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

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Census Reconsidering Proposed Restrictions on Option 4

Based on strong complaints from exporters about proposed restrictions on the use of Option 4 postdeparture reporting of exports, the Census Bureau is reconsidering changes it proposed to the Foreign Trade Regulations (FTR) in January. "We are in the process of revisiting exactly what we want for Option 4," said Census Trade Ombudsman Omari Wooden. "What I can definitely say is that we still intend to have Option 4. The question we are debating now is what format Option 4 will exist in," he told the Bureau of Industry and Security's (BIS) Regulations and Procedures Technical Advisory Committee (RAPTAC) June 14.

> The proposal called for limiting Option 4 to agriculture products and bulk materials (see **WTTL**, Jan. 31, page 1). The list of permitted products was posted on the Census website, but was not part of the proposed regulation. "One of the proposals we're considering is instead of having a pro-list, is maybe creating a 'nots list' of products that cannot be exported Option 4," Wooden said.

A 'nots list' might include products subject to the Export Administration Regulations (EAR). RAPTAC members questioned that idea, noting that some EAR items are controlled only because they are subject to antiterrorism (AT) controls. They also urged Census to consider permitting the continued use of Option 4 by companies that have used it in the past with good compliance records. Wooden said Census also is considering cutting the time for postdeparture reporting to five days from 10 days because most reports come in within that time already.

Justice Opposes Industry-Backed Changes to FCPA Law

International firms aren't likely to see any easing of Justice prosecutions under the Foreign Corrupt Practices Act (FCPA), despite a new push from the business community and some congressional Republicans to amend the law to narrow the department's enforcement discretion. Justice opposes industry-proposed changes to the statute that would allow corporations to use the establishment of an FCPA compliance program as a defense against prosecution and also set a *de minimis* level for bribery, add a corporate "willfulness" requirement for prosecution and create a new definition of foreign official and instrument.

"The department would oppose an affirmative compliance defense," Greg Andres. acting deputy assistant attorney general in the criminal division, told a House Judiciary Committee subcommittee hearing June 14. "I think given that it's a novel and somewhat risky approach, the time is not right to adopt such a compliance defense," he said. The law already requires willfulness

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because prosecutors must show that actions were committed "corruptly," he argued. Andres refuted complaints that Justice is over-criminalizing the FCPA. "The department does not prosecute corporations based on the acts of a single rogue employee," he asserted.

> Former Attorney General Michael Mukasey, who is now with Debevoise & Plimpton, testified at the hearing on behalf of the U.S. Chamber Institute for Legal Reform. The Chamber has proposed legislation to amend the FCPA to (1) add a compliance defense; (2) clarify the meaning of "foreign official"; (3) improve the procedures for guidance and advisory opinions from Justice; (4) limit a company's criminal liability for the prior actions of a company it has acquired; (5) add a "willfulness" requirement for corporate criminal liability; and (6) limit a company's liability for acts of a subsidiary not known to the parent.

George J. Terwilliger III, a partner with White & Case, also testified and proposed amending the FCPA to provide "a post-closing period of repose for companies involved in acquisitions during which they would be shielded from FCPA enforcement while undertaking review of FCPA compliance in the acquired business and undertaking steps to remediate potential FCPA issues discovered as a result of that review." He claimed such a safe-harbor provision "presents no hazard to the fundamental objectives of the statute itself."

Final STA Rules Provide New Tool for Enforcement

The final version of new License Exception Strategic Trade Authorization (STA) published in the June 16 Federal Register will eliminate license requirements for some $1.4 billion annually, but it also will provide a new tool for export enforcement. BIS enforcement officials particularly see the notification and certification provisions of the new regulation as a way to track unlicensed reexports through a "conduit of information," according to Bob Rarog, senior advisor to BIS Assistant Secretary for Export Enforcement David Mills.

> "It not only provides the information to potential customers overseas, it also provides an auditable chain of custody. So fundamentally in the future, we will be able to check it," Rarog told RAPTAC June 14. "It seems to be trivial, but basically what it does is establish a conduit of information to the reseller or to a customer and the second thing is the customer has to acknowledge it and keep records after the transaction," he said (see **WTTL**, June 6, page 1).

In the final rule, BIS reduced the number of countries eligible for STA's most liberal treatment to 36 from 37, dropping Ukraine from the list without explanation. But it expanded a second list of countries under STA that will be eligible to receive goods that are on the Wassenaar Arrangement's Basic List. In addition to Albania and Israel, which were originally proposed, this second list now includes Hong Kong, India, Malta, Singapore, South Africa and Taiwan.

BIS dropped entirely a third list of 125 countries that it had proposed to allow STA exports for civil end-uses. An administration official denied that BIS dropped the list under pressure from Congress. "It was no one thing. It was just the result of mining the data and taking into account foreign policy considerations," he argued. The official said Congress was consulted on the provision, but the change was based on "national security considerations and nothing else."

In response to strong industry objections, BIS agreed to modify requirements for exporters to provide notifications to foreign consignees of the restrictions on STA shipments and to obtain certifications from the consignees acknowledging those limits. In the final rule, BIS will allow shippers to use the same documents for multiple shipments, if the consignee and products included in the container remain the same. An exporter must still furnish the Export Control Classification Numbers (ECCNs) to consignees "for each item to be shipped to the consignee, but does not require that the ECCN be furnished for every successive shipment of the item at issue to the same consignee so long as the ECCN remains accurate. In addition, one consignee statement may be used for multiple shipments," the notice said. BIS clarified that STA applies

to deemed exports but modified the certification requirements for such transfers. "BIS has concluded that the requirements to furnish ECCNs, to obtain a consignee statement, and to provide a destination control statement are not likely to be relevant or useful in deemed export situations, which typically involve an employer-employee relationship or researcher collaborations," BIS said. "The ECCN notification, consignee statement, and destination control statement requirements are replaced with a requirement that the releaser of the technology or source code notify the recipient of the restrictions on further release," it said.

ETRAC Concerned about BIS Resources, Export Control Reform

Members of BIS' Emerging Technology and Research Advisory Committee (ETRAC) have added their voices to the growing chorus of concern that the agency won't have the staff and resources to handle the thousands of additional license applications it will receive after hundreds of articles on the U.S. Munitions List (USML) are transferred to Commerce Control List (CCL). BIS is expected to receive an additional 30,000 licenses a year after the move, which is contemplated as part of the Obama administration's export control reform initiative, compared to the roughly 20,000 it now reviews annually (see **WTTL**, June 13, page 2).

At their June 16 meeting, ETRAC members expressed concern that their recommendations for monitoring emerging technologies would add to the additional work from the reforms and BIS won't have sufficient resources to deal with both. According to ETRAC Chair Tom Tierney of Los Alamos National Laboratory, committee members are worried their proposals for a monitoring methodology will require new regulations and resources at a time when the BIS staff is expected to face more strains on its time and budgets.

If the proposed methodology isn't useful or even implemented, then all their hours of work would be wasted, Tierney said. "My sense of what BIS wants now is very little, very easy to digest, that requires very few resources on their part, and very little in-house technical understanding," said committee member Seth Marder of Georgia Tech.

Showdown over Colombia FTA Pits Labor against Industry

As a compromise appears close to renewing the Trade Adjustment Assistance (TAA) program and moving legislation to implement the free trade agreements (FTAs) with Colombia, Panama and Korea, organized labor and the business community have mounted strenuous lobbying and advertising campaigns aimed primarily at the Colombia deal. The battle over the Colombia pact reached higher decibels after U.S. Trade Representative (USTR) Ron Kirk announced June 13 that Bogota had met the milestones in an action plan to improve labor and human rights and House Ways and Means trade subcommittee chairman Kevin Brady (R-Texas) said on June 14 that his panel would be ready to hold a "mock markup" of implementing bills for the three accords the week of June 20. At press time, a markup date had not yet been announced, but industry sources suggested the markup would not be held unless there was a deal on TAA.

"The Action Plan is designed to significantly increase labor protections in Colombia, and we are pleased that Colombia is meeting its commitments," Kirk said in a statement. Colombian union representatives in Washington the week of June 13 refuted Kirk's claims.

"I'm here to tell you that the action plan signed by President Obama and President Santos is nothing more than a trick by the Colombian government" to get Congress to ratify the FTA, a leader of Colombia's Confederation of Workers told reporters June 16. "This action plan is not going to put an end to violence against Colombian trade unionists. This action plan is not going to stop them from firing workers for trying to organize trade unions," he said through a translator. Meanwhile, Ways and Means Ranking Member Sander Levin (D-Mich.), who traveled to Colombia the week of June 6 to check on the action plan, isn't saying publicly what

he found, but is discussing his findings with other Democrats. "He met with many, many people and is sharing those conversations with his colleagues and staff," Levin's spokesman said (see **WTTL**, June 13, page 3).

> The Chamber of Commerce and AFL-CIO both launched national lobbying and advertising campaigns June 15, taking opposing sides over the trade deals and primarily Colombia. In addition to fighting the unions over the deals, the Chamber had to lobby Republican lawmakers to reject calls from the Republican Study Committee (RSC) and others to oppose extension of the TAA program, which was blocking action on the FTAs.

Chamber President Tom Donohue suggested there was not much support for the RSC position, which drew public backing in a letter signed by only 11 House members. One main issue holding up TAA was the so-called "pay-go" on how it would be funded. Donohue said members were close to a deal, with the level of funding "plus or minus a little Kentucky windage."

Dry Cleaner Sentenced to 70 Months in Jail for Evading Duties

Even without legislation to toughen enforcement of antidumping (AD) and countervailing duty (CVD) orders, Justice has succeeded in getting a 70-month jail sentence imposed on a Mexican dry cleaner who pled guilty to circumventing the AD order on wire garment hangers from China. A San Diego U.S. District Court judge sentenced Arturo Huizar-Velazquez, who owns two dry cleaners in Tijuana, Mexico, to the prison term and also ordered him to pay $7 million in forfeiture and restitution for a scheme to avoid U.S. duties (see **WTTL**, May 9, page 1).

> In pleading guilty to 55 counts of wire fraud, false statements, money laundering and other charges, Huizar-Velazquez admitted he purchased the hangers from Chinese companies and had them shipped to the U.S. without marking the country of origin. After the hangers arrived in Long Beach, Calif., he arranged for them to be shipped to Tijuana, where they were falsely labeled as "Made in Mexico," before being shipped back to the U.S. through the Otay Mesa port of entry.

"Our aggressive trade investigators are on their game. They've uncovered a complicated commercial fraud operation on the U.S./Mexico border that put law-abiding businesses at a disadvantage -- it's payback time now," said Miguel Unzueta, special agent in charge of Immigration and Customs Enforcement's (ICE) Homeland Security Investigations in San Diego. One of Huizar-Velazquez's employees, Jesus De La Torre-Escobar of Tijuana, was also sentenced to one year time served and will pay $3 million in restitution.

* * * Briefs * * *

BAHRAIN: Labor published notice in June 16 Federal Register saying it has accepted AFL-CIO petition to review whether Bahrain has violated labor provisions of U.S.-Bahrain FTA (see **WTTL**, May 16, page 4).

EX-IM BANK: In speech noting release of annual competitiveness report June 15, Bank Chairman Fred Hochberg underscored finding that export financing by Brazil, India and China has exceeded G-7 aid (see **WTTL,** May 23, page 1). In particular, he cited success of Chinese router manufacturer Huawei. "In less than 15 years, they have positioned themselves ahead of global leaders like Nokia and Siemens," he noted. "But what you can't see when you look at a Huawei router – and one of the central reasons the company's growth has been so dramatic – is that it's backed by a $30 billion credit line from the Chinese Development Bank," Hochberg stated.

EXPORT ENFORCEMENT CENTER: Site for new center is being built in Northern Virginia, but it is still three to six months away from becoming operational, BIS enforcement official Bob Rarog told RAPTAC June 14. BIS, ICE and FBI representatives have agreed on "concept of operations paper" and standard operating procedures and deputy directors are being recruited, he reported (see **WTTL**, Nov. 15, page 1).

EDITOR'S NOTE: June marks the 30th anniversary of ***Washington Tariff & Trade Letter***. As always, we thank our subscribers, "unnamed sources," and friends who have made our success possible. Thanks.