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BIS Suspends VEU Approvals for Sites in China, India

The Bureau of Industry and Security (BIS) in the Dec. 23 Federal Register suspended the Validated End-User (VEU) authorizations for one General Electric site in India and for Aviza Technology in China, citing only "material changes at the companies." Information from the companies revealed that the withdrawals were due to GE's sale of its homeland security business and Aviza's filing for bankruptcy protection. GE voluntarily asked BIS to withdraw the VEU for the GE Fanuc facility in Bangalore -- where its homeland protection division had operations -- after it sold the division to Paris-based Safran, a GE attorney told WTTL.

> The continued VEU authorization for Aviza was the subject of complaints at a House hearing in June by Rep. Edward Markey (D-Mass.), who cited the firm's filing for Chapter 11 bankruptcy protection (see **WTTL**, June 8, page 1). He also noted that the address for the Aviza VEU in China was the same as for a firm that had been debarred by State for proliferation concerns.

"Suspension of the availability of Authorization VEU in this amendment is not the result of prohibited activities by the two companies," BIS said in its notice. "This amendment does not otherwise create a new license requirement or adversely affect the licensing policy for exports, reexports or transfers of items to the company and facility identified in this rule," it said. The notice also included a "savings clause" which will allow exports under the VEUs to proceed as long as they were "on dock for loading, on lighter, laden aboard an exporting carrier, or en route aboard a carrier to a port of export, on December 23, 2009, pursuant to actual orders."

GE received VEU authorizations for four facilities in India in July, and the three remaining sites are unaffected by the suspension of the GE Fanuc plant. Before the VEU was granted, GE in April had announced that it had reached an agreement with Safran to sell the French firm 81% of its Homeland Protection business. The deal closed after the VEU was issued.

CFIUS Action on Firstgold Reflects Policy on Proximity

The results of a Committee on Foreign Investment in the U.S. (CFIUS) review in December may mean that large areas of the U.S. near military facilities, particularly airfields, may be off limits to certain foreign investments because of national security concerns. Treasury officials told Firstgold Corp. of Lovelock, Nev., that CFIUS was prepared to send a recommendation to President Obama to block the company's proposed sale of its mines in Nevada to Chinese-owned Northwest Non-Ferrous International Investment Company Limited. Based on this

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information, Northwest Dec. 21 withdrew its proposed acquisition. CFIUS officials told lawyers for Firstgold and Northwest that it "had identified serious and significant national security risk issues associated with the proposed Transaction, particularly the proximity to the Fallon Naval Air Base and associated training range facilities and other sensitive and classified security and military assets that cannot be identified," according to a Dec. 14 memo the attorneys sent to their clients and first obtained by the *New York Times.*

> The memo said Treasury Deputy Assistant Secretary Mark Jaskowiak had "emphasized that CFIUS had undertaken a thorough and exhaustive review of options and alternatives as well as possible mitigation measures, but CFIUS and its constituent agencies were unable to develop anything that would mitigate the risk to national security." Following the collapse of the deal, Firstgold was delisted from the Toronto stock exchange Dec. 30 when its stock price fell to 2 cents and failed to meet the exchange's listing requirements.

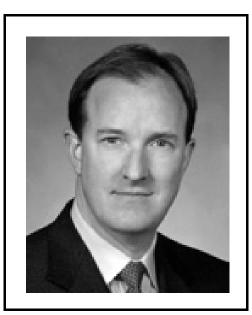
The issue of proximity to military bases or sensitive facilities is not new for CFIUS, according to Nova Daly, a former Treasury deputy assistant secretary who is now a consultant with the law firm of Wiley Rein in Washington. "Proximity has always been a vulnerability factor that CFIUS considers," he told WTTL. He suggested that the air base issue was the only thing the Treasury officials were able to disclose. "The key was that there were other facilities. So I think the airfield proximity was five or ten percent of what was 100% of the issue," he said.

The Firstgold case, however, still might suggest a trend, noted Timothy Keeler, an attorney with Mayer Brown who was an official in the USTR's office during the Bush administration. He pointed to similar rulings issued by Australia against foreign investments near military facilities. Keeler said he expects a pick up in CFIUS reviews because some countries are "sitting on cash and it's a good time to buy in the U.S." In addition, CFIUS is just beginning to apply new regulations published in 2008, he said. "I think you'll see novel issues popping up like this, particularly with the new regulations, where they are having to grapple with some cases of first impression on some of the nuances and wrinkles in the regs," he told WTTL.

CFIUS significantly increased the number of national security reviews it conducts after Congress amended its mandate and the new regulations were issued. In a report released Dec. 1 on its activities in 2008, CFIUS told Congress that it conducted 23 reviews and received 153 notifications of foreign investments in that year. This compares to 2007 when it conducted only six reviews and received 138 notices.

Obama Nominates Wolf to Head BIS Export Administration

President Obama Dec. 21 sent the Senate the nomination of Kevin Wolf, a partner in the D.C. law offices of Bryan Cave, to be BIS assistant secretary for export administration. Wolf's name surfaced early in the Obama administration as a potential candidate for the BIS post, but his formal nomination had to await the nomination of Eric Hirschhorn to be BIS under secretary. Hirschhorn's nomination was approved by the Senate Banking Committee Dec. 17, but a full Senate vote on him was reportedly blocked before lawmakers adjourned for the year by a last-minute "hold" placed on his confirmation by Sen. Jon Kyl (R-Ariz.). Sources say they don't know the reason for Kyl's action.



Kevin Wolf

In his law practice, Wolf has specialized in issues related to the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (OFAC), as well as trade sanctions enforced by the Office of Foreign Assets Control (OFAC). He has focused particularly on Commodity Jurisdiction (CJ) disputes over aviation products and other controlled items. Wolf join Bryan Cave in 1993, but from 1996 to 1997, he was the assistant special counsel to the House Ethics Committee during its investigation of Speaker Newt Gingrich. He has also been active in Democratic Party activities and was a fundraiser and organizer for the Obama presidential campaign in Virginia. Wolf has a B.A. from the University of Missouri-Columbia, an M.A. from the University of Minnesota's Humphrey Institute of Public Affairs, and a J.D. from the University of Minnesota Law School.

USTR Balances Good and Bad in Report on China

The art of writing a report on China's compliance with its World Trade Organization (WTO) obligations depends on being able to acknowledge progress without sounding Pollyanna while identifying concerns without raising protectionist fears. The U.S. Trade Representative's (USTR) annual report to Congress on Beijing's WTO compliance, released Dec. 22, tries to strike that balance, but still leans toward the critical side of the scale. Buried in the report is the acknowledgment that the U.S. is running a surplus with China in services trade.

> "All of China's key commitments should have been phased in by December 11, 2006, three years ago," the report notes. "Consequently, China is no longer a new WTO member, and the United States and other WTO members have been holding China fully accountable as a mature member of the international trading system, placing a strong emphasis on China's adherence to WTO rules," it states.

"Bilateral engagement produced concrete results in a number of important areas in 2009," the 121-page report concedes. "The two sides were able to resolve significant trade irritants, while also achieving incremental but important progress in other areas and agreeing to pursue dialogue in still other areas where more detailed discussions were needed to lay the foundation for possible resolutions," it adds.

Among the signs of progress, the report points to China's agreement to lift unscientific bans on imports of U.S. pork, pork products and live swine; removal of local content requirements on wind turbines; and resumption of licensing of qualified direct-selling services companies. In addition, "China confirmed that rules on information security certification that would have potentially barred several types of U.S. products from China's market only apply to products procured by Chinese government agencies and not to products purchased by state-owned enterprises or other sectors of China's economy," the report says.

The report, however, devotes extensive space to specific "priority issues" that "cause particular concern for the United States and U.S. industry." Among these are intellectual property rights, industrial policies, trading rights, agriculture, services and transparency. "China continued to pursue industrial policies in 2009 that seek to limit market access for non-Chinese origin goods and foreign service suppliers while offering substantial government resources to support Chinese industries and increase exports," the report states. "While the United States continued to enjoy a substantial surplus in trade in services with China and the market for U.S. service providers in China remains promising, Chinese regulators continue to use an opaque regulatory process, overly burdensome licensing and operating requirements and other means to frustrate efforts of U.S. suppliers of banking, insurance, express delivery, telecommunications and legal services to achieve their full market potential in China,"it adds.

ITC Finds Less "First Sale" Valuations than Industry Claimed

The business community's uproar against a Customs proposal in 2008 to revoke the "First Sale" methodology for valuing imports for tariff purposes may have been overblown, according to a report the International Trade Commission (ITC) issued Dec. 23. Although Customs withdrew the proposal, Congress had ordered the ITC to examine the use of First Sale valuations among importers (see **WTTL**, Feb. 18, 2008, page 1). Based on data provided by Customs and Border Protection (CBP), the ITC found that from September 2008 to August 2009 only 23,520 U.S. importers (8.5% of all importers) reported using the First Sale rule for imports valued at \$38.5 billion (2.4% of total U.S. imports by value). On the other hand, "transaction value" was found to be the most common method of import valuation, accounting for an estimated \$1.411 trillion

(86.4%) of U.S. imports. The ITC admits the data are too sparse to explain why some importers use the First Sale method while others don't. It also noted several other limitations on its ability to measure these transaction precisely. There appears to be greater use among importers of high-tariff apparel and footwear, which may explain why apparel and retail groups were among the most vociferous opponents of the proposed rule change. "Analysis of First Sale use across tariff classifications and in particular sectors suggests that tariff rates can explain a portion of First Sale use," the report says.

> "However, in some sectors, particularly food and agriculture, in which the average duties paid are lower, tariff rates do not appear to explain the extent of First Sale use. Furthermore, First Sale use is substantial for many products not generally subject to duty and from countries and territories on whose goods little or no duties are imposed (such as Canada, Mexico, and the U.S. Virgin Islands)," it says.

Customs had proposed the elimination of the First Sale rule, which was first adopted in 1996, in January 2008. The proposed change would have applied the transaction value to "the price paid in the last sale occurring prior to the introduction of the goods into the United States, instead of the first (or earlier) sale." First Sale valuations are often used when foreign goods go through multiple hands or middlemen before final sale in the U.S. The extra handling usually raises the price of the items and hence the potential tariff. CBP received more than 100 comments on the proposal, almost entirely negative, and withdrew the proposal in August 2008.

* * * Briefs * * *

OCTG: In final determination Dec. 30 on countervailing duty complaint against imports of oil country tubular goods from China, four ITC commissioners found threat of injury to U.S. industry and two found material injury due to imports. Ruling will lead to imposition of CVDs ranging from 11.98% to 15.78% on four mandatory Chinese exporters. Bigger decision awaits final ITA ruling due March 19 on pending antidumping case against Chinese OCTG and final ITC determination on injury scheduled for May 3. Preliminary antidumping rates are around 36.5%.

USTR: Senate Dec. 24 approved nomination of Miriam Sapiro to be deputy USTR after "hold" on her confirmation was lifted. Senate Finance Committee Dec. 23 favorably reported out nominations of Michael Punke to be deputy USTR for Geneva and Islam Siddiqui to be chief agriculture negotiator, but their names didn't get to Senate floor for vote before lawmakers adjourned until mid-January.

OFFSETS: BIS in Dec. 23 Federal Register issued final changes to reporting rules for U.S. firms providing "offsets" in sales of defense weapons to foreign buyers (see **WTTL**, May 4, page 4). Among changes are new requirements to provide information using North American Industry Classification System (NAICS) codes. Although BIS rejected most comments on proposal, it agreed to one change. "In the proposed rule, BIS included a requirement for U.S. firms to assign NAICS codes to the credit value of each offset transaction. BIS has determined that it does not need this information," agency said.

GSP/ATPA: President Obama Dec. 28 signed bill (H.R.4284) extending Generalized System of Preferences and Andean Trade Preferences Act for one year (see **WTTL**, Dec. 14, page 4). "The legislation did not restore benefits to Bolivia," White House statement noted. "The President has directed the Administration to work with the government of Bolivia to improve cooperation, and if cooperation improves, to work with Congress to restore benefits to Bolivia under the ATPA program," it said. Separately, president issued proclamation terminating African Growth and Opportunity Act eligibility for Guinea, Madagascar, and Niger, but adding Mauritania to program.

CHINA: WTO Appellate Body Dec. 21 upheld dispute-settlement panel ruling which found China in violation of its WTO obligations with its restrictions on imports of films, DVDs, books and music (see **WTTL**, Aug. 17, page 3). It rejected Chinese claim that rules were intended to protect public morals. "Today America got a big win," said USTR Ron Kirk. "We expect China to respond promptly to these findings and bring its measures into compliance," he said.

EXPORT ENFORCEMENT: In settlements agreements, BIS has fined Ning Wen $1,364,000 and his wife, Hailin Lin, $1,364,000 for illegal exports to China. Agency suspended fines for one year and will waive if they remain in compliance with export rules. It also imposed 15-year denial of export privileges on couple. Wen is in federal prison serving 60 month sentence after criminal convictions. Lin has completed 42 month jail sentence after pleading guilty to criminal charges (see **WTTL**, Sept. 26, 2005, page 4).