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Task Force Recommends Changes in Export Controls

Two days after President Obama made an unprecedented call for reform of U.S. export controls in his State of the Union address, an interagency task force reviewing those controls submitted its report Jan. 29, recommending changes to the current system. A meeting of sub-Cabinet officials is expected in the next few weeks to consider those recommendations and decide which to adopt and how to implement them (see **WTTL**, Jan. 25, page 3). The next stage of the task force's work will also include an outreach to Congress and industry to get reactions to the proposals and to build support for the recommended changes.

The review, which Obama ordered last August, originally began to look at about a dozen specific areas of export controls. That approach was abandoned in favor of a more comprehensive look at both processes and fundamental reforms. Some of the recommended changes can be done right away; some can be implemented in stages; and some will require major changes or legislation, one source reported.

Ahead of the submission of the report, Defense Secretary Robert Gates, Commerce Secretary Gary Locke, National Security Advisor James Jones and State Under Secretary Ellen Tauscher Jan. 27 briefed the chairs and ranking members of the House and Senate committees with jurisdiction over export controls on the task force's work. The briefing did not disclose the specific recommendations the task force intended to make, but explained the goals and process of its work. A separate briefing was also held for committee staff.

Also at the briefing was former National Security Advisor Brent Scowcroft who chaired a National Research Council (NRC) panel that issued a report, *Beyond Fortress America*, in January 2009. Administration sources deny press reports that claim the task force has adopted the NRC report's recommendations. They praise the report for drawing attention to problems with the current system, but there was disagreement about many of its recommended solutions. Rep. Brad Sherman (D-Calif.), who attended the briefing, told **WTTL** that "it is not enough to say control less stuff but better, you have to have both elements in your package." Sherman, who chairs the House Foreign Affairs Committee's subcommittee on terrorism, nonproliferation and trade, said, "I think, if anything, the task force is having the right balance."

Obama Trade Policy Puts Focus on Export Promotion

The business community's excitement about the amount of attention President Obama gave to trade in his State of the Union address Jan. 27 cooled quickly after it realized that there were



no major new trade policy shifts coming in wake of the speech. A new 50-state export promotion initiative that is being announced doesn't look much different from similar programs launched by every administration dating back to Ronald Reagan, who offered an "Export Now" campaign in the 1980's, and Bill Clinton, who implemented the congressionally mandated national export strategy in 1993 with the creation of the interagency Trade Promotion Coordinating Committee (TPCC). The Obama administration's focus on exporting by small- and medium-size companies appears aimed more at building grassroots support for trade than having significant impact on trade figures.

"We need to export more of our goods," Obama said in his speech. "So tonight, we set a new goal: We will double our exports over the next five years, an increase that will support two million jobs in America. To help meet this goal, we're launching a National Export Initiative that will help farmers and small businesses increase their exports, and reform export controls consistent with national security," he said. Obama's job's estimate appears based on the low-ball calculation that each billion dollars in exports creates only 2,000 jobs.

A doubling of exports over the next five years seems very achievable, if 2009 is used as the base. Between 2003 and 2008, exports of manufactured goods, without an export initiative, grew more than 80%, with annual growth ranging from 12% to 14%. Using the rule of 72, exports would have to grow 14.4% annually over the next five years to double. Trade figures for 2009 are likely to show U.S. goods exports down nearly 20% from 2008 to slight more than \$1 trillion. A rebound to the 2008 level of \$1.3 trillion would account for nearly a third of Obama's goal. With many economists and investment analysts projecting a long-term decline in the value of the dollar due to U.S. budget deficits and expansionary monetary policies, exports will also benefit from a favorable exchange rate.

Obama also seemed to back negotiating new trade agreements. "If America sits on the sidelines while other nations sign trade deals, we will lose the chance to create jobs on our shores," he said. "And that's why we'll continue to shape a Doha trade agreement that opens global markets, and why we will strengthen our trade relations in Asia and with key partners like South Korea and Panama and Colombia," he declared. The mention of South Korea, Panama and Colombia did not include any indication that the administration is ready to seek congressional approval of the signed free trade agreements with those nations. In a separate appearance Jan. 28, Deputy U.S. Trade Representative Demetrios Marantis made it clear the administration is still "consulting" with members of Congress and stakeholders, such as Ford, on how to move the South Korean deal forward (see story below).

Deal on South Korea FTA Still Eludes Obama Administration

President Obama's State of the Union call for strengthening trade with South Korea remains stymied by the inability of U.S. trade officials to come up with fixes to the U.S.-Korea (KORUS) free trade agreement (FTA) that will provide political cover to Democrats in Congress and a way to overcome resistance in South Korea to new concessions in an already signed trade pact. "This is a very difficult issue, and there is a lot of work we still need to do and we're not there yet," Deputy USTR Demetrios Marantis told reporters Jan. 28.

Earlier, Marantis said beef and autos remain the main sticking points to sending the deal to Congress. "They are very difficult, and we are working with our partners in Congress as well as with our counterparts in Korea to figure out how to address these outstanding concerns in a way that builds as much support in Congress for this agreement as possible," he told an audience in Washington. "At the end of the day, it is Congress that has to pass these, and it's our job to make sure that we make their job of passing this as easy as possible," he added.

"There is a bad history in the auto market in Korea of practices that have excluded foreign automobiles for many years," Marantis said. Memoranda of understanding between the U.S.

and Korea in the 1990s to open the market have not gone very far, he noted. “So the concerns we face today are based on that legacy, and the question is whether the provisions we negotiated in the KORUS FTA on autos is sufficient to overcome that long history of tariff and nontariff barriers in the Korean market,” Marantis explained. He said he was confident the talks would come up with a solution.

Graduated Enforcement of “10+ 2” Import Rules Begins

After giving importers a year to get into compliance with added data filing requirements under the Importer Security Filing (ISF) initiative, Customs and Border Protection (CBP) began enforcing the rules Jan. 26, but it will take a “graduated, escalated enforcement approach,” said Richard DiNucci, director of the ISF program in CBP’s office of field operations (see **WTTL**, Nov. 9, page 2). He denied as inaccurate suggestions that Customs wasn’t going to enforce the requirements. The attempt airplane bombing on Christmas day in December has added pressure to make cargo a high priority for CBP, he told reporters.

The new ISF requirements added two additional items to information vessel operators must provide in advance of arrival in the U.S. to Customs along with 10 previous data elements. Hence the “10+2” name for the rules. The added elements are for a stow plan and container status messages relating to containers loaded on vessels destined to the U.S.

Initial enforcement will focus on importers who do not file required information. Over the last year, most responsible importers, brokers and forwarders began filing the additional information, DiNucci reported. “There is still a pretty good number out there who have not taken the steps they need to,” he said. “Those who didn’t might not be treated well,” he said. Customs will be looking at late filers, the accuracy of filed data and its completeness, DiNucci said. Up until Jan. 26, CBP did not enforce the requirement. “Now that we have reached the 26th, we will begin to look at the data coming into us from that date on in an enforcement mode,” he said. “When we see data that does not meet the requirements, that will kickoff a communication to the importer and probably to the filer as well, and that could lay the groundwork for what might be liquidated damages in the future,” he warned.

Key Player in 22 FCPA Indictments Charged

A Florida businessman, who apparently was the mysterious “Individual 1” who helped the FBI carry out a sting operation that caught 22 executives of firms exporting military supplies in alleged violations of the Foreign Corrupt Practices Act (FCPA), was charged himself Jan. 21 with conspiracy to violate the FCPA, to export controlled items without a license and falsifying business records. Richard Bistrong was the subject of a criminal information filed in the D.C. U.S. District Court (see **WTTL**, Jan. 25, page 2).

The filing of an information is ordinarily a sign that a plea agreement is in the works, says J. Patrick Rowan, a former assistant attorney general for national security at Justice, who is now with the law firm of McGuire Woods in Washington, D.C. In an article to be published in the February 2010 issue of our sister publication, *The Export Practitioner*, Rowan suggests that Bistrong cooperated with the FBI in the sting to help reduce the charges against him. [**Editor’s Note:** Copy of February issue will be sent to **WTTL** subscribers on request.]

According to several press reports, Bistrong worked as vice president for international sales for Armor Holdings in Jacksonville, Fla. While working for the company, Bistrong allegedly conspired to arrange the sale of ballistic armor vests through overseas-based company subsidiaries without first obtaining validated export licenses. His customers included United Nations peacekeepers and the police and military in the Netherlands, the Kurdistan Regional Government in Iraq, the United Kingdom, and Nigeria, the criminal information charges. The exports to

Kurdistan required an export license and none was obtained, the information alleges. In 2001, Bistrong also allegedly helped his company submit a winning bid worth \$6 million on a contract to supply body armor to U.N. peacekeepers.

According to the information document, a U.N. agent “instructed Bistrong [and a company employee] to give [the agent] a signed, but otherwise blank, pricing sheet.” The U.N. agent filled in the blanks on the form only after learning the amounts submitted in other non-public bids, the information paper stated, adding that Bistrong’s company got the contract as a result. During the duration of the deal, the information stated, “Bistrong caused [the company] to pay the U.N. agent more than \$200,000 in commissions” for the contracts, “knowing that a portion of that money was to be passed on” by the agent to a U.N. procurement official in exchange for inside information regarding body armor contracts.

BIS Clarifies “Second Incorporation” De Minimis Rules

Foreign manufacturers that use foreign-made components that contain U.S. content must ensure that the foreign-made component is a “discrete product” to avoid falling under the *de minimis* provisions of the Export Administration Regulations (EAR), the Bureau of Industry and Security (BIS) explains in a recently posted advisory opinion. The advisory, issued in September to an unknown firm, tries to clarify the agency’s interpretation of the “secondary incorporation rule.” The purpose of this rule, it notes, is to minimize the burden on foreign firms that buy items containing U.S. components but don’t know how much U.S. content is in the product. The firm first incorporating U.S. content in a product does need to know whether the amount of U.S. content would trigger U.S. reexport controls.

“Evidence that a foreign-made item was purchased in an arm’s-length transaction or evidence that the item is regularly sold by itself, either as a stand alone product or as an identifiable replacement for a particular product, would tend to indicate that the item is a discrete product,” the letter states.

“Alternatively, if the purchaser of a foreign product in contemplation of further manufacturing operations participated in the design or manufacture of the product or chose the parts that were to go into the foreign product, then that indicates that the foreign-made product was in fact part of a larger manufacturing or production process and therefore not a discrete or completed product when further processing or manufacturing commenced,” it cautions.

* * * Briefs * * *

STATE: Beth McCormick, who has served as deputy director of Defense Security Cooperation Agency since Oct. 12, 2008, and before that as deputy director and then director of Defense Technology Security Administration (DTSA), has been named deputy assistant secretary of State for defense trade and regional security. In this job, she will supervise Directorate of Defense Trade Controls (DDTC) and Office of Regional Security and Arms Transfers (RSAT).

IRAN: Senate, by voice vote Jan. 28, approved Iran sanctions bill (S. 2799), which gives president authority to impose sanctions on firms selling petroleum to Iran or helping develop petroleum production. It also supports state governments’ right to divest investments in firms supporting Iran’s energy section. Another provision directs Commerce to identify items that if transshipped, reexported, or diverted to Iran could contribute to Iran obtaining nuclear, biological or chemical weapons, or other defense items or technologies. It would require export licenses for listed items to any country designated as Destination of Diversion Concern unless president waives requirement (see **WTTL**, Dec. 21, page 4).

TRADE PEOPLE: Maurice H. Subilia Jr., 65, who was convicted in 1995 of violating U.S. export controls when he was executive with Fiber Materials, Inc., and sentenced to three years probation in 2005, was sentenced Jan. 15 in Portland, Maine, U.S. District Court to eight years in jail, followed by three years of supervised release, for separate conviction on bribery and money laundering charges related to bribery of employees at U.S. Army Space and Missile Defense Command in Huntsville, Ala., (see **WTTL**, March 19, 2007, page 1). He was also ordered to pay restitution of \$9,238,450 to Defense Department.