiating authority. Chairman Max Baucus (D-Mont.), who just returned from a trip to Russia, said he agrees with the administration on PNTR. "PNTR is a one-way street. Passing PNTR would double U.S. exports to Russia in five years. And we give up nothing in return; not a single U.S. tariff will be reduced as part of this deal," Baucus said. At the hearing, Sen. Ben Cardin (D-Md.) said he will seek an amendment to PNTR legislation to address human rights in Russia. Finance will hold a hearing March 15 for industry witnesses to discuss the benefits of granting Moscow PNTR.

Sen. Orrin Hatch (R-Utah) disagreed with Baucus. "The President would have Congress pass PNTR and ignore Russia's rampant corruption, theft of U.S. intellectual property, poor human rights record, and adversarial foreign policies for a market that amounts to .05 percent of U.S. exports," he said at the opening of the hearing. "Moreover, it is a market we will have access to anyway on an MFN basis under the terms of our 1992 trade treaty once Russia joins the WTO," Hatch added. He also said he was "quite disturbed to hear comments that the president will seek TPA when he decides that he needs it." He said TPA "is not something the president asks for after an agreement is negotiated. TPA establishes the foundation upon which trade agreement negotiations and meaningful consultation takes place."

In response, Kirk said the administration "will engage with Congress on the steps that we would need to implement a new Trade Promotion, not only for TPP but for others. We believe not having TPA right now does not hinder those negotiations. We are proceeding as if we have it." Regarding the timing of Japan, Canada and Mexico joining TPP talks, Kirk said no decision has been made on whether to complete the talks with the first nine TPP partners before bringing other countries into the talks. "I want to be careful, I don't know if we've made a final decision that we have to conclude before we welcome others," he said. "We have not predetermined anything; we very much welcome their expression of interest," he continued.

BIS Set to Propose “Holding” ECCN

BIS is set to propose creation of a new Export Control Classification Number (ECCN) into which it will place uncontrolled emerging technologies and items currently on the U.S. Munitions List (USML) that have no place to go on the Commerce Control List (CCL). The new ECCN OY521 was originally announced as part of the agency’s July 2011 proposal for handling the transfer of items from the USML to the CCL as part of the Obama administration’s export control reform initiative (see **WTTL**, July 18, 2011, page 3).

In addition to emerging technologies, the new ECCN also should make it easier for BIS and the Directorate of Defense Trade Controls to agree on moving items to the CCL under the Commodity Jurisdiction (CJ) process, contends BIS Under Secretary Eric Hirschhorn. Some CJ requests are denied now because there is no specific ECCN into which the USML item can be transferred and there are objections to the item being classified as EAR99, he says.

“By creating this new category, which will be similar to Category XXI on the USML for new technologies, it will allow us in a situation like that to get the item transferred to the Commerce Control List but not to immediately list it as EAR99,” Hirschhorn told the BIS Export Control Forum in Irvine, Calif., Feb. 27. “This would be a temporary holding classification that could be used instead of having to designate items as munitions subject to the jurisdiction of the Department of State,” he said. With OY521, “the agencies continue to examine what controls, if any, it should have; continue to work on whether it should have multilateral controls, in which case we will have to take it to a multilateral regime,” Hirschhorn said.

Export Enforcement and Intelligence Units Launched

The Obama administration formally launched the long-promised Export Enforcement Coordination Center (E2C2) and the Information Triage Unit (ITU) March 7, naming the two officials that will head the office (see **WTTL**, Nov. 21, page 2). Craig C. Healy of Immigration and Customs Enforcement (ICE) will be director of the enforcement center, while Kevin Kurland, who is director of the BIS office of enforcement analysis, will be chief of the ITU. Healy is a Senior Executive Service employee of ICE’s Homeland Security Investigations (HSI) staff, with 24 years of combined federal service, including in the Marine Corps and U.S. Customs Service. Before being assigned to E2C2, he served as the HSI liaison to the ICE deputy director and senior advisor to the HSI executive associate director. E2C2 will also have a deputy director of operations from the FBI and a deputy director of programs from BIS.

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TRADE PROMOTION: House Foreign Affairs Committee approved legislation (H.R. 4041) March 7 to give Commerce secretary more authority to assure interagency support for Trade Promotion Coordinating Committee (TPCC). Measure, sponsored by Rep. Howard Berman (D-Calif.), passed by voice vote. Among several provisions, it would require Commerce secretary to assess foreign markets and redeploy Foreign Commercial Service staff to growing markets and give TPCC greater authority.

EXPORT ENFORCEMENT: Federal magistrate in El Paso, Texas, U.S. District Court ordered detention March 6 of Christopher Tappin, British citizen who was extradited from Great Britain after arrest on 2007 indictment that charged him with exporting batteries for Hawk surface-to-air missiles to Iran. One of his co-defendants, Robert Caldwell, was convicted on related charges in 2007 and sentenced to 20 months in jail. Another, Robert Gibson, pleaded guilty in 2007 and was sentenced to 24 months in prison.

TPP: USTR’s office said latest round of talks on Trans-Pacific Partnership in Melbourne, Australia, which concluded March 8, made “strong headway” toward agreement, with 20 working groups meeting during session. Negotiators also heard presentations from private sector stakeholders. USTR said notable progress was made in talks on regulatory coherence, role small and medium-sized businesses in trade, regional supply linkages and development. Talks also covered trade and investment in innovative products, services, digital technology and state-owned enterprises (see **WTTL**, March 5, page 2).