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New Lawmakers Will Need Education on Export Controls

With as many as 85 new members entering the House in January, including some 60 Republicans who will fill formerly Democratic seats, and a half dozen joining the Senate following the Nov. 2 elections, one of the biggest challenges facing the Obama administration's effort to enact export control reforms will be educating these new lawmakers on the basics of export controls. Even before the election, expertise about export controls was in short supply among members and their staffs, with few having worked on the issue in the last decade.

> More important than the number of new Republicans coming to Congress is the change in leadership in the two key committees with jurisdiction over the export control legislation. The GOP sweep in the House means the chairmanship of the Foreign Affairs Committee will switch to Rep. Ileana Ros-Lehtinen (R-Fla.) from Rep. Howard Berman (D-Calif.). In the Senate, it is retirement rather than a change in the majority that will see departing Banking Committee Chairman Chris Dodd (D-Conn.) succeeded by Sen. Tim Johnson (D-S.D.).

Havana-born Ros-Lehtinen, who represents part of Miami, has been a staunch supporter of sanctions on Cuba and Iran, making it more difficult for any legislation to ease the embargo on Cuba. Berman had been working on a major rewrite of the Export Administration Act, but the delay in getting it introduced may have doomed its chances even if introduced next year. The administration's export control reforms will depend on enactment of major legislation to amend export control statutes, and it may face a tougher time convincing lawmakers to back its goals.

But some observers are more optimistic about such legislation, claiming export controls are a nonpartisan issue where the White House and GOP could demonstrate bipartisanship and both could tout reform as a way to increase exports and jobs. "Republicans have said that they are looking for areas of law and policy where they can agree with the administration during the new Congress," one attorney told WTTL. "Although there are differences of opinion on export control issues, it is not a partisan issue," he said. The administration's plans include "reducing unnecessary and outdated regulations, and, as a result, improving the competitiveness of U.S. industry -- all primary objectives of both Republicans and Democrats," he added.

GOP Control of House Won't Guarantee More Trade Legislation

The overwhelming election victories Nov. 2 that will give Republicans control of the House in 2011 don't necessarily mean trade legislation will move easily and quickly through Congress,

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some Washington observers caution. While incoming Speaker of the House John Boehner (R-Ohio), Ways and Means Committee Chairman Dave Camp (R-Mich.) and trade subcommittee chairman Kevin Brady (R-Texas) have expressed strong support for approval of pending free trade agreements (FTAs), uncertainty remains about the trade views of newly elected GOP members, especially those backed by the tea party, and whether President Obama will send Congress any other trade pacts besides the U.S.-Korean FTA (see related story page 3). While some observers say they expect the Panama FTA to move forward, they are still skeptical about the chances for White House action on the Colombia FTA.

> With Boehner taking over leadership of the House, the biggest change will be his willingness to allow any FTA to get to the floor for a vote. Outgoing Speaker Nancy Pelosi (D-Calif.) has refused to allow a vote on these pacts even after the Bush administration sent up the Colombia accord for approval. If trade bills can move in the House, their approval is likely in the Senate where Democrats will stay in charge and Sen. Max Baucus (D-Mont.) remains Finance Committee chairman. One change, however, will see Sen. Orrin Hatch (R-Utah) moving into the ranking Republican chair, which was held by Sen. Charles Grassley (R-Iowa).

The business community still harbors hope that President Obama will follow the model of President Clinton, who campaigned against trade in his election bid but became a strong supporter of legislation to enact NAFTA, the Uruguay Round agreements and China's accession to the World Trade Organization. "There is a history of cooperation of Democratic presidents and a Republican Congress, as Bill Clinton demonstrated," says Scott Miller, director of global trade policy for Procter & Gamble. "It will take courage on the part of the president. The president will have to disappoint parts of his base to advance anything, including the Korea FTA," Miller adds.

Even before the new Congress meets in January, current lawmakers may face votes on several trade bills in the lame-duck session that will start Nov. 15 and could last until Christmas, with time off during Thanksgiving week. The trade agenda could include votes on extension of the Generalized System of Preferences and the Andean Trade Preferences Act, which expire at the end of 2010. Also being considered is a vote on a new Miscellaneous Tariff Bill (MTB) that would include duty suspensions that didn't get included in the MTB enacted in July.

Expanded benefits under the Trade Adjustment Assistance program that passed in early 2009 also expire in January and will be need legislation to get renewed. A Customs reauthorization bill is also on the list of possible trade measures. With the lame-duck session likely to be consumed by debate over extension of the Bush tax cuts, several business tax breaks and a broad appropriations bill, action on these trade measures could fall by the wayside. If they do, they will all be back on the agenda for the new Congress in 2011. China currency legislation also remains on deck, and, down the road, renewal of the fast-track negotiating authority to complete the Doha Round and Obama's single trade initiative, a Trans-Pacific Partnership trade pact.

Report Finds Nations Resisting Protectionist Measures

Governments around the world are continuing to resist pressure to impose protectionist measures to counter the impact of the global economic slowdown, according to a Nov. 4 report from three international organizations. The report, issued jointly by the World Trade Organization (WTO), Organization for Economic Cooperation and Development (OECD) and the U.N. Council on Trade and Development (UNCTAD), warns, however, that the threat of new measures remains because of the persistence of high unemployment and tension over exchange rates.

"In aggregate there has been a slight decline in the number of these measures and in their trade coverage relative to the levels registered earlier this year," said the report, which is part of a monitoring mechanism set up during the recession to track potential protectionist moves. "Also, there has been a marked increase in the number of new measures introduced to facilitate trade, especially by reducing or temporarily exempting import tariffs and by streamlining customs procedures," the report said. "Although the record so far is reasonably satisfactory, there is a need for increased vigilance in the coming months to three potential dangers," said the three organizations. The protectionist pressures could still come from persistent high unemployment in many countries, macroeconomic imbalances between them, and tensions over exchange rates. "The stability of the trading system will be put at considerable risk if currencies move in what some perceive as the pursuit of an exchange-rate-induced comparative advantage," the report said. It also warned about the danger of the steady accumulation of distortive trade and investment measures and the difficulty in unwinding from those temporary measures.

Ford Mounts Late Campaign Push against Korean Deal

Just as negotiations between the U.S. and Korea intensified ahead of President Obama's arrival in Seoul Nov. 11, Ford Motor Company stepped up its opposition to U.S.-Korean Free Trade Agreement (FTA) with a newspaper advertising campaign highlighting the lack of access that foreign autos have in the Korean market (see **WTTL**, Nov. 1, page 3). Along with the ads, which feature a headline saying, "For Every 52 Cars Korea Ships Here, the U.S. Can Only Export One There," Ford has set up a website detailing Korean barriers to foreign car imports.

> Meanwhile talks between the U.S. and Korea to find a way to fix complaints about the FTA have intensified. Negotiators are under pressure to find a deal before President Obama arrives in Korea for the G-20 meeting Nov. 11. Assistant U.S. Trade Representative (USTR) for Korea, Japan, and APEC Affairs Wendy Cutler and Korean Deputy Minister for Trade Choi Seok-young were scheduled to meet in Seoul Nov. 4-5. USTR Ron Kirk and Korean Minister for Trade Kim Jong-hoon plan to meet in Seoul Nov. 8-9.

U.S. Extending Reach of FCPA to Non-Registered Foreign Firms

The far reach of the Foreign Corrupt Practices Act (FCPA) to foreign companies that are not registered stock issuers in the U.S. is shown in a six-part settlement Justice and the Securities and Exchange Commission (SEC) reached Nov. 4 with major oil production and service companies for the alleged bribery of government officials in ten countries. One of the targets was Panalpina World Transport (PWT), a Swiss freight-forwarding and logistics company.

> "The bribes were paid by Panalpina to obtain preferential customs, duties, and import treatment for its customers in connection with international freight shipments," an SEC release said. "Although PWT, Panalpina, and the Panalpina Group are not issuers for purposes of the FCPA, many of their customers are. By paying bribes on behalf of issuers, Panalpina both violated and aided and abetted violations of the FCPA," the SEC said.

In its settlement, PWT admitted that between 2002 and 2007, it paid thousands of bribes totaling at least $27 million to foreign officials in at least seven countries, including Angola, Azerbaijan, Brazil, Kazakhstan, Nigeria, Russia and Turkmenistan. At the same time, Panalpina's customers, including Shell Nigeria Exploration and Production Company Ltd. (SNEPCO), Transocean Inc. and Tidewater Marine International Inc., admitted they "approved of or condoned the payment of bribes on their behalf in Nigeria and falsely recorded the bribe payments made on their behalf as legitimate business expenses in their corporate books, records and accounts," Justice said. In addition, Pride International Inc., an offshore drilling company in Houston, Texas, admitted that it paid a total of approximately $800,000 in bribes directly and indirectly to government officials in Venezuela, India and Mexico (see **WTTL**, July 26, page 4).

Under the specific settlements of each company: Panalpina agreed to pay a $70.5 million criminal penalty and $11.3 million in disgorgement; SNEPCO, a $30 million criminal fine and $18.1 million in disgorgement; Transocean, a $13.44 million criminal penalty and $7.2 million in disgorgement; Tidewater, a $7.35 million criminal fine and $8.3 million in disgorgement; and Pride, a $32.62 million fine and $23.5 million in disgorgement. Noble Corporation, a Swiss company with its main U.S. office in Sugar Land, Texas, entered into a non-prosecution agreement for charges involving a Nigerian freight forwarding agent, agreeing to pay $2.59 million to Justice and $5.5 million to the SEC.

ISTAC Finds Technology Is Outpacing Terminology

The terminology in the Export Administration Regulations (EAR) related to technology needs to be revisited, contend members of the Bureau of Industry and Security's (BIS) Information Systems Technical Advisory Committee (ISTAC). At ISTAC's meeting Nov. 3, members noted two places in the EAR where technology has advanced beyond the terminology in the rules or where the technology that was originally targeted has become commonplace and widely available.

> The first case involves free, open-source software and its relationship to mass-market software and the Obama administration's effort to allow the export of communications software that would let dissidents in totalitarian countries connect with the outside world. ISTAC members questioned how current rules apply to the Tor Project, a free and open-source, encrypted network that is available in 80 countries and used to surf the Internet anonymously. Users include the U.S. military, human rights activists and domestic violence victims. Tor software is currently classified under Export Control Classification Number (ECCN) 5D002 and can ship anywhere except Iran, North Korea, Syria, Sudan and Cuba.

In March 2010, Treasury's Office of Foreign Assets Control (OFAC) granted permission for the export of mass-market software (ECCN 5D992) to Iran and Sudan. Under the EAR, however, mass market software is generally defined as products available to the public by being "sold" without restriction from stock through electronic transactions. Despite this rule and changes in the EAR encryption regulations, ISTAC members said the rules covering free software over the Internet still aren't clear and will need to be addressed in the export control reform effort.

According to Tor Executive Director Andrew Lewman, OFAC is still waiting for a decision from BIS and State as to whether his free, open-source software should be included under the license exception for mass-market software. "A streamlined process would be better," he told WTTL.

Another area of debate is the idea of "fault-tolerant" computers, which are covered under ECCN 4A003.a. ISTAC Co-Chairman Henry Brandt of IBM presented a recommendation from an ISTAC working group and said, "It's time to delete this entry." Brandt said, "It's a very old control, really ambiguous, and the techniques are commonplace." The EAR decontrol note includes equipment that utilizes "Error detection or correction algorithms in 'main storage'." Among other things, almost all technology that is now produced involves error detection and correction, Brandt said. "We're not sure what it used to control; we're not sure what it presently controls; we're not sure what it ought to control; it may be a completely empty box as worded; and related controls are especially unclear," Brandt said.

* * * Briefs * * *

<ins>DOHA ROUND</ins>: U.S. industry delegation returning from Geneva Nov. 2 said they are encouraged by informal talks going on and "reempowerment of ambassadors" to WTO.

<ins>ITC</ins>: GAO report Oct. 29 (GAO-11-5) criticized ITC's failure to name inspector general before 2010 and provide adequate budgetary resources and staff for office to conduct independent audits and investigations.

<ins>VEU</ins>: BIS in Nov. 1 Federal Register removed Cension Semiconductor Manufacturing Corporation facility from <ins>Semiconductor Manufacturing International Corporation's</ins> (SMIC) list of approved VEU facilities in PRC due to a material change at SMIC. "This amendment is not the result of prohibited activities by Cension or SMIC," BIS said. "SMIC remains a qualified participant in the VEU program and exports, reexports and transfers (in-country) of the items controlled under the export control classification numbers listed in SMIC's entry in Supplement No. 7 to Part 748 of the EAR to the SMIC facilities listed in the same part may continue to be made under Authorization VEU," it stated.