

# Washington Tariff & Trade Letter<sup>®</sup>

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

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## **BIS ESTABLISHES “FOREIGN NATIONAL REVIEW” PROCESS**

The Bureau of Industry and Security (BIS) issued final rules in the Federal Register Nov. 5 to amend its deemed export requirements to give pre-cleared foreign nationals easier access to technology for the development and production of certain computers and microprocessors. The regulations create a process known as the Foreign National Review (FNR) under which BIS will conduct a background check of individual foreign nationals and grant those who pass muster eligibility to have access to these technologies under License Exceptions CIV and CTP.

The new regulations are limited only to the application of the deemed export requirements because the U.S. must wait until it passes a “global test” and gets multilateral agreement in the Wassenaar Arrangement to change controls for technology leaving the country. Those broader changes are on the agenda for Wassenaar’s annual plenary meeting in December.

The final rule will allow access to higher levels of computer technology than BIS’ original proposal. Foreign nationals from Tier 1 countries and 22 close U.S. allies will have access in the U.S. to technology for computers operating up to 190,000 million theoretical operations per second (MTOPS) under License Exception CTP. BIS originally proposed a 150,000 MTOPS limit. Nationals of Tier 3 countries who clear the FNR hurdle will have CTP access to technology for computers operating up to 75,000 MTOPS (see **WTTL**, July 26, page 2).

License Exception CIV for microprocessor technology will be available for foreign nationals from D:1 countries after they have passed a FNR. “Exporters who have current licenses for deemed exports of such technology to Country Group D:1 foreign nationals that become eligible for License Exception CIV are no longer bound by conditions on their licenses,” BIS declared.

## **CIT JUDGE TELLS ITC TO REFINE “LIKELINESS” DEFINITION IN SUNSET REVIEWS**

Court of International Trade (CIT) Judge Donald Pogue Oct 27 told the International Trade Commission (ITC) to clarify its definition of “likeliness” to support its “sunset review” finding that imports of standard, line and pressure (SLP) pipe from four countries would hurt U.S. industry if the current antidumping order on the products were terminated.

In *Siderca v. U.S.* (Slip Op. 04-133), Pogue said the ITC had not made it clear whether the word “likely” means “possible,” “probable,” or “more likely than not.” The ITC’s “use of an incorrect standard in contemporaneous reviews, the ITC’s confused arguments regarding the standard it used in this review, and the failure of the Commission’s views to identify the

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standard used in this review all render the determination unclear on this issue,” Pogue stated. “It therefore cannot be sustained as in accordance with law,” he declared. The judge supported the Commission’s decision on cumulation in the case but said its “determination that material injury is likely to reoccur in the event of revocation is neither in accordance with law nor supported by substantial evidence.” On remand, the ITC should also explain why it “found that the SLP industry’s newfound strength did not suffice to defeat a finding of likelihood of material injury,” Pogue ruled.

## **ELECTION GIVES BIG BOOST TO BUSH FREE TRADE AGENDA**

With slightly larger Republican majorities in the House and Senate after the Nov. 2 elections, President Bush will start his second term in January with a stronger mandate to pursue the same free trade agenda he has advocated for the past four years. This will mean a continued focus on completing Doha Round negotiations in the World Trade Organization (WTO) by the end of 2006, while accelerating the pace of talks on bilateral free trade agreements (FTAs).

Whether or not U.S. Trade Representative (USTR) Robert Zoellick stays on for a second Bush administration, the marching orders for U.S. trade negotiators will remain the same: more free trade deals with willing trade partners either on a bilateral, regional or global basis. Zoellick’s future has received less publicity than some other Cabinet members. While he has long aspired for the top job at Treasury, he could stay on longer at USTR, if the Doha Round talks go well.

In a new term, the administration also will place increased emphasis on trade relations with China and India, the two emerging markets that will dominate U.S. trade and international economic policies for the next two decades and beyond. The White House has sought closer ties with both countries and has attempted to resolve trade disputes without confrontation. It will face pressure, however, from Congress to do something about the ballooning trade deficit with China, the perception that Beijing is not living up to its WTO obligations and complaints that the Chinese are holding down the value of their currency.

## **EXPORT CONTROL POLICIES WILL REMAIN UNCHANGED**

None of the results of presidential and congressional elections is expected to have any impact on U.S. export control policies. While the war on terrorism was a central campaign issue in the presidential election, export controls were never part of that debate. As a result, “no seismic changes” in export control policy are likely, one Commerce source predicted.

The election, however, will give President Bush greater leverage to push for reform and renewal of the lapsed Export Administration Act (EAA), if he chooses to put that on his quickly filling up legislative agenda. Having won reelection partly because he is perceived as being strong on national defense, Bush could use his enhanced stature to push an administration position on EAA.

A study of EAA that the President’s Export Council subcommittee on export administration (PECSEA) will undertake could be the starting point for a White House stand on the statute (see **WTTL**, Oct. 25, page 4). Key committees in the House and Senate are likely to insist on writing their own EAA bills, but the White House, as always, will play a major role in keeping the measures from swinging too far toward tightening or loosening controls.

“No bill will pass without a balance between national security and economic interests,” one Commerce source noted. During his first press conference after the election, President Bush Nov. 4 said he “earned capital in the campaign, political capital” and now he intends to spend it. Getting EAA through Congress in a form acceptable to the administration, the business community and national security hawks will cost a lot of that capital. The direction Congress takes on EAA will depend greatly on how the Bush administration handles China. While a

major goal of a new EAA would be to prevent the release of dual-use goods and technology to terrorists, restraining China is a primary concern for many lawmakers.

## HEAVY SCHEDULE OF TRADE LEGISLATION AWAITS NEW CONGRESS

When the new Congress convenes in January it will face a long list of trade bills that will provide an early test of how well President Bush's free trade agenda plays among lawmakers. Congressional and business community sources foresee a mixed level of intensity in the trade debates ahead. Among the top legislative issues facing Congress next year are:

**CAFTA:** The biggest fight facing the incoming 109<sup>th</sup> Congress will be over approval of the U.S.-Central American Free Trade Agreement (CAFTA). The battle will resemble previous struggles to enact fast-track legislation in 2002 and approve China's permanent normal trade relations status in 2000. Unions and environmentists have targeted CAFTA for defeat, with the House being the main battleground. Opponents of the deal say the White House is 20 to 30 votes shy of the number needed to pass it in the House even with the added GOP seats, and finding Democrats to back it will be harder than ever.

Depending on when the White House sends the implementing legislation to Congress and how long it takes the administration to build support for the deal, the debate could start next spring. The administration may drop its plan to link CAFTA with the Dominican Republic FTA because of legislation the DR has enacted to impose a 25% tax on beverages using high-fructose corn syrup. U.S. trade officials are scratching their heads wondering why the DR would pass such a tax at this time, knowing it would derail a DR FTA indefinitely. U.S. corn producers have mounted a campaign against the deal because of the tax.

**WTO:** Under Section 125 of the Uruguay Round Agreements Act, every five years after the creation of the WTO, any member of Congress may introduce a joint resolution to withdraw congressional approval of the Uruguay Round Agreement. This provision is much misunderstood because many people think it would force the U.S. to withdraw from the WTO. Congressional sources emphasize that WTO membership would not be affected nor would U.S. trade laws implementing the Uruguay Round Agreement be changed, if Congress did enact a resolution of withdrawal from the agreement. The time clock for action starts March 1 after the USTR submits to Congress his annual report on the benefits and workings of the WTO. Congress then has 90 days to pass the resolution, which cannot be blocked in committee. The president can veto any resolution that is passed, and Congress would have to override that veto.

Industry representatives in Washington have little doubt that such a resolution would be defeated easily, as was a similar resolution five years ago. Nonetheless, they say they expect a bigger fight than five years ago because of the number of WTO dispute-settlement decisions that have gone against the U.S. and because trade has become more polarized than the last time the resolution came up.

**RENEWAL OF FAST-TRACK:** Section 2103 of the Trade Act of 2002, which includes the fast-track negotiating authority known as Trade Promotion Authority, says that authority expires June 1, 2005, unless the president by March 1 submits a report to Congress requesting extension of the fast-track procedures. The president's request is granted automatically, extending TPA until June 1, 2007, unless either house of Congress passes a resolution of disapproval before June 30.

This resolution must go through the Finance and Ways and Means Committees, which can kill it and probably will. The measure is not subject to a presidential veto because fast-track is a procedural restriction Congress has imposed on itself. The high legislative hurdles make it almost impossible for the president's request to be denied. The trade community is still taking the potential fight seriously to minimize any negative impact the effort to block renewal might have on the trade debate.

**NEW FARM BILL:** The 2002 Farm Bill isn't up for renewal until 2007, but Congress is likely to move early to start work on renewing the legislation by the end of 2006. The legislation, which dictates how much Congress spends annually on various farm support programs and subsidies, could be a major vehicle for implementing the agriculture deals that come out of any final Doha Round agreement. Congressional sources say lawmakers will want the Farm Bill to dictate the final mandate for U.S. negotiators in the agriculture talks before the WTO negotiations conclude. In addition to the WTO deal, the measure may also have to address a WTO dispute-settlement panel's ruling against the U.S. cotton program. The U.S. has appealed the ruling, which also hits the much broader farm credit guarantee program. As important as

the Doha Round agreement will be to the legislation, congressional sources also expect major pressure to cut farm aid as part of an expected drive to cut spending to reduce the federal budget deficit.

## OPPOSITE POLES OF TRADE WON'T RETURN TO CONGRESS

When the new 109<sup>th</sup> Congress starts in January, two of the most prominent and most diametrically opposed voices on trade won't be there to add color and flavor to the coming battles over trade legislation. In one of the few losses for a sitting incumbent, free-trade advocate Rep. Philip Crane (R-Ill.) lost his reelection bid, while self-admitting protectionist Sen. Ernest Hollings (D-S.C.) will retire in December after 37 years in the Senate.

Crane, who has served in Congress since 1970, was among the first in Washington to propose free trade deals with Latin America and Central America. Although his own party passed over him to selected Rep. Bill Thomas (R-Calif.) to chair the Ways and Means Committee, Crane remained chairman of the trade subcommittee.

Hollings was a staunch and colorful opponent of trade legislation throughout his career. Although South Carolina became a magnet for foreign investment, especially for Germany, in the 1990s, Hollings continued to fight to protect the shrinking textile industry of the state. His keen wit and sharp tongue often pierced the hypocrisy of trade supporters who would vote to help big business interests but not the workers who lost their jobs to imports.

Retirements and lost elections also removed from Congress more than a dozen moderate Democrats who supported trade legislation over the years. A key loser in the House was Rep. Charles Stenholm (D-Texas), ranking member of the House Agriculture Committee. The Senate will see the retirement of Sens. John Breaux (D-La.) and Bob Graham (D-Fla.). The departure of these lawmakers will make it harder for the Bush administration to find bipartisan support for its trade bills and leave the harshest critics of trade on the Democratic side of the aisle.

## CANADA WANTS NAFTA IMPROVED TO MAINTAIN PREFERENCES

Even before the Nov. 2 elections, Canadian officials began to send signals that they want an improvement in U.S.-Canada trade relations to be major goal for the next four years. In particular, they want the U.S., Canada and Mexico to find ways to strengthen NAFTA without totally reopening the trade pact. The Canadians are putting their focus on improving NAFTA's rules of origin to increase the integration of the North American market to prevent the further erosion of the accord's benefits as the U.S. enters free trade deals with more countries.

NAFTA provides for changes in its rules of origin without reopening the accord, Canadians point out. With all three members facing pressure from mounting imports from China, "it may well be to the advantage of all three to make North America a more competitive and productive market," one Canadian official said.

\* \* \* BRIEFS \* \* \*

SAFE HARBOR: Representatives of major exporters, trade associations and lawyers grilled BIS Assistant Secretary for Export Administration Peter Lichtenbaum at Nov. 4 meeting on agency's proposed "safe harbor" mechanism and new definition of knowledge (see WTTL, Oct. 18, page 1). Participants reportedly voiced concerns that new rules will increase burden and legal liability on exporters while not providing enough protection against legal actions.

WTO: Annual report on antidumping actions by members in last year found 18 countries imposed 52 new final dumping measures against exports from 24 countries or customs territories. "This represents a significant decline from the 114 measures imposed during the corresponding period of 2003," WTO noted.

ITC: Commission published new procedural rules in Nov. 5 Federal Register for responding to questionnaires in dumping and countervailing duty investigations and separate proposal to amend policies for hearings, in camera proceedings and APOs in almost all Commission investigations.