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EU Refuses to Negotiate on Data Protection in TTIP Talks

Amidst reports of U.S. spying on European Union (EU) leaders, EU officials are taking a hard stand on protecting data privacy in talks toward a Transatlantic Trade and Investment Partnership (TTIP). “The EU position is very clear,” Jean-Luc Demarty, the European Commission’s director-general of trade, said Oct. 30 at an event in Washington sponsored by the Coalition of Service Industries. “We are not and will not negotiate data protection in this negotiation, which is a fundamental right,” he declared.

U.S. and EU officials have gone back and forth about what the TTIP will mean for domestic regulations, using code words such as regulatory coherence and harmonization, and what it will mean for global companies sending data all over the world. “We have to resolve the different constraints on both sides, from the data flows perspective, and from the respect of data protection and data privacy on the other hand,” Demarty noted.

“We will not negotiate our respective regulation in TTIP, nor in other sectors. It’s not a deregulation agenda, it’s an agenda to make our regulation more compatible and more coherent with some form of equivalence,” he added (see **WTTL**, Sept. 30, page 4).

A committee of the EU parliament passed new legislation on data protection Oct. 22 and the proposals were validated Oct. 24-25 by heads of state and government. These new data protection rules include three main components: one continent, one law; a single supervisory authority; and the same rules for all companies – regardless of their establishment, noted an EU release announcing the vote.

“With the reform, companies based outside of Europe will have to apply the same rules. European regulators will be equipped with strong powers to enforce this. Data protection authorities will be able to fine companies who do not comply with EU rules with up to 2% of their global annual turnover,” the EU said.

Business Community Keeping Powder Dry on TPP

Members of the business community say they are withholding wholehearted support for a Trans-Pacific Partnership (TPP) deal because they don’t know yet what will be in the agreement and many are concerned the U.S. is ready to make concessions that will hurt

their interests. Just as trade critics have complained about the lack of transparency into the U.S. negotiating positions, industry executives also say they are not being told the U.S. stand on such issues as investment, intellectual property rights and tariffs.

According to one source, U.S. Trade Representative (USTR) Michael Froman has been trying to get corporate CEOs to go to Congress to voice support for TPP but has mostly had his requests rejected. The executives are demurring in their support for TPP because they don't know what will be in the deal, the source said (see **WTTL**, Sept. 30, page 3).

At a recent meeting in Washington on TPP, industry representatives were asked how many are ready to support TPP. No hands were raised, another source reported. One representative said his company was actually preparing to oppose the agreement based on what they expected in it.

Another business representative had a more sanguine view of TPP negotiations. "We're nearing the end game," she told **WTTL**. "That makes everyone nervous," she added. Companies want to make sure their interests are taken care of and are keeping pressure on U.S. negotiators to achieve that, she suggested.

Froman has repeatedly offered vague answers about U.S. positions on such issues as biological data protection, textile, apparel and shoe tariffs, and investment. Although he has said he is consulting with "stakeholders" on these and other issues, business representatives involved in these issues say they have not been consulted. They also complain that industry sector advisory committees (ISACs) that supposedly are being consulted lack the necessary expertise since the expulsion of registered lobbyists from their ranks.

USTR officials have tried to stir business support for TPP by warning of unprecedented opposition to the deal from unions, environmentalists and consumer groups. That argument isn't gaining traction because industry representatives say they have seen similar resistance for many previous trade agreements. In what may be a negotiating ploy, business executives may be using their reluctance to support TPP as leverage to counter any move by U.S. negotiators to make too many concessions that industry might oppose.

Meanwhile, Reps. Dave Reichert (R-Wash.), Charles Boustany (R-La.), Ron Kind (D-Wis.) and Greg Meeks (D-N.Y.) have formed a bipartisan Congressional Friends of TPP Caucus. Reichert told reporters Oct. 30 that he has been "whipping" members on the House floor for the last two weeks to support Trade Promotion Authority (TPA), which will be needed to approve any TPP deal. "So far, I'm getting some very positive feedback," he said. Reichert acknowledged that formal TPA language is still being drafted. "I think if TPA can get the support before it moves along, why wait? Let's get this thing moving along. The support in Congress drives everything. If you've got members behind us saying let's get this done, it really drives the rest of the process," he added.

Eurasian Customs Unions to Seek Trade Pact with EU

With free trade negotiations going on to the east and west of them, members of what will be the Eurasian Economic Union (EEU) -- Russia, Kazakhstan and Belarus -- are working on a potential trade agreement with the EU, Andrey Slepnev, trade minister for the Eurasian Economic Commission (EEC), told **WTTL** in an exclusive interview Oct. 30. "We

are working on a technical level with the European Commission,” he reported. “Of course, our long-term goal is a free trade zone,” he said. Russian President Vladimir Putin raised the idea of a free trade agreement between the EEU and the EU about a year ago. Slepnev acknowledged that many issues will need to be resolved before an FTA could be negotiated, including completing Kazakhstan’s and Belarus’ accession to the World Trade Organization (WTO) and the current dispute between the EU and Russia over tariffs on used vehicles. “We have no deadlines,” he said.

“We are talking about a common space with the European Union from the Atlantic Ocean to the Pacific,” Slepnev said. “It is my understanding that we could reach a legal understanding on regulatory issues as well,” he added. “I understand this is not a fast process; however, within this process each Eastern European state could find its own niche,” he said. “A dialogue based on an agreement between Russia and the European Union could be used for this purpose,” Slepnev said.

The three former Soviet states formed a customs union with a common external tariff in July 2010. Their broader integration into the EEU will go into effect Jan. 1, 2015. Recently, Armenia began talks to join the EEU, although those negotiations are “at the very early stage,” Slepnev said. The EEU is also in early talks with Kyrgyzstan about joining, he reported. For now, the EEU is not looking to expand its membership beyond that. “Actually, we have no big priority for widening” the union, he said.

Slepnev said the EEU is not looking to have Ukraine become a member. “It is not a pressing issue, because Ukraine’s main agenda is the association with the European Union. It is impossible to unite two unions,” he said. He acknowledged, however, the struggle between Russia and EU over Ukraine’s political direction. The competition between Russia and the EU over Ukraine “is nothing good,” he told WTTL. “I think it is a superficial approach to choose between them and us,” he said. “On the other hand, this issue is politically snowballing. It is made unnecessarily unwieldy, but in the final analysis, it will all work out,” Slepnev said.

Slepnev was in Washington with a large delegation from the EEC to meet with U.S. trade and regulatory officials to discuss several issues, including such bilateral irritants as Russian restrictions on beef imports treated with ractopamine, dumping duties on steel and fertilizer imports from customs union members and customs regulations. He was scheduled to meet with Deputy USTR Miriam Sapiro on Oct. 31. Under the organization of the EEU, the EEC serves as an administrative body similar to the European Commission and will have “competency” for certain areas for all three members, such as on tariffs, non-tariff barriers, customs regulations and trade remedies. Other topics will remain the competency of member states.

Divided CAFC Retains Right to Review “Substantial Evidence”

A divided Court of Appeals for the Federal Circuit (CAFC) Oct. 25 upheld its right to conduct its own “substantial evidence” review in trade remedy cases decided by the Court of International Trade (CIT) and not to give deference to the lower court’s opinion. The decision came in a nonprecedential ruling in *NSK v. ITC*, rejecting a request by ball bearing importers for an *en banc* review and rehearing of a CAFC order in May overturning the CIT’s repeated remands to the International Trade Commission (ITC) of

the commission's injury determination in the "sunset" review of dumping orders on ball bearings (see *WTTL*, May 27, page 1). The ITC decision, which found that ending the order would renew injury to the U.S. industry, is now upheld.

"We concur in the decision of the court not to rehear this case *en banc*," ruled five CAFC judges in an opinion that was per curiam with no author identified. "Contrary to the urgings of the dissenters from the denial of rehearing en banc, there is no legal justification for this court to adopt a rule requiring deference to the substantial evidence determinations of the Court of International Trade," the ruled.

"Under the Administrative Procedure Act (APA), when district courts review agency action for substantial evidence, and the district court decisions are reviewed by courts of appeals, the appellate courts conduct a nondeferential second level of substantial evidence review, applying the same standard as the district court. Every circuit has adopted that position, including this court," the opinion stated.

The majority rejected the claim that the Supreme Court's decision in *Universal Camera v. National Labor Relations Board* applied in this case. That case addressed Supreme Court's role in the review of agency action. "The Court declared that in such cases it will confine itself to deciding whether courts of appeals have 'misapprehended or grossly misapplied' the proper standard of review," they noted. "The Court did not suggest that the 'misapprehended or grossly misapplied' standard should apply to court of appeals review of district courts in administrative review proceedings," their opinion said.

The three CAFC judges who dissented and said they would have granted *en banc* included Chief Judge Randall Rader. Their opinion was written by Appellate Judge Evan Wallach, who had served previously as a CIT judge. "Most notably, the CIT's remands to the ITC for additional explanation are reviewed deferentially for an abuse of discretion, but remands for additional findings are reviewed *de novo*. There is no statutory or practical basis to distinguish the two. I believe this conflict should be resolved in favor of deferential review, consistent with the 'misapprehended or grossly misapplied' standard articulated by the Supreme Court in *Universal Camera*," Wallach wrote.

"Deferential review is appropriate because of the CIT's unique appellate role and its institutional expertise in trade matters. Because of the conflict in this court's case law and the importance of this issue, I believe the *de novo* standard should be reconsidered *en banc*. I dissent from this court's contrary ruling," he argued unsuccessfully.

Fast-Track Authority Needed to Pass Trade Deals, Senators Say

Senate Finance Committee leaders gave their endorsement Oct. 30 to U.S. trade talks on a Trans-Pacific Partnership (TPP) and a Transatlantic Trade and Investment Partnership (TTIP) but said Congress will need to enact fast-track negotiating authority – also known as Trade Promotion Authority (TPA) – before lawmakers can approve those agreements. "Congress needs to be a full partner in the development and execution of this agenda, and the best way to do that is to pass Trade Promotion Authority – and to do it soon," Baucus said in his prepared opening statement at a hearing on the U.S. trade agenda. "TPP is near completion. The TPP parties just need to know in the clearest terms what Congress' priorities are. And Congress needs to set priorities as the administration starts

negotiating with Europe. We can do that through Trade Promotion Authority,” Baucus said. “I’m pleased that President Obama has requested TPA and that Ambassador Froman has been making the case for TPA,” Baucus stated. “It’s time for us to do our part. We must introduce a bill and quickly pass it. Senator Hatch, let’s continue to work together to get that done as quickly as possible,” he added.

Before a TTIP deal can be reached, a number of challenges have to be overcome, he noted. “For example, we must address the EU’s unscientific and unjustified barriers to U.S. agricultural exports, including beef and poultry,” he said. “It’s finally time for the EU to act,” he said. “I’m confident we can overcome that hurdle – and others,” he added.

Ranking Member Orrin Hatch (R-Utah) also called for enactment of fast-track authority. “For this, or any trade negotiation to succeed, the president must work with Congress to achieve renewal of Trade Promotion Authority. Senator Baucus and I are currently working with our House counterparts to conclude a discussion on legislation to renew TPA. Once those efforts succeed, I hope that President Obama and his team will actively work with Congress to quickly seek its approval,” Hatch said.

Hatch also emphasized the importance of strong intellectual property protections in any TTIP deal. “For me to support a final agreement, it is absolutely essential that TTIP reflect the highest standard of intellectual property rights protection of any prior agreement,” he stated. He also stressed the need for an agreement on digital trade. “Given the importance of digital trade and the European market, there are several barriers to digital trade that I believe the agreement must address,” he said; citing forced localization policies that require data servers to be located in-country or that require utilization of local content or technologies.

“The final TTIP agreement should prohibit these kinds of policies,” Hatch asserted. “The agreement should also prohibit discriminatory treatment of digital products and ensure that all technologies are given the chance to compete in the marketplace,” he added. In addition, audiovisual services must be included, Hatch said.

Treasury Report Cites Appreciation of Chinese Currency

Treasury’s semi-annual report on exchange rates Oct. 29 again avoided calling China a currency manipulator and cited the 12% appreciation of the Chinese renminbi (RMB) since June 2010 when China moved off its peg against the dollar. “Based on the analysis in this report, Treasury has concluded that no major trading partner of the United States met the standard of manipulating the rate of exchange between their currency and the United States dollar for purposes of preventing effective balance of payments adjustments or gaining unfair competitive advantage in international trade as identified in Section 3004 of the Act during the period covered in the Report,” the report declared.

“The RMB is appreciating on a trade-weighted basis, but not as fast or by as much as is needed, and intervention has resumed,” the report stated. “Treasury will carefully monitor the pace of RMB appreciation in China, and press for further policy changes consistent with market determination of the exchange rate, minimizing intervention, transparency with respect to intervention, and a level playing field for American workers and businesses,” it added. In the first nine months of 2013, the RMB appreciated 6.3%

on a nominal effective basis, and 6.6% on a real effective basis, it said. Part of this was due to depreciation of the Japanese yen and weakness in the currencies of emerging markets. “However, the pace of nominal RMB appreciation against the dollar has been more modest (2.2 percent year-to-date as of October 18, 2013), with very little appreciation for several months,” it noted.

The report also covered Japan’s exchange rates. “Japan has not intervened in the foreign exchange markets in almost two years, though the authorities issued numerous public statements regarding their desire to ‘correct the excessively strong yen’ in the weeks following Prime Minister Abe’s election,” the report said.

“Japanese officials have clearly ruled out purchases of foreign assets as a monetary policy tool and have refrained from public comment on the level of the exchange rate,” it added. “We will continue to closely monitor Japan’s policies and the extent to which they support the growth of domestic demand,” the report promised.

The report found that the Korean won depreciated at a moderate pace against the U.S. dollar in the first half of 2013 and its real effective exchange rate remains undervalued in a range from 2% to 8%. “While the Korean government does not publish intervention data, market participants estimate that the authorities intervened in early 2013 to limit the pace of won appreciation as the Japanese yen weakened, switched to limiting won depreciation in June, as financial market volatility increased, and then switched back again to limiting won appreciation in September 2013,” the report stated.

Obama Boosts Efforts to Attract Foreign Investment to U.S.

The Obama administration has jumped on the bandwagon of “in-sourcing” and the increasing attractiveness of foreign investment in the U.S., launching a new program Oct. 31 to make encouragement of foreign direct investment (FDI) one of the main goals of U.S. commercial diplomacy. President Obama announced the new initiative at a Commerce-sponsored SelectUSA conference in Washington that attracted some 1,200 attendees from 58 countries and dozens of state and local government representatives who came to pitch the advantage of investment in their cities and states.

“I’m here because I want your companies to know -- I want companies around the world to know -- that I believe there is no better place in the world to do business than the United States of America,” the president said in his keynote address to the conference. “Think about it; globalization and technology means you can go just about anywhere. But there are a whole lot of reasons you ought to come here,” he said.

The four-part program includes: (1) making encouragement of FDI in the U.S. part of the portfolio of U.S. ambassadors and foreign commercial officers overseas; (2) bringing Cabinet-level officials and the White House into coordinated FDI advocacy efforts; (3) creating points of contact program for businesses looking to bring jobs and production to the U.S. in Commerce’s SelectUSA; and (4) coordinating with regional, state, local governments and economic development offices to help their efforts to bring in foreign investment, including by providing them with more research and analysis to support their work. The U.S. has become more attractive for investment for many reasons, including

rising labor and land costs that have made China less attractive; higher transportation costs to bring in imports; booming oil and gas production that has lowered energy costs in the U.S., and slower growth in emerging markets and Europe.

This is not Washington's first effort to promote FDI. At the end of President George W. Bush's term, then-Under Secretary of Commerce Frank Lavin launched a similar program but without the same White House push and authority. The U.S. has long been the largest recipient of FDI, with inflows rising and falling year-to-year. In 2012, net U.S. assets of foreign affiliates totaled \$3.9 trillion, according to a joint Commerce-White House report. For 2012, FDI inflows totaled \$166 billion, it noted.

A separate report issued Oct. 30 by the Organization for International Investment (OFII), which represents foreign firms in the U.S., boasted about the FDI benefits to the U.S. The report, "Insourcing Companies: How They Raise Our Game," noted that over the past two decades, approximately 84% of all foreign companies entering the U.S. came through mergers and acquisitions of U.S. companies; over the past decade they increased their contribution to U.S. GDP by 25.2% – nearly double the private sector's 14.3% increase – and increased their research and development spending in the U.S. by 31.5% compared to 15.5% for by domestic firms.

A panel of executives at the SelectUSA conference stressed many of the factors that are making the U.S. more attractive for FDI and the return to the U.S. of companies that had moved production offshore. Black Rock CEO Larry Fink cited America's large, safe, well-regulated capital markets, which recovered quicker than the rest of the world from the 2008 recession. Dow Chemical President and CEO Andrew Liveris warned against squandering the opportunity the U.S. has because of its energy and natural resources. "Where's the brightest spot? It's here," Liveris declared.

Walmart CEO Bill Simon reported on his company's initiative to increase the purchase of "made-in-America" goods by \$50 billion a year over the next five years and to encourage its suppliers to move production to the U.S. from overseas. He said the program can work because "Walmart can provide the certainty of a purchase order." Later at a press conference, he introduced executives from three companies that have moved production to the U.S. to take advantage of Walmart's initiative. Elan Polo Inc. is building a shoe factory in Georgia; Louis Hornick & Co. is opening a factory in South Carolina to produce window drapes; and Everyware, maker of Anchor and Oneida housewares, is investing in Ohio and Pennsylvania to make canning jars for Walmart.

* * * **Briefs** * * *

EXPORT ENFORCEMENT: Chih-Kwang Hwa of Woodinville, Wash. and his company, Precision Image Corporation, were sentenced Oct. 28 in Seattle U.S. District Court for violating Arms Export Control Act (AECA) and wire fraud. Company was fined \$300,000 and Hwa was sentenced to four months in prison, and six months of home detention as part of his two years of supervised release. He admitted that he obtained Navy contracts to supply circuit boards by falsely claiming they would be made in U.S. Instead, he sent restricted information to company in Taiwan to make them there. Hwa pleaded guilty July 30 (see **WTTL**, Aug. 5, page 9).

MORE EXPORT ENFORCEMENT: Graftech International Holdings Inc. of Parma, Ohio, agreed Oct. 25 to pay \$300,000 to settle 12 BIS charges of exporting CGW grade graphite to China and India without licenses. Graphite is classified under ECCN 1C107.a and controlled for

missile technology reasons. Graftech neither admitted nor denied the charges. GrafTech USA LLC settled unrelated BIS charges in March 2012 (see **WTTL**, April 9, 2012, page 4).

CHINA: AFL-CIO President Richard Trumka issued statement Oct. 31 opposing coming talks between U.S. and China on bilateral investment treaty (BIT). “The United States should not pursue an investment agreement that makes it easier for U.S. businesses to move their operations offshore to China, further undermining American jobs and living standards,” he said. “Nor should we make it easier for Chinese firms that are operating at the direction of or under the umbrella of the Chinese government to invest in the U.S. and be rewarded with new protections,” Trumka added. “A BIT with China based on the existing model will only exacerbate the negative outcomes of the current misguided U.S. trade policy, which has resulted in more than 2.7 million jobs displaced to China and a 2012 trade deficit of more than \$315 billion,” he said (see **WTTL**, July 15, page 5).

CHLORINATED ISOCYANURATES: In 4-0 preliminary vote Oct. 28, ITC determined that there is reasonable indication that U.S. industry is materially injured by dumped imports of chlorinated isocyanurates from Japan and subsidized imports from China. Commissioners Shara L. Aranoff and F. Scott Kieff did not participate.

BIS: Report from Commerce Inspector General (IG) Sept. 30 on department’s handling of classified documents found greatest mishandling by BIS. As part of audit of classified material mandated by Reducing Over-Classification Act of 2010, IG found BIS had mismarked 15 documents and failed to record 14 document classifications accurately in its security system. Only other Commerce agency cited in report was National Telecommunications and Information Administration, which had 20 deficiencies tied to failing to declassify documents and potentially exceeding classification dates. Commerce said it has taken steps to correct all identified faults.

UKRAINE: Japan requested WTO dispute-settlement consultations with Ukraine Oct 30 to complain about Kiev’s safeguard measures against passenger car imports. In April, Ukraine imposed duties of 6.46% on imports of cars with cylinder capacity exceeding 1000cm³ but not exceeding 1500cm³ and of 12.95% on imports of cars with cylinder capacity exceeding 1500cm³ but not exceeding 2200cm³. Japan claims Ukraine’s actions weren’t consistent with WTO safeguard agreement because Ukraine did not provide adequate opportunity for prior consultations with members, failed to publish report explaining reasons for safeguards and imposed restrictions that went beyond what is needed to prevent or remedy serious injury.

TOBACCO: Fifty-six House members, including Ways and Means Ranking Member Sander Levin (D-Mich.), sent letter Oct. 30 to President Obama, urging USTR to reconsider “safe harbor” provisions to preserve regulations on tobacco in TPP negotiations. “With tobacco tariffs subject to duty reduction, and with uncertainty as to whether tobacco control measures are adequately protected, the TPP could result in greater use of a deadly product,” letter noted.

BALL BEARINGS: CIT Judge Timothy C. Stanceu affirmed Commerce’s use of zeroing in 20th administrative review of ball bearings from France, Germany, Italy, Japan and the United Kingdom Oct. 25 but ruled as unlawful department’s publication of liquidation instructions 15 days after publication of final results (slip op. 13-131). Plaintiff, *SKF*, had argued that previous CIT ruling on liquidation notice was entitled to collateral estoppel in this case. Stanceu agreed. “As a result, the issue litigated by the parties in this action already has been considered and decided by this Court in a previous case that culminated in a declaratory judgment in favor of plaintiffs. The court therefore declines, on the basis of collateral estoppel, to consider the merits of defendant’s argument in support of the fifteen-day policy as applied to implement the twentieth administrative reviews and will award plaintiffs declaratory relief,” he ruled.

TIRES: CIT Judge Jane Restani upheld Commerce redetermination decision in countervailing duty (CVD) case against imports of pneumatic off-the-road tires from China Oct. 30 (slip op.13-132), ruling department corrected problems she identified in earlier remand order. In *GPX*

v. U.S., Restani noted that Chinese government had refused to provide information on government-owned entities in case. "When Commerce has access to information on the record to fill in the gaps created by a lack of cooperation by the government, however, it is expected to consider such evidence," she wrote. "If an alternative benchmark meets the regulatory criteria and is neutral with respect to a cooperating party, that benchmark would be superior to the one that adversely affects the cooperating party," Restani added. Commerce revised review of this alternative data was sufficient to uphold its ruling.

IRAN: As it often does, OFAC Oct. 30 reissued General License 5c, authorizing transactions related to arrest, detention and judicial sale of MV Dianthe, Iranian vessel on its Specially Designated Nationals and Blocked Persons (SDN) list. Vessel is under arrest in Mundra, India. "If the Vessel is sold pursuant to judicial sale, the purchaser of the Vessel may provide OFAC with evidence demonstrating that the basis for the blocking is no longer applicable in order to expedite the removal of the Vessel" from SDN list, OFAC noted.

PIRATES: Pirates off Horn of Africa near Somalia extorted between \$339 million and \$413 million in ransom for highjacked ships from 2005 to 2012, World Bank reported Nov. 1. International organizations tracking those funds found them being used in both criminal and legitimate investments. Study followed "pirate money model" through 59 pirate "financiers" who funneled money into arms trafficking, funding militias, migrant smuggling and human trafficking, as well as legitimate trade in popular African stimulant, khat. Laundering occurred particularly in Kenya, "where it is not monitored and therefore is the most vulnerable to illicit international flows of money," bank noted. From 30 to 75% of money ends up with these financiers. The pirate "footsoldiers" aboard the ships receive less than 0.1% of the total, report found. "These criminal groups and their assets will continue to pose a threat to the stability and security of the Horn of Africa unless long-term structural solutions are implemented to impede their current freedom of movement," one UN official said in statement.

STEEL REBAR: In preliminary vote Nov. 1, ITC determined U.S. industry may be materially injured by dumped imports of steel concrete reinforcing bar from Mexico and Turkey and subsidized imports from Turkey. Two votes on Turkish imports were 5-0 affirmative; vote was 4-1 for Mexico. Commissioner F. Scott Kieff did not participate.

ANTIDUMPING: ITA will publish change to its antidumping review practices in Nov. 4 Federal Register to adopt new policy of sampling potential respondents to give smaller exporters better chance of getting review and also ending "conditionally" accepting respondents in NME cases. "Random selection ensures that every company has a chance of being selected as a respondent and captures potential variability across the population," agency says. "The Department will no longer consider the NME entity as an exporter conditionally subject to administrative reviews. Accordingly, the NME entity will not be under review unless the Department specifically receives a request for, or self-initiates, a review of the NME entity," notice states.

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