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Export Reforms Address Obama's Regulatory Review, Wolf Says

The Bureau of Industry and Security (BIS) is not likely to participate in the federal regulatory review that President Obama has ordered, Assistant Secretary for Export Administration Kevin Wolf told the agency's Sensors and Instrumentation Technical Advisory Committee (SITAC) Jan. 25. While admitting he has not seen the specifics of the order or how it would apply to national security functions, Wolf said the export control reform initiative that has been underway for over a year has already been achieving the goals of the new regulatory review.

On Jan. 18, Obama issued an Executive Order to all federal agencies requiring them "to design cost-effective, evidence-based regulations that are compatible with economic growth, job creation, and competitiveness." The order "really doesn't matter, because a lot of what we've been doing all along is consistent with that notice," Wolf said.

"It's the same sort of approach and mindset and structure of removing redundant controls consistent with national security obligations and making things more clear," he told SITAC. "So whether as a matter of law it does or doesn't apply to BIS and export controls, I don't know, but largely it's a moot point because it is what we've been doing for over a year," he said.

Census Proposes Restrictions on Postdeparture AES Filing

Among 111 changes the Census Bureau proposed to the Foreign Trade Regulations (FTR) in the Jan. 21 Federal Register are new restrictions on the availability of the postdeparture filing option in the Automated Export System (AES). The proposal marks the end of a nearly five-year fight between Census and Customs and Border Protection (CBP) over the availability of the postdeparture filing option and reflects a compromise between Census which wanted to save the option and CBP's call for its total elimination (see **WTTL**, April 19, 2010, page 1).

As proposed, the option would be available only for the export of about 125 commodities, ranging from food and plants such as wheat, straw and flowers to materials such as coal, granite and iron. The list of eligible items has been posted on the Census.gov website. Another proposed change would shorten the time for filing postdeparture information to five days from 10 days. According to the website, all exporters currently eligible to use so-called Option 4 will have to reapply once the FTR changes become final. "At the time of publication, companies that are currently approved for postdeparture reporting privileges, who are interested in retaining those privileges, will have to reapply with no exceptions," Census says. "Only U.S.



Principal Parties in Interest (USPPI) can be granted the privilege to report postdeparture. Furthermore, only USPPIs that ship approved commodities can be granted the privilege to report postdeparture,” it explains. “For a USPPI to be approved for postdeparture reporting, it must meet the revised postdeparture criteria (i.e. reporting history, compliance, ship approved products, etc.) which will be available on the Postdeparture Filing Application,” Census states.

The many proposed changes to the FTR try to address issues that have arisen since the rules were initially published and AES became mandatory, as well as from government and industry experience with the AES process. One complaint that CBP port officials have raised and issued violation notices for is the entry of the wrong port of export on Electronic Export Information (EEI) often due to last-minute port switches by carriers.

The proposal would clarify that “when a carrier identifies that a portion of the goods covered by a single EEI transaction has not been exported on the intended conveyance, the carrier shall notify the U.S. Customs and Border Protection Port Director at the Port of exit immediately and amend the manifest.” Directions for voluntary self-disclosures would add a requirement to include a description of any mitigating circumstances and corrective measures taken.

Democrats Prepare Way to Back Colombia Trade Pact

Notwithstanding President Obama’s vague statement during his State of the Union address Jan. 25 in support of free trade agreements (FTAs) with Panama and Colombia, House and Senate Democrats appear to be laying the groundwork that will allow them to do an about-face in their opposition to the deals and get ready to support both pacts. All they seem to be demanding are enough modifications to show that the delay in voting on the agreements made the FTAs better, just as the revisions to the U.S.-Korean FTA made that accord acceptable to them.

In his speech, Obama called on Congress to pass the Korean FTA “as soon as possible.” With reports from Korea indicating that a final legal text has been reached, that vote could come this spring. Just as the revised Korean deal kept his promise to “keep faith with American workers and promote American jobs,” Obama said “that’s what I intend to do as we pursue agreements with Panama and Colombia and continue our Asia Pacific and global trade talks.”

The softening of Democratic opposition to the Colombia FTA was seen in a statement by Rep. Sander Levin (D-Mich.), ranking Democrat on the House Ways and Means Committee, during a Jan. 25 committee hearing on the Korean FTA. Levin, who visited Colombia earlier in January, said Bogota is paying more attention to the issues that have stood in the way of support for the deal. “Throughout my discussions, there seemed to be wide agreement that the new Colombian government was expressing a different approach than its predecessor on these critical issues. I believe there is now an opportunity for the two governments to work together mutually to achieve real progress on the ground,” Levin said.

In the Senate, Finance Committee Chairman Max Baucus (D-Mont.), who will make his own pilgrimage to Colombia the week of Feb. 20, criticized Obama for not making a stronger statement on the Panama and Colombia deals. “Our free trade agreements with Colombia and Panama were signed more than three and a half years ago, so it’s extremely disappointing the president did not lay out a timeline for submitting them to Congress,” Baucus said in a statement. “To help Americans export their goods and services and create jobs here at home, it is time to quickly resolve any outstanding issues and send these agreements to Congress as soon as possible,” he added.

Meanwhile, Vice President Biden met Jan. 28 with Colombia’s Vice President Angelino Garzon. “Vice President Biden expressed the administration’s commitment to working closely with the government of Colombia and other key stakeholders on the successful conclusion of the U.S.-Colombia Free Trade Agreement,” a White House statement said after the meeting. “Vice

President Biden commended Vice President Garzon for his leadership on issues related to labor and human rights and underscored the administration's support for key reforms being pursued by President Santos and his administration," it said.

Commerce Eases Restrictions on Exports to India

As President Obama promised Indian Prime Minister Singh during his November visit to India, the Bureau of Industry and Security (BIS) removed nine Indian facilities from the Entity List and changed the country's eligibility for certain license exceptions in a notice in the Jan. 24 Federal Register (see **WTTL**, Nov. 15, page 4). To make India eligible for the license exceptions, BIS removed it from Country Groups D:2, D:3 and D:4. BIS said this is the first of a series of new rules that will implement the agreements between Obama and Singh.

BIS added India to Country Group A:2, "as an adherent to the Missile Technology Control Regime (MTCR), with countries that are members of that regime," BIS noted. "Under section 742.5 of the EAR [Export Administration Regulations], a license is still required for export and reexport of items controlled for missile technology (MT) reasons to all destinations except Canada," BIS added.

BIS removed the following organizations from the Entity List: Bharat Dynamics Limited (BDL); all subordinates of India's Defense Research and Development Organization (DRDO), including Armament Research and Development Establishment (ARDE); Defense Research and Development Lab (DRDL); Missile Research and Development Complex; and Solid State Physics Laboratory. Also removed were all Indian Space Research Organization (ISRO) subordinate entities, including Liquid Propulsion Systems Center; Solid Propellant Space Booster Plant (SPROB); Sriharikota Space Center (SHAR); and Vikram Sarabhai Space Center (VSSC).

CIT Issues First-Ever Ruling on Country-of-Origin Determination

In the first case ever brought to the Court of International Trade (CIT) under the country-of-origin provisions of Section 1581(e) of the Trade Agreements Act (TAA) of 1979, CIT Judge Gregory Carman ruled Jan. 24 that Customs and Border Protection (CBP) determinations under those provisions are subject to review by the CIT. He remanded the case to Customs to make a country-of-origin determination on whether refurbished toner cartridges made by Nukote and imported by Xerox are eligible for procurement under the Buy American Act (BAA).

Xerox had challenged a Customs' ruling letter that asserted the cartridges had not undergone sufficient substantial transformation to qualify as U.S. goods under the BAA but did not identify their country of origin. "Customs must identify the country of origin of Nukote's printer cartridges for purposes of government procurement, or, alternatively, make an explicit final determination that the country of origin cannot be determined," Carman ordered (slip op. 11-8). He rejected the government's motion to dismiss the suit.

"While the Buy American Act remains a significant part of the government procurement landscape, its effect was dramatically altered by the Trade Agreements Act of 1979, which permits the domestic preference of the BAA to be waived under certain conditions," Carman noted. Under the TAA, the U.S. government can buy qualifying imports under the BAA if they are from countries that are signatories to the World Trade Organization's (WTO) Government Procurement Agreement (GPA) and identified as "designated foreign countries and instrumentalities (DFCI). The Act requires Customs to issue "advisory rulings and final determinations on whether . . . an article is or would be a product of a foreign country."

CBP's "qualms about a potential judgment lacking meaning stem from a radical misapprehension of the state of government procurement law," Carman wrote. "A ruling that a particular article has been substantially transformed in the U.S. has great potential value. Nukote and

Xerox are by no means the only parties to have seen economic value in this type of ruling. The Court's review of relevant legal databases reveals that no less than half of the Section 305(b)(1) final determinations issued by Customs over the last 30 plus years have dealt squarely with the issue of whether a given article was substantially transformed in the United States. Therefore, hearing no persuasive argument to the contrary, the Court finds that this case presents a justiciable controversy," he ruled.

Thermal Imaging Firms to Test STA Foreign Availability Policy

Thermal-imaging product firms may test how serious BIS is about considering foreign availability in determining which products will be eligible for License Exception Strategic Trade Authorization (STA) and in placing controlled goods into the proposed three-tier structure for the Commodity Classification List (CCL). Most thermal-imaging products in CCL Category 6 -- and particularly cameras in Export Control Classification Number (ECCN) 6A003 -- have been identified among 29 ECCNs that may not be eligible for STA and are likely to be placed in Tier 1, the most stringent tier of the proposed new system (see **WTTL**, Jan. 17, page 1).

At the Jan. 25 meeting of the BIS Sensors and Instrumentation Technical Advisory Committee (SITAC), members discussed filing comments with BIS on the STA proposal to remind the agency that it had conducted a foreign availability assessment for thermal-imaging cameras in 2009 after the SITAC had submitted a certification claiming foreign availability of these items, including in China. The BIS review led to the revision of the Export Administration Regulations (EAR) and the liberalization of controls on uncooled thermal imaging cameras (UTIC).

"I would absolutely encourage you to say, 'By the way, U.S. government, the SITAC put together this foreign availability information' and get that into the record," BIS Assistant Secretary Kevin Wolf told the committee. He advised the group to take into account the experience they have had dealing with the government on commodity jurisdiction and commodity classification requests. "I would take into account that long history of your dealings with the government, because the same people will be thinking about this," Wolf noted. "You know what they think is significant; what they think should be controlled," he added. Wolf also said he is considering splitting some ECCNs into different tiers. "We may want to split out a particular technical parameter or characteristic [and say] that anything above this level or capability would be Tier 1 item and anything that doesn't wouldn't," he explained.

* * * Briefs * * *

EXPORT LICENSING: Export license processing times for CCL and USML items have slowed due to delays at DTSA, industry and government sources say. "DoD is really backlogged big time," one industry executive said. Part of blame is DTSA staff work on export control reform initiative, a State source said.

OFAC: Agency issued new guidance Jan. 21 to clarify its use of "weak aliases" (AKAs) on Special Designated Nationals (SDN) list in light of potential false positives. "As a general matter, though, OFAC does not expect that persons will screen for weak AKAs, but expects that such AKAs may be used to help determine whether a 'hit' arising from other information is accurate," it advises.

NME ANTIDUMPING: ITA in Jan. 27 Federal Register proposed amending antidumping policy to change methodology used since 1996 in case involving Russia. It proposes to calculate margins to reduce export price or constructed export price in cases involving China and Vietnam by amount of export tax, duty or other charge. "The present-day Chinese and Vietnamese economies are sufficiently dissimilar from Soviet-style economies that the Department can determine whether the Chinese or Vietnamese government have bestowed an identifiable and measurable benefit upon a producer, and whether the benefit is specific, including certain measures related to taxation," ITA explained.

EXECUTIVE NOMINATIONS: With new Congress, President Obama resubmitted nominations Jan. 18 of several officials whose nominations died in last Congress. Among renewed nominees are Eric Hirschhorn to be BIS under secretary; Alan Bersin to be CBP commissioner; Michael Punke to be Deputy USTR and Islam Siddiqui to be USTR's chief agricultural negotiator (see **WTTL**, Jan. 3, page 4).