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BIS to Exclude Fewer ECCNs from STA Exception

The Bureau of Industry and Security (BIS) will exclude fewer Export Control Classification Numbers (ECCNs) than it originally proposed from its final rule establishing License Exception Strategic Trade Authorization (STA), BIS Assistant Secretary Kevin Wolf told the agency's Regulations and Procedures Technical Advisory Committee (RAPTAC) March 15. A near final draft of the rule is circulating interagency, and BIS hopes to publish it in April, he said. In its original proposal, BIS said it would exclude 29 ECCNs from eligibility for STA treatment.

> "A smaller number of ECCNs than were identified in the proposed rule will be carved out from STA and a smaller number of countries will be included," he told RAPTAC. Other changes that will be made in the final rule reflect comments that were submitted, including "things we need to say more clearly and will, with respect to deemed exports and certification and notification obligations," he said.

Wolf also reiterated statements he has made that STA won't create new licensing requirements. "The beauty of an exception is that it is only applicable when a license would be required in the first place," he said. "If you didn't require a license to export item X to country Y yesterday, after STA comes out, you won't either, regardless of the status of the item within the tiering process," Wolf added. He acknowledged that it would have been better to complete the tiering process for the whole Commerce Control List (CCL) before issuing the STA rule, but the agency wanted to move the reform process as quickly as possible. "It's an example of not letting the perfect be the enemy of the good," he said (see **WTTL**, Feb. 21, page 2).

Under STA, BIS is going "to presume for the short-term that everything on the CCL is Tier 2 with the license policy in the group of countries," Wolf said. "Since there is a theoretical possibility that some items will be classified in Tier 1, we will take the most conservative approach and decide which ones should be removed from it," he said. "It's not a rollback, just a maintenance of the status quo," he asserted. Later in 2011, BIS "will identify which ones are going to be Tier 3 with a broader licensing policy," he added.

ITA's "Zeroing" Proposal Draws Divided Views

Not surprisingly, the International Trade Administration's (ITA) proposal to bring the U.S. into compliance with World Trade Organization (WTO) rulings against the use of "zeroing" in administrative reviews of antidumping orders hasn't completely satisfied everyone. Its attempt to retain flexibility to continue to use its zeroing methodology raised concerns among attorneys

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and groups representing respondents in trade cases, while drawing support from petitioning industries and their lawyers. The proposal, published in the Dec. 28 Federal Register, attracted more comments than many recent ITA proposals, with more than 75 comments submitted by law firms, trade associations and foreign governments, including China, Canada, Mexico, Korea, Russia and Thailand (see **WTTL**, Jan. 3, page 1).

> Several comments argued that the issue of zeroing is still being negotiated in the WTO Doha Round talks on trade rules and the U.S. should not change its methodology until after those talks have concluded. Others suggested a change in the zeroing rules should be left to Congress to make in legislation.

Comments in a letter from 14 House members and eight senators also urged ITA to seek a change in WTO rules in the Doha Round. The lawmakers, including Rep. Sander Levin (D-Mich.) and Sen. Charles Schumer (D-N.Y.), called on the agency to alter the proposal to ensure that any "compliance action preserves the maximum flexibility" in implementing the trade law. ITA also should "seek changes by our trading partners to modify their own systems, consistent with what the United States is being asked to do," they wrote.

The new rules should also apply to "sunset" rulings, several comments said. Michael Shor of Arnold and Porter said the change in the rules would have produced a zero dumping margin for one of his clients in a sunset case and a different injury ruling from the International Trade Commission (ITC). Although the ITA proposal did not address sunset cases, "there is no reason to delay the termination of zeroing in department sunset reviews," Shor wrote. Com-ments from the Consuming Industries Trade Action Coalition also called for ending zeroing in sunset cases and for ITA to recalculate margins in sunset reviews immediately. ITA should transmit to ITC "without zeroing the margin likely to exist if an order is revoked for any sunset review initiated after the publication of the proposed rules," the group wrote.

ITA's proposal "appears to stop short of full compliance with the rulings of the WTO Appel-late Body," wrote Donald Cameron of Troutman Sanders. He echoed concerns many comments raised about language in the proposal that said ITA would use average-to-average comparisons "except where the department determines that application of a different comparison method is appropriate." The proposal "gives no indication of the circumstances under which it would use the average-to-transaction or transaction-to-transaction comparison method," he wrote. "More ominously, the department's proposal gives no indication as to whether it intends to zero negative dumping margins when using either of these alternative comparison methods," Cameron said. "The unmistakable implication of these omissions," he wrote, is that ITA "intends to retain the option of zeroing when using these alternative comparison methodologies."

Other comments, however, said it is important for ITA to retain that flexibility to capture the full extent of dumping in each review. "Where appropriate, for example, the department should use a transaction-to-transaction or average-to-transaction calculation methodology, if requested by interested parties," wrote attorneys with King and Spalding. "The department also should retain flexibility to prevent the concealment of dumping in particular proceedings," they added.

William Burkhart, general counsel for Timken, which has been a petitioner in numerous anti-dumping cases against imports of bearings from the European Union (EU) and Japan, urged ITA to withdraw the proposal. "The EU and Japan are pushing for a system that could permit the masking of dumping, as much as 16.87% of sales in at least some circumstances – an astounding request on its face and one that, if granted, will seriously harm domestic producers who compete with dumped foreign goods," he wrote.

China's Ministry of Commerce (MofCom) argued against continued use of zeroing in "targeted dumping" cases. "Arguments that the targeted dumping context presents a distinct situation than what has been considered by the [WTO] Appellate Body are unavailing," it told ITA. The definitions of dumping "do not vary depending upon the situation in which they are being considered," it said. The meaning is the same "in the context of an original investigation, an administrative review, a sunset review or a targeted dumping situation," it argued. Korea,

which won one of the WTO cases against the U.S. use of zeroing, urged ITA to amend the proposal so any duty refunds will cover past cases where the dumping margins were calculated under the old practices. "In that regard, the Korean Government further encourages the department to provide a proper duty refund procedure in relation to such cases which are still within the time limitation for refund request," it wrote. In contrast, the AFL-CIO argued that if ITA implements the proposal, it "must only do so *prospectively* - consistent with U.S. law."

State Proposes to End Licenses for Parts and Components

In response to industry complaints that repair or replacement of defense parts and components should be easier, especially if they were originally exported under an approved license, State has proposed amending the International Traffic in Arms Regulations (ITAR) to "streamline the flow of parts and components and to eliminate redundancy in licensing." The proposed change to ITAR Part 123.28, published in the March 15 Federal Register, would eliminate the require-ment for a license for parts and components for systems approved in a previous license.

> A second proposal would eliminate license requirements under ITAR Part 126 for incorporated parts under certain conditions. "Those conditions include where the end-item would be 'rendered inoperable' by the removal of the defense article, where no technical data for development or production are transferred with the defense article, and where the incorporation of the defense article does not provide (or is not related to) a military application," State explained.

Administration Getting the Message on Trade Agreements

The Obama administration seems to be getting the message that Republicans in Congress are serious about wanting all three pending free trade agreements (FTAs) submitted for their approval before they take up the U.S.-Korea FTA. Deputy U.S. Trade Representative (USTR) Miriam Sapiro told the House Ways and Means Committee's Trade Subcommittee March 17 that "the Obama Administration shares the sense of urgency we have heard from many members of Congress to advance the Colombia FTA." A sign of a quicker pace toward resolving concerns about the Colombia pact was a second round of high-level talks between U.S. and Colombian officials in Washington March 16-17 (see **WTTL**, March 14, page 3).

> Sapiro said increased negotiations would be going on almost around the clock over the next few days. "We are being responsive to those that have asked us to work more quickly. And we're also being responsive to those that have asked us to be sure to identify concrete steps that the Colombian government can take to address the serious concerns we have identified," she said. Sapiro said the outstanding issues include (i) the protection of labor rights; (ii) prevention of violence against labor leaders; and (iii) the prosecution of perpetrators of such violence. She declined to give a specific deadline to the negotiations, but said the administration was working "intensively, quickly and thoughtfully."

Republicans upped the ante on the trade deals three days before Sapiro's testimony. In a letter to Senate Majority Leader Harry Reid (D-Nev.) March 14, 44 GOP senators threatened the confirmation of Obama trade-related appointments. "So important are these deals to our econ-omy and our relations with these key allies in Latin America that, until the president submits both agreements to Congress for approval and commits to signing implementing legislation into law, we will use all the tools at our disposal to force action, including withholding support for any nominee for Commerce Secretary and any trade-related nominees," said the letter.

On the other side of the aisle, House Democrats who oppose the three FTAs sent a 12-page memo to President Obama March 17, listing specific steps Colombia must take to show progress in labor rights. "These are credible, achievable steps Colombia can take in the near term to comply with internationally recognized labor rights; protect unionists and other rights activists

from violence, attacks and threats; and break with its long history of impunity. Anyone familiar with Colombia understands that the magnitude and roots of the challenges it faces cannot be addressed in one or two years, but the measures we describe would clearly show that Colombia has turned the corner and is committed to irrevocable and sustainable change," they wrote.

Core Democrats Still Oppose Korea FTA

The Obama administration's argument that delaying approval of FTAs to get changes that would win support for the pacts from trade critics hasn't convinced a block of Democrats who said March 16 they still oppose the Korean FTA and will work to defeat it. At a press conference, nine House Democrats, who may represent a majority of their caucus, said the accord still doesn't provide adequate protection for labor rights and will permit a large share of Chinese components to be shipped through Korea under the FTA's rules of origin. Rep. Brad Sherman (D-Calif.) also complained that the vague wording in Annex 22-B of the agreement will allow imports into the U.S. of goods made in North Korea in the Kaesong Industrial Complex.

Despite Concerns, Textile Import Rule Made Permanent

In 2005, textile importers got rid of one reporting requirement, but got another one in its place. Now, Customs and Border Protection (CBP) and Treasury have made the interim rule final in the Federal Register March 17. Under the rule, importers no longer have to submit a paper textile declaration with all imports, but they are required to identify the manufacturer of such products through a manufacturer identification code (MID). The original October 2005 interim rule drew over 20 comments opposing the change or suggesting changes to the requirement.

> Critics of the rule said it would significantly increase paperwork and costs for (1) consolidated shipments from multiple manufacturers and countries; (2) collecting tracking, reporting and storing data; (3) reprogramming exporter and importer systems; (4) shipments that are refused entry by CBP due to incorrect MID; and (5) segregating fungible goods that previously were commingled in inventory without reference to the manufacturer.

CBP defended the rule. "The elimination of the paper textile declaration has allowed importers to complete paperless entry filing, thereby facilitating trade in textiles and wearing apparel," it said. "CBP recognizes that expenditures may be necessary to comply with the new rule with respect to fungible goods that are commingled in inventory. But, consistent with common business practices, many companies already know the identity of their suppliers/producers and the quantity of products purchased from each for accounts payable purposes," it argued.

* * * Briefs * * *

FCPA: IBM has agreed to pay $10 million to settle FCPA charges of improper cash payments, gifts, travel and entertainment to government officials in South Korea and China from 1998 through 2009, SEC announced March 18. The case involved joint venture in Korea in which IBM held majority interest and two wholly owned IBM subsidiaries in China. IBM neither admitted or denied the SEC's allegations.

EXPORT ENFORCEMENT: TW Metals, Inc., of Exton, Pa. will pay $575,000 fine to settle allegations that it exported titanium alloy and aluminum bar to China and Israel from April 2004 to August 2007 without required licenses, BIS announced March 15. "TW Metals voluntarily disclosed the violations and cooperated fully in the investigation," said Deputy Assistant Secretary for Export Enforcement Don Salo.

LIBYA**:** Treasury March 15 froze assets of Libyan Foreign Minister Moussa Koussa and 16 state-owned companies, including National Oil Corporation, Afriqiyah Airways, four investment companies, and nine banks (see **WTTL**, March 7, page 1). Also, on March 9, OFAC issued General License No. 3, authorizing using blocked Libyan funds for certain legal services for blocked entities, provided all receipts and reimbursements are specifically licensed.