

Vol. 41, No. 31

August 2, 2021

Biden Nominates Trial Attorney to be BIS Assistant Secretary

No one can say Justice trial attorney Thea Kendler, a member of the career civil service, doesn't have the prerequisite experience in either export controls or China policy to be Commerce assistant secretary for export administration, as President Biden July 29 nominated her. Based on her experience, she won't need much onboarding at the Hoover Building.

While Kendler has most notably participated in the government's cases against Chinese telecom firm Huawei and its CFO Meng Wanzhou, she was also the prosecutor in other export cases, including a July indictment against a former Corning scientist on charges of illegally exporting technical data regarding fiber laser manufacturing to China (see **WTTL**, July 19, page 7).

Prior to joining Justice in 2014, Kendler served as senior counsel in the Bureau of Industry and Security (BIS) Office of Chief Counsel. Earlier, she practiced in the international trade section of the law firm Akin Gump Strauss Hauer & Feld LLP.

Two weeks earlier, President Biden nominated former Pentagon official Alan Estevez to be BIS under secretary (see **WTTL**, July 19, page 1). "As with Mr. Estevez, this nomination of Kendler signals that the administration will keep a tough stance on China and that it will nominate a proven professional to hit the ground running at BIS," China Tech Threat wrote in a blog post.

Diverse Imports Require Diverse Solutions, Section 232 Reports Reveal

When it rains, it pours. Commerce July 29 released the four outstanding Section 232 reports, on the effect of uranium, titanium sponge, transformers and their components, and vanadium on U.S. national security. In all four reports, dependence on imports were

found to be a threat to national security, but the department suggested different solutions for different products. Commerce in July issued the Section 232 report on autos and auto parts that the previous administration wrote in February 2019 (see **WTTL**, July 19, page 5).

The latest four investigations although completed over the past two years, were never released to the public or to Congress. In reverse order, Commerce completed the vanadium report in February 2021, transformers and components in October 2020, titanium sponge in November 2019, and uranium in April 2019. For example, on titanium sponge: “Despite national security concerns... an adjustment of tariffs on imported titanium sponge will not address the distortionary effect of non-market producers such as Russia, and eventually China, on the global titanium sponge market,” Commerce said.

“An alternative approach could include the United States government temporarily compensating U.S. industry for the difference between its comparatively higher production prices and lower global sale prices,” it noted. “This report also examines the possibility for multilateral negotiations among the world’s market titanium sponge producers to constructively address low prices, low inventory levels, and other factors that harm the U.S. and other market producers,” Commerce added.

On vanadium: “Given vanadium’s almost-exclusive use in concert with steel and titanium, and, as steel and titanium are both considered critical to national security—with their domestic production threatened by imports...—the Department finds that unilaterally imposing import tariffs or quotas in order to raise the domestic price of vanadium would largely impact domestic steel and titanium industries and would therefore have significant negative effects on the economic and national security of the United States,” Commerce said.

“Cost increases for only domestic steel and titanium producers would put these critical industries, already threatened by low-cost imports, at a further disadvantage relative to foreign producers,” it added.

Lawmakers, who recently had pushed for reports’ release, applauded the administration’s actions. “Congress requires consultation and reporting for all trade powers delegated to the executive branch. I thank [Commerce Secretary Gina] Raimondo and President Biden for making good on their commitment to publish these reports, something the previous administration repeatedly refused to do, and hope compliance with the law will become routine as opposed to something to celebrate,” Sen. Pat Toomey (R-Pa.) said in a statement.

USTR Needs to Document Tariff Exclusion Review Process, GAO Says

Adding insult to injury, the U.S. Trade Representative’s (USTR) office in the previous administration did not fully document all of its internal procedures to review Section 301 tariff exclusion requests, including roles and responsibilities for each step in its process,

the Government Accountability Office (GAO) said in a report released July 28 (GAO-21-506). From 2018 to 2020, USTR received 53,000 exclusion requests for specific products covered by the tariffs. Of those, the agency denied about 46,000 requests (87%), “primarily for the failure to show that the tariffs would cause severe economic harm to the requesters or other U.S. interests,” the GAO report noted. In addition, USTR did not extend 75% of the tariff exclusions it had previously granted.

In reviewing 16 selected case files and other data, GAO found inconsistencies in the agency’s reviews. “For example, USTR did not document how reviewers should consider multiple requests from the same company, and GAO’s case file review found USTR performed these steps inconsistently. Another case file lacked documentation to explain USTR’s final decision because the agency’s procedures did not specify whether such documentation was required,” the agency said.

“USTR evaluated each exclusion request on a case-by-case basis using several factors, including product availability outside of China and the potential economic harm of the tariffs. According to USTR officials, no one factor was essential to grant or deny a request. For example, USTR might grant a request that demonstrated the tariffs would cause severe economic harm even when the requested product was available outside of China,” the report said.

The agency concurred with GAO’s recommendation to fully document both the exclusion and extension processes. “USTR stated that its exclusion processes evolved over time and it did document some aspects of its procedures. Further, USTR reiterated that its extension process required different documentation than the exclusion process,” the report noted.

The report added fuel to the argument for a better process. “These tariffs are clearly hurting us too. Time to reinstate an improved exclusion process, while exploring some initial small steps with China to get rid of some of the tariffs hitting us the most,” Asia Society VP Wendy Cutler tweeted.

GOP Opposition to Treasury Nominees Could Fall in Empty Forest

All 12 Senate Banking Committee Republicans will oppose two senior Treasury nominees responsible for overseeing sanctions implementation until the administration imposes mandatory sanctions over the Nord Stream 2 pipeline, they told Treasury Secretary Janet Yellen July 28.

President Biden nominated Brian Eddie Nelson to be under secretary for terrorism and financial crimes and Elizabeth Rosenberg to be assistant secretary for terrorist financing in May. The committee held a hearing with the two nominees in June. As has been true in other cases, the nominees can still move to the Senate floor under special procedures, even with the Republican hold.

“The State Department’s own PEESA findings to Congress, combined with NS2AG’s apparent ongoing involvement with sanctioned Russian entities, strongly suggests there is evidence that NS2AG has facilitated significant transactions for, or on behalf of, one or more previously-sanctioned entities,” the senators wrote.

The Biden administration a week earlier defended its deal with Germany on the pipeline (see **WTTL**, July 26, page 1). “While we remain opposed to this pipeline, we reached the judgment that sanctions would not stop its construction and risked undermining a critical alliance with Germany, as well as with the EU and other European allies,” a senior State official told reporters at the time.

Unions Applaud Biden’s Buy American Proposal

It didn’t take long for unions and domestic industry groups to celebrate the Biden administration’s July 28 proposal to immediately increase the domestic content threshold for products the federal government buys to 60% from 55%, and a phased increase to 75% by 2029. The proposal was part of a larger effort to implement the administration’s Buy American agenda, which the president announced during the campaign (see **WTTL**, Nov. 9, 2020, page 4).

“This proposal would close a problematic loophole in the current regulation, while also allowing businesses time to adjust their supply chains to increase the use of American-made components. If adopted, this change would create more opportunities for small- and medium-sized manufacturers and their employees, including small and disadvantaged enterprises, from all parts of the country,” a White House fact sheet noted.

The administration also proposed applying “enhanced price preferences to select critical products and components” identified by the recent Critical Supply Chain review. “These preferences, once in place, would support the development and expansion of domestic supply chains for critical products by providing a source of stable demand for domestically produced critical products,” the fact sheet added.

“Increasing the domestic procurement threshold for domestic goods under the current Buy American law will bolster domestic production and stimulate more investment in U.S. manufacturing,” National Council of Textile Organizations President and CEO Kim Glas said in a statement. “For far too long, Buy American policies have contained loopholes that have undermined our U.S. domestic industrial base and its workforce,” she added.

“For years, we’ve received lip service on the importance of Buy American, but today the Biden administration is following through on the simple concept that American taxpayers’ dollars should be used to create jobs and advance production here at home,” AFL-CIO President Richard Trumka said.

Tech groups held their applause. “As we review this proposed rule, we will be considering potential impacts on the ability of companies to leverage existing global supply chains and

markets that fuel the development of new technologies and support U.S. jobs, national security, and global competitiveness,” Rob Strayer, Information Technology Industry Council (ITI) executive VP of policy, said.

Senators Introduce Bipartisan Arms Export Bill

A trio of senators July 20 introduced legislation that would flip the normal script: instead of Congress being simply notified of arms sales, lawmakers would have to take an affirmative vote on each sale over a certain dollar amount. Sens. Bernie Sanders (I-Vt.), Chris Murphy (D-Conn.), and Mike Lee (R-Utah) sponsored the National Security Powers Act (S. 2391) to “reassert and safeguard congressional prerogatives,” they said in a joint statement.

The legislation, which observers see as unlikely to pass a standalone bill, would require an affirmative vote to approve certain types of arms sales: firearms and ammunition of \$1,000,000 or more; air to ground munitions of \$14,000,000 or more; tanks, armored vehicles, and related munitions of \$14,000,000 or more; fixed and rotary, manned or unmanned armed aircraft of \$14,000,000 or more; and services or training to security services of \$14,000,000 or more.

Advocacy group Security Assistance Monitor in June 2020 attempted to quantify the arms sales that would not require congressional notification under final rules transferring firearms and ammunition from the U.S. Munitions List (USML) to Commerce jurisdiction (see **WTTL**, June 8, 2020, page 3). In 2019, sales of “at least \$249 million, including to a number of countries with questionable human rights records, would almost assuredly have fallen under the radar,” according to the group, a project of the Center for International Policy.

Congress has never successfully prevented a notified arms transfer through legislation, according to the Center for Civilians in Conflict (CIVIC). “At a moment when we’re seeing U.S. weapons devastate civilian communities caught in armed conflict, fuel human rights abuses around the world, and facilitate impunity for harm, it’s clear that Congress needs better tools to conduct real oversight and curb harmful arms transfers,” CIVIC Senior Advisor Annie Shiel said in a statement.

Businesses Could Face Mandatory Cyber Reporting Requirements

While the White House spelled out its July 28 National Security Memorandum (NSM), the executive’s branch approach to the torrent of cybercrimes, the Senate continued its push in getting at the real number of cybercrimes, as well as structuring legislation to address those attacks. For U.S. businesses, this could mean mandatory reporting of cyber attacks (see related story, page 7).

During a July 27 Senate Judiciary Committee hearing, Sen. Sheldon Whitehouse (D-R.I.) attacked the U.S. Chamber of Commerce for standing in the way of meaningful reform. He also highlighted the difficulty of getting at the hard number of companies affected by cyber intrusions because businesses are not compelled by law to report cases; rather it's a voluntary requirement. "Over and over again, groups like the U.S. Chamber of Commerce have said, don't regulate us...if you are critical infrastructure, we should no longer tolerate this voluntary regime," Whitehouse argued.

According to the Cybersecurity and Infrastructure Security Agency (CISA), the agency created in 2018 to shield America from cyber intrusions, knowledge of the scale of attacks in the U.S. is opaque, since there is no mandatory reporting by businesses. In addition, the U.S. has no way of knowing if Russia and China are keeping their word on curtailing attacks emanating from their shores, since the U.S. tally of attacks is unclear. At the July 27 Senate hearing, representatives from CISA, FBI and Justice all urged the committee to push for laws that mandate reporting by businesses.

Committee chair Dick Durbin (D-Ill.) argued for a better way of confronting cyberattacks. "We need new protocols for preventing and responding to ransomware attacks. The president understands it. His administration is taking a whole-of-government approach to prevent, deter and respond. They recently launched a cross-government task force to coordinate offensive and defensive measures against these attacks—and to help businesses."

Among the bipartisan bills before Congress, many of which were introduced in June 2021, is one sponsored by Sens. Mark Warner (D-Va.) and Susan Collins (R-Maine) that mandates companies operating critical infrastructures to report to Homeland Security (DHS) no more than 24 hours after a cyber incident. Another, by Whitehouse and Sen. Lindsey Graham (R-S.C.), would impose criminal penalties on anyone targeting a dam or hospital; while yet another sponsored by Whitehouse and Sen. Steve Daines (R-Mont.) would empower DHS to hack those who hack the U.S.

White House Moves to Protect Critical Infrastructure from Cyber Attacks

Having coordinated with allies to sanction Russia and shame China for cyber intrusions, the Biden administration shifted its focus to future cyber threats domestically. A National Security Memorandum (NSM) the White House issued July 28 specifically addressed cybersecurity for critical infrastructure and the private corporations overseeing their operations.

This NSM follows up on and works in conjunction with the president's May 2021 Executive Order (EO). Right off the bat, the administration made clear that the threats cannot be handled by the government alone, but require a "whole of nation effort," since critical infrastructure is largely owned and operated by the private sector.

The U.S. July 19 joined its allies in condemning the government of China for supporting, backing and shielding cyber hackers who in January 2021 broke into Microsoft email server, but the administration stopped short of sanctioning Beijing (see **WTTL**, July 26, page 4).

“We look to responsible critical infrastructure owners and operators to follow voluntary guidance as well as mandatory requirements in order to ensure that the critical services the American people rely on are protected from cyber threats,” the White House said. The administration argued that the degradation, destruction or malfunction of systems that control the infrastructure “could have a debilitating effect on national security, economic security, ...and safety of the American people.”

But nothing happens without structure, goals and supervision. Currently federal cybersecurity regulation is sectoral: consisting of a patchwork of statutes that have been adopted piecemeal. It only seems to grab attention when cyber threats grab public attention. The administration wants both voluntary and mandatory compliance formalized by the NSM and not ad hoc.

The NSM directs Homeland Security’s Cybersecurity & Infrastructure Security Agency (CISA) and Commerce’s National Institute of Standards and Technology (NIST) “to collaborate with other agencies, to develop cybersecurity performance goals for critical infrastructure. We expect those standards will assist companies responsible for providing essential services like power, water, and transportation to strengthen their cybersecurity,” a White House fact sheet said.

In addition, the NSM formally establishes the President’s Industrial Control System Cybersecurity (ICS) Initiative; a voluntary, collaborative effort between the federal government and the critical infrastructure community to facilitate the deployment of technology and systems that provide threat visibility, indicators, detections, and warnings.

“The Initiative began in mid-April with an Electricity Subsector pilot, and already over 150 electricity utilities representing almost 90 million residential customers are either deploying or have agreed to deploy control system cybersecurity technologies. The action plan for natural gas pipelines is underway, and additional initiatives for other sectors will follow later this year,” the White House said.

*** * * Briefs * * ***

FCPA: UK citizen Anthony Stimler pleaded guilty July 26 in Manhattan U.S. District Court to conspiracy to violate Foreign Corrupt Practices Act (FCPA) and money laundering for role in scheme to pay millions of U.S. dollars in bribes through intermediaries to foreign officials in multiple countries, including Nigeria. “In exchange for the bribes, foreign officials caused the Nigerian state-owned and state-controlled oil company to award oil contracts and to provide more lucrative grades of oil on more favorable delivery terms to Company 1, two wholly owned subsidiaries of Company 1 ... and their business partners,” criminal information noted. Sentencing is scheduled for Jan. 28, 2022.

IRONING TABLES: In 5-0 “sunset” vote July 30, ITC said revoking antidumping duty order on ironing tables and certain parts thereof from China would renew injury to U.S. industry.

SILICON METAL: In 5-0 final vote July 28, ITC determined U.S. industry is materially injured by dumped imports of silicon metal from Malaysia.

LOCKERS: In 3-2 final vote July 27, ITC determined U.S. industry is materially injured by dumped and subsidized imports of metal lockers from China. Chair Jason Kearns and Commissioner David Johanson voted no.

WIND TOWERS: In 5-0 final vote July 27, ITC found U.S. industry is materially injured by dumped imports of utility scale wind towers from Spain.

NEPAL: Customs and Border Protection (CBP) July 23 modified 1998 withhold release order (WRO) on imports of carpets and hand-knotted products from Nepal, removing products by Nepalese company Annapurna Carpet Industries Pvt. Ltd. “CBP’s thorough review of Annapurna Carpet’s business practices indicates that the company has remediated concerns about the use of forced labor in its production process and that its products may be imported,” said AnnMarie Highsmith, CBP executive assistant trade commissioner, in statement.

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