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## Obama Addresses Export Reforms at BIS Conference

As the first president to speak about export controls to a group of exporters, President Obama emphasized his commitment to his long-range export control reform plans Aug. 31 in a video message to the Bureau of Industry and Security's (BIS) annual Update conference. Obama revealed nothing that other administration officials haven't said in the last six months about the plans, but his appearance underscored the importance of the reform program at the highest level of the White House. While Obama in his two minute and 53 second address just repeated the four main points of the plan – the four singularities – he linked it to the administration's broader agenda to improve the economy and create jobs through increased exports.

Obama described the goal of having a single, tiered, positive list that will be created through the merger of the U.S. Munitions List (USML) and the Commerce Control List (CCL). The single list will be “one which will allow us to build higher walls around the export of our most sensitive items while allowing the export of less critical ones under less restrictive conditions,” he said. There will also be a single set of licensing policies “that will apply to each tier of control, bringing clarity and consistency across our system,” he added (see story page 4).

Obama said he will sign an Executive Order creating an Export Enforcement Coordination Center “to coordinate and strengthen our enforcement efforts – and eliminate gaps and duplication – across all relevant departments and agencies.” Finally, Obama noted interagency agreement to use a single information technology system, “making it easier for exporters to seek licenses and ensuring that the government has the full information needed to make informed decisions.”

“There is still more work to be done,” Obama admitted. “All of this represents significant progress. And as we implement these reforms and take further steps – including working to create a single licensing agency – I look forward to working with both Congress and the export control community to ensure their success,” he said.

## Legislation Considered to Sanction False Trade Filings

As part of a broad list of changes Commerce says it wants to make to antidumping (AD) and countervailing duty (CVD) rules for nonmarket economies (NME), the department is considering the need for new legislation to give it the power to impose administrative sanctions on lawyers and parties that file inaccurate or fraudulent data (see story page 2). “We don't have a special set of powers unique to the department, and there have been proposals to give the



department such powers,” a senior Commerce official told WTTL in an exclusive interview. “That’s what we are looking at -- what would be required?” he said. While the International Trade Administration (ITA) has authority to sanction parties that violate administrative protective orders, there is no similar power to deal with falsely certified submissions. “It’s not clear what our power would be to do that; it’s one of the things we are looking at,” the official said. Currently, ITA has the choice of using “facts available” if submissions can’t be verified or seeking criminal prosecution for parties making a false statement to the government.

The official confirmed that ITA is concerned about inaccurate data in China cases. “What we have now is a situation where a lot of firms participating in these cases are subcontracting out portions of the work to Chinese subcontractors who are issuing certifications, some of which have turned out to be not entirely reliable,” the official told WTTL. “We certainly have found instances where companies, counsels, etc., simply photo copy certifications and just attach them without regard to the requirement that they have actually read and can certify that information being provided is correct,” he said (see WTTL, Aug. 23, page 1).

“When you approach this problem and try to work out a solution, you have to be very careful that you are not placing unfair burdens on any of the U.S. counsel involved,” the official stated. “So, it’s a delicate trade-off. It’s a difficult problem for the department and it’s just something we are working on,” he added. “I don’t think we can give you any clear direction at this point on how exactly it will come out,” he told WTTL.

## Commerce Aims to Toughen Trade Remedy Rules for NMEs

If Commerce thought the floating of 14 proposals to toughen antidumping (AD) and countervailing duty (CVD) rules for imports from nonmarket economies (NME) such as China could deflect criticism of its decision not to treat China’s currency policy as a countervailable subsidy, it was mistaken. The Aug. 26 proposals for changing AD/CVD rules brought only mild praise from members of Congress, most of whom were still on vacation, but its Aug. 31 announcement on the currency issue drew strong complaints from lawmakers (see story page 3).

As expected the proposals, which would raise hurdles for Chinese imports hit by AD/CVD complaints, sparked criticism from lawyers who represent Chinese respondents and importers and praise from those who represent petitioners. It was not clear, however, how much the proposals, if implemented, would actually raise duties on Chinese imports, since current rules already produce high margins. Several changes appear aimed at discouraging Chinese companies from seeking to be considered market-oriented enterprises or claiming market-priced inputs.

Commerce officials claim many of the proposals merely codify or clarify policies currently in place. They also stress that no specific decisions have been made on how to change some of the rules and they will seek public comments on the changes whether the revisions involve trade remedy regulations or just policy statements. They say at least one change, the use of random sampling to select respondents, could help Chinese exporters who are now excluded from getting a separate duty rate because of ITA’s limited resources. For now, the list of proposals is a sketchy outline of what the department is considering with no specific details.

Commerce said half the proposals could be implemented through administrative actions, such as policy statements or an ITA Policy Bulletin while the other half would likely require changes in its regulations. The department is also considering whether it will need legislation to impose sanctions on parties that file false information with ITA in cases (see story page 1). One set of changes would seek to amend the treatment of labor costs in surrogate countries that are used to establish costs of production in lieu of costs in the NME. These revisions would take into account benefits and wages paid to workers in surrogate countries while also addressing an appellate court ruling in *Dorbest*, which threw out the department’s previous method of calculating wages (see WTTL, May 17, page 1). “Whatever we do will have to be consistent

with *Dorbest*. This will be a basic restraint on us,” one senior Commerce official told WTTL. “This is a logical occasion to reconsider the methodology as a whole,” he said.

## ITA Rejects Treating Chinese Currency as Subsidy in CVD Case

To the strong disappointment of some domestic industries, lawyers and members of Congress, ITA Aug. 31 rejected a request to treat the undervaluation of the Chinese renminbi (RMB) as an export subsidy that can be sanctioned with a countervailing duty (CVD). In cases involving aluminum extrusion and coated paper from China, it said petitioners failed to show that China’s alleged manipulation of the currency meets the three-part test for a countervailable duty.

“In these two cases, the department has determined not to investigate whether the alleged undervaluation of China’s currency, the RMB or yuan, is a countervailable subsidy, because the allegations made by domestic producers do not meet the statutory standard for initiating an investigation under the requirement that benefits provided under China’s unified foreign exchange regime be specific to the enterprise or industries being investigated,” said ITA Deputy Assistant Secretary for Import Administration Ronald K. Lorentzen in a statement.

The decision may intensify congressional interest in amending the trade law to change these rules to make it possible to treat China’s currency policy as a subsidy. “Because the White House has refused to take action to level the playing field with China, it is absolutely imperative that Congress do so as soon as it returns,” said Rep. Mike Michaud (D-Maine).

“China’s currency regime is broadly available across the Chinese economy to all firms that exchange foreign currency and thus does not single out any enterprise, industry or group thereof,” an ITA staff memo explained. “Indeed, the exchange system of China is ‘unified,’ meaning that there is only one ‘price’ for every user. Given that all enterprises and individuals in China that convert allegedly overvalued foreign currencies into RMB are recipients of the alleged subsidy, and in light of the findings in previous cases noted above, Petitioners have not sufficiently supported their claim that the undervaluation of the RMB is specific to any enterprise, industry, or group thereof,” it concluded in recommending against CVD treatment of the currency.

## Industry Raises Concerns about Draft Berman EAA Bill

A staff draft version of a new Export Administration Act (EAA) being prepared for House Foreign Affairs Committee Chairman Howard Berman (D-Calif.) has drawn criticism from the exporting community over concerns that it vests too much power in the president and the executive branch. Unlike the now-expired EAA, the draft contains little guidance on the application of the law or restraints Congress can impose on its interpretation or enforcement.

Congressional sources stress that the draft is only an early version of what might end up being introduced and changes are being considered based on the reaction from industry. They say the draft that was circulated among trade groups and lawyers in Washington is not near what the final version will look like. Despite some criticism of the draft, congressional staffers say they have received positive reactions to the proposed new structure of the law, which focuses on the new threats from terrorism and the proliferation of weapons of mass destruction.

In addition to complaints from industry, the draft reportedly has raised questions inside the Obama administration over its timing. With the White House planning to seek legislation to implement its broader export control plan, which would require additional changes to the EAA and the Arms Export Control Act, some officials are wondering whether Congress would be willing to tackle two separate export control bills. “There won’t be two bites at the apple,” one industry source said. One of the concerns that industry has about the wide discretion given the executive branch is how that flexibility will be used by future administrations. While

industry supports the policies being proposed by the Obama administration, it “fears this broad discretion will be used by the next president against us,” one source told WTTL. “Industry wants more process to contest over-burdensome rules,” he added.

A key element in the 45-page draft is the creation of a “Transfer Policy Committee” composed of “senior officials of Federal departments, agencies, and offices to which the President delegates authority under this title.” Among the committee’s numerous possible assignments are: advising the president about “specific threats to the national security and foreign policy;” “exercising the authority under this title to implement policies, regulations, procedures, and actions that are necessary to effectively counteract those threats;” reviewing “criteria for including items on, and removing such an item from, a list of controlled items;” setting “criteria for including a person on a list of persons to whom transfers of items are prohibited or restricted;” and setting “standards for compliance by persons subject to this title.”

## **First USML Review Finds Many Items Could Shift to CCL**

The first effort by the Obama administration to see how the U.S. Munitions List (USML) could be merged with the Commerce Control List (CCL) has concluded that 74% of the items licensed by State’s Directorate of Defense Trade Controls in one category in 2009 could have been transferred to the CCL or decontrolled. The White House announced the results of the review of USML Category VII (Tanks and Military Vehicles) Aug. 31. Of the items that would remain on the USML, none should be in the highest of the three-tier control structure being proposed by the export reform plan, 18% should be in the middle tier; and the remaining 8% in the lowest tier, the White House reported (see **WTTL**, July 19, page 3).

With work completed on Category VII, an interagency team has begun the same kind of review for USML Category XV (satellites). “With regard to Category XV, there is very clear legislation that limits what can be done in actually moving things at this time, but we are going to undertake the exercise and make sure we understand where things should be tiered,” James Hursch, director of the Defense Technology Security Administration, told the BIS Update conference Sept. 1.

Some exporters are skeptical about the Category VII review because moving their items to the CCL won’t lessen their licensing burden. If the items, as would be expected, are transferred to Export Control Classification Number 9A018(b) on the CCL for non-military trucks they would face national security export controls that have been imposed unilaterally by the U.S., while their foreign competitors can export similar items, especially to China, without a license.

“We are working to make both the Commerce Control List and the Munitions List positive lists,” Commerce Secretary Gary Locke told the Update conference. Until the lists are merged, they will remain separate, but items will be classified and controlled based upon specific characteristics, such as size or wavelength or their ability to operate under extreme atmospheric conditions, he noted. In the end, there will be a “bright line” between the two lists and “exporters will be able to know which agency has jurisdiction over their products,” he stated.

During his speech to the Update conference, Locke offered a show-and-tell to demonstrate an anomaly in Category VII, placing two, almost identical pivot blocks for truck axles on top of the lectern, one made of aluminum and one of steel. “Pivot blocks for Marine all-terrain vehicles require export licenses from the State Department. But nearly identical pivot blocks for fire trucks can be exported nearly anywhere in the world without a license,” Locke noted. “This simply does not make sense,” he declared.

The White House used brake pads for the MIAI tank as an example of products on the USML that could be moved to the CCL or decontrolled. “These brake pads are virtually identical to brake pads for fire trucks, but the tank brake pads require a license to be exported to any country around the world, while the fire truck brake pads can be exported to virtually all countries without a license,” the White House pointed out.