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A Weekly Report for Business Executives on U.S. Trade Policies, Negotiations, Legislation, Export Controls and Trade Laws

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RE-INTRODUCED EAA BILL NOT EXPECTED TO GO FAR

House International Relations Committee (HIRC) Chairman Henry Hyde (R-Ill.) Dec. 16 introduced legislation (H.R. 4572) at the request of the White House to renew the Export Administration Act (EAA), but sources in the business community don't expect the measure to get serious consideration this year. The slimmed-down bill would renew EAA, which lapsed in 1994 except for a short renewal in 2000, for just two years.

> Business community skepticism about the bill's chances is based on the perception that there is no one in Congress who wants to take on the tough job of managing the legislation through the House and Senate and fighting the struggles that every EAA bill in the past has generated. In addition, Hyde's chief legislative aid on export control issues, Walker Roberts, recently left his staff to join a Washington lobbying firm. Hyde has announced plans to retire at the end of 2006, which is likely to diminish further his willingness to fight for an EAA bill.

The proposed legislation includes changes that both the Clinton and Bush administrations have wanted in EAA. It would increase criminal penalties for each violation to a maximum of $1 million and 10 years in prison for individuals and a maximum of $5 million for corporations. It would make it clear that the International Emergency Economic Powers Act (IEEPA) can be used to enforce export regulations in addition to the EAA and also to protect the confidentiality of license applications whenever EAA expires. The measure includes non-binding goals for multilateral trade regimes, such as the Wassenaar Arrangement. Another non-binding provision urges BIS to use U.S. intelligence agencies to help review export license applications. The bill would require an audit and report on BIS undercover export enforcement investigations.

TRADE MINISTERS TO HOLD HONG KONG REUNION IN DAVOS

U.S. officials expect little to be accomplished at mini-ministerial that will be held in the side halls of the annual World Economic Forum in Davos, Switzerland, Jan. 26-28, but they are eager to get the momentum in the Doha Round restarted. U.S. Trade Representative (USTR) Rob Portman is planning to attend the forum and the side talks that the Swiss government is organizing for attending trade ministers.

Since returning from the World Trade Organization's (WTO) Ministerial Meeting in Hong Kong in December, Portman has already had telephone conversations with key trade ministers, including European Union (EU) Trade Commissioner Peter Mandelson and Brazilan Foreign Minister Celso Amorim. Despite the harsh rhetoric that marked most of the ministerial, trade

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ministers didn't come out of the meeting with hard feelings that need a lot of mending, USTR sources say. Rather than a flurry of mini-ministerial meetings similar to those that marked the run-up to Hong Kong, trade sources see most of the renewed Doha negotiations taking place at the senior negotiator level in Geneva over the coming months. The final Ministerial Declaration adopted in Hong Kong calls for agreements to be reached on the still-missing numerical targets for market access in industrial goods and agriculture by the end of April (see **WTTL**, Dec. 19, page 1). An expanded meeting of the WTO General Council, with ministers attending, is likely to be held in Geneva at the end of April to try to achieve that goal.

RULING UNDERSCORES NEED FOR TIMELY NAFTA ORIGIN CERTIFICATION

The importance of timely filing of Certificates of Origin for NAFTA imports was underscored again in a new ruling from the Court of Appeals for the Federal Circuit (CAFC). In a Jan. 3 ruling in *Corrpro Companies v. U.S.* (case No. 05-1073), the court reversed a Court of International Trade (CIT) decision which said the rejection by Customs of the company's late filing of a certification could be reviewed by the CIT. The new CAFC order restates views the court expressed in a September 2005 ruling in *Xerox v. U.S.*

> "We agree with the government that the Court of International Trade lacked jurisdiction over the complaint for lack of protestable decision by Customs," wrote Appellate Judge Alan Lourie for the three-judge panel. He cited the *Xerox* ruling which rejected an appeal of a Customs decision in a NAFTA certification case because the agency had not ruled on the merits of the goods' NAFTA eligibility.

Corrpro admitted that it had not filed its Certificate of Origin for its magnesium anodes within one year of their import as permitted under NAFTA rules. When Customs rejected its late certification, it appealed the liquidation of its entries to the CIT which said the court had jurisdiction to review the company's complaint. The company argued that rejection of its NAFTA certification was a protestable decision because it had shown reasonable care awaiting revocation of a Customs Headquarters Ruling Letter.

"Under our precedent, there is a protestable decision as to a NAFTA eligibility that confers jurisdiction in the Court of International Trade under 28 USC Section 1581(a) only when the importer has made a valid claim for NAFTA treatment either at entry or within a year of entry, with a written declaration and Certificates of Origin presented in a timely fashion and Customs has engaged in 'some sort of decision-making process' expressly considering the merits of the claim," the court ruled. "An importer may not circumvent these statutory and regulatory requirements," it declared.

OFAC PROPOSAL SHOWS ITS NEW EMPHASIS ON "RISK-BASED" COMPLIANCE

A preview of how Treasury's Office of Foreign Assets Control (OFAC) may implement its new "risk-based" approach to compliance may be seen in a Jan. 4 proposal to implement the due diligence requirements of the banking provisions of the USA PATRIOT Act. The proposal, published by OFAC's related Financial Crimes Enforcement Center (FinCen), would amend rules enforcing the anti-money laundering provisions of the Bank Secrecy Act, which applies to U.S. "covered financial institutions" that establish, maintain or administer accounts for foreign correspondent banks. OFAC officials have said the FinCen rules would be a model for future OFAC guidance in other regulatory areas under its jurisdiction (see **WTTL,** Oct. 24, page 2).

An initial proposal to implement the new law was published in May 2002, but it drew so many negative comments, including from members of Congress, that FinCen decided to revise and repropose the rules. In the same Jan. 4 issue of the Federal Register in which it published the due diligence rules, it also published a final rule implementing the rest of the PATRIOT Act requirements. Under FinCen's risk-based approach to applying the new enhanced due diligence requirements, the center recognizes that not all foreign correspondent accounts require the same

level of scrutiny. The level of due diligence that the center would consider reasonable will depend on several factors, including the covered financial institution's previous relationship with the foreign bank, the level of regulation in the country in which the foreign bank is located, the foreign bank's owners, and the customers the foreign bank has.

> "We recognize that not all correspondent accounts present the same type or level of risk, and that to impose an obligation of applying the same enhanced due diligence procedures in every case would require covered financial institutions to allocate limited resources inefficiently, thereby undermining the effectiveness of their anti-money laundering programs and the objectives of this statutory provision," FinCen explained.

"Accordingly, we have determined that it is appropriate to propose a final rule that makes it clear that covered financial institutions should apply enhanced due diligence with regard to the three categories of foreign banks on a risk-basis, as contemplated by the statute," it continued.

This varied approach is seen in the proposed requirement for analyzing a foreign correspondent bank's anti-money laundering procedures. "With regard to this requirement, we have determined that it may not be necessary in every instance, especially with a well-regulated foreign correspondent bank that the covered financial institution knows well and has been doing business with for an extended time, for the covered financial institution to actually obtain and analyze that foreign bank's anti-money laundering program," FinCen stated.

BUSINESS COMMUNITY BACKS BROAD APPROACH TO TRADE TALKS

The U.S. Chamber of Commerce continues to support a multiple approach to reaching new trade agreements, including through multilateral and bilateral talks, Chamber President Tom Donohue declared Jan. 4 in announcing his organization's 2006 agenda. "I'm in favor of having two ways to approach this. I'm for bilateral and multilateral agreements while we're all trying to work at getting a broad based WTO agreement," he told WTTL. "While all this is going on, I want to negotiate and sign bilateral and multilateral trade agreements all over the world. I don't want to sit around until we get this all done," he said.

> Donohue said he wasn't discouraged by the results of the WTO Ministerial in Hong Kong. "Our guys did a great job. I think Portman is very, very good," he said. "It is exactly what you would expect with a 149 countries trying to negotiate something. I think the French, quite frankly, through a monkeywrench in the gears," he added.

"My bottom line is we are going to get it done. We are going to get it done early in '07 probably," Donohue asserted. He also said he was not concerned with the WTO's shift in emphasis to the concerns of developing countries. At the end of the day, he said, he expects Brazil and India to contribute to the final agreement.

USTR PERSONNEL MANAGEMENT NEEDS IMPROVEMENT

The USTR's office, despite its highly touted effectiveness and esprit de corps, needs to improve its personnel management system, the Government Accountability Office (GAO) asserts in a report released Jan. 5. The GAO criticized the office's inadequate "strategic human capital management" of its small 200-person staff and its lack of long-term consideration of its dependence on other trade agencies to support it mission.

The report focuses on the USTR career staff, which has carried an increasingly heavy workload as the U.S. has pursued multilateral, plurilateral and bilateral trade talks simultaneously. The office has looked at its short-term goals but has not considered how to deal with succession issues for key negotiators or its reliance on other departments for support. "While USTR

officials state that their human capital efforts are sufficient to accomplish USTR's immediate mission, USTR does not demonstrate a commitment to managing its human capital strategically," the GAO stated. As an example, it cited the office's failure to fill its top human management post for a year and a half. It also said USTR has not conducted formal succession planning to fill critical management positions in a timely manner.

> Over the years, the USTR's small staff has served as a "networked organization" that relies on other agencies and departments, particularly Agriculture, Commerce and Treasury, to support its negotiating and trade compliance activities. The GAO noted that at one recent trade meeting, these other departments constituted 75% of the U.S. delegation. Yet, the USTR's office doesn't have planning procedures in place to determine how its mission might be affected by changes in the staff and resource levels of those other departments, the GAO contended.

"While USTR prides itself on being a results-oriented agency, it could do even better if it linked its individual performance expectations to organizational goals," the GAO said. The office has greater flexibility than other agencies in special hiring rules and in its ability to offer higher than minimum salaries, but it has not taken advantage of its ability to offer retention bonuses to existing staffers.

MEDICAL FIRM FINED FOR EXPORTS FROM SINGAPORE

Unapproved exports to organizations in India that were on the Bureau of Industry and Security's (BIS) Entity List continue to draw fines and penalties even as the U.S. has opened new trade and diplomatic initiatives with India. In the latest settlement announced by the agency, Becton Dickinson, the U.S.-based maker of medical devices and diagnostic products, has agreed to pay a $123,000 civil fine for 36 exports of medical research products, lab ware, and reagent systems from its branch in Singapore to entities in India without approved BIS export licenses.

> Becton Dickinson had voluntarily self-disclosed the exports to the BIS Office of Export Enforcement. This confession apparently contributed to a 69% reduction in the maximum fine the company faced. The firm will be required to conduct an audit of its export compliance program and provide a copy of the results to BIS.

According to the draft BIS Charging Letter, the exported items were all classified as EAR99 and had been previously exported from the U.S. to the Singapore branch. The Singapore branch reexported the items at various times between 1999 and 2000 to several different Indian organizations and government agencies that were on the BIS Entity List at the time.

* * * BRIEFS * * *

C-O-R-R-E-C-T-I-O-N: Lead story on page 1 of Jan. 2, 2006, issue of ***Washington Tariff & Trade Letter*** was incorrect. Final National Defense Authorization (NDAA) bill passed by House and Senate did not include increase in fines for violations of IEEPA. Change in penalties was in final Senate version, but it was dropped in House-Senate Conference Report approved on final passage. At press time, last NDAA version posted on congressional website was still old Senate version, which we mistook for final bill. Conference report, published in Dec. 18, 2005, Congressional Record, on final bill does not explain decision to drop penalties beyond saying that Senate receded to House which didn't have provision.

EXPORT ENFORCEMENT: CIT Group of Livingston, N.J., has agreed to pay $74,800 civil fine in settlement with BIS to resolve charges that it committed 13 violations of EAR in connection with unlicensed exports of oscilloscopes to Israel and four violations with unlicensed exports of signal generators to Philippines. CIT voluntarily self-disclosed its actions.

PAPER CLIPS: ITC voted 6-0 Jan. 4 that lifting anti-dumping order on paper clips from China would likely lead to renewed injury to U.S. industry.

INDONESIA: State Jan. 3 announced decision to allow renewed Munitions List exports to Indonesia.