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## BIS Officials Still Not Sure about “2 for 1” Waiver

Now that proposed rules on the transfers of items from U.S. Munitions List (USML) categories I, II and III (firearms and ammunition) are at the Office of Management and Budget (OMB) for formal review, Bureau of Industry and Security (BIS) officials are still not sure if its proposed rule will be granted a waiver from the administration’s “2-for-1” executive order.

OMB received parallel proposed rules from BIS and State’s Directorate of Defense Trade Controls (DDTC) Sept. 26 (see **WTTL**, Oct. 2, page 8). Gun industry sources had thought the rule would be exempt from the order since it is reducing or lessening regulation, rather than adding to control.

While DDTC has been ruled exempt, OMB will determine BIS rules on a case-by case basis. So far, any rules to implement multilateral regime changes have already been ruled exempt. However, “other rules, particularly ones we would do in terms of bookends for items moving off the USML, they are covered. We’ll have to work through the ‘2 for 1’ and cost-savings requirements. What we’ve done is for [firearms] is a model for that, I think we have a process worked out for that,” BIS Deputy Assistant Secretary Matt Borman told the agency’s annual Update conference Oct. 4.

“Generally speaking, sanctions and entity list will also be under the foreign affairs exemption because of the very nature of their subject,” Borman said. As far as timing of the firearms rules, “I would expect that will be in the next some weeks, [but it] really depends on the comments we get from other agencies, he added.

## GAO Wants More Recent Sanctions Data

State is more than three years behind in providing to Congress the most recent data on sanctioned entities and its process for identifying those entities, the Government Accountability Office (GAO) reported Sept. 28 (GAO-14-779R). Specifically, the GAO

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report outlined the process that State and Treasury use for identifying entities that are “potentially sanctionable” under two prior Executive Orders (12938 and 13382) and the Iran, North Korea, and Syria Nonproliferation Act (INKSNA).

According to the agencies, since the January 2016 implementation of the Iran nuclear deal, they have designated 33 entities and 25 individuals for Iran missile-related sanctions pursuant to one of the executive orders, the GAO report noted. In March 2017, for example, State imposed sanctions on 30 foreign entities and individuals in 10 countries in its annual review under INKSNA (see **WTTL**, March 27, page 1).

However, GAO reported that while State has imposed sanctions on entities under INKSNA since January 2016, the department has not provided the most recent data to Congress. “The most recent INKSNA reports to congressional committees, delivered in June 2016 and March 2017, covered activities in calendar years 2013 and 2014, respectively. However, State has yet to provide the committees with reports covering the period after January 16, 2016, as required by INKSNA’s reporting deadlines,” the report noted.

“State informed us that the most recent INKSNA reports contain references to, or consideration of, information subsequent to the implementation of JCPOA and that it used this information to inform some decisions that led to the imposition of sanctions against entities and individuals for transfers of items to Iran’s missile program,” GAO added.

In comments included in the GAO report, State defended its deliberative process. “In terms of specific steps we have taken to improve the process, we regularly review lessons learned from previous reports and incorporate these best practices into follow-on iterations of INKSNA reports,” it said. Treasury and the Office of the Director of National Intelligence (ODNI) declined to provide written comments, GAO said.

“For example, we have now streamlined the decision making process to reduce the workload in making sanctions determinations by modifying the INKSNA decision and background memo to consolidate certain cases on which the interagency has achieved consensus recommendations, thereby simplifying the review and approval process,” State responded with a vague exercise in buzzword bingo. “We continue to note the inherent difficulties in meeting the INKSNA timelines,” it added.

“Finally, the decisions made on one report, such as approval to add new items to INKSNA reportability and/or to defer sanctions in order to permit more time for foreign governments to investigate relevant activity, affect the contents of the next report so we have to prepare and submit them in sequence. Nevertheless, we endeavor to meet the deadlines set.”

## **BIS License Amendments Proposed Rule Coming Soon**

Bureau of Industry and Security (BIS) expects to publish a proposed rule on license amendments by the end of 2017 or early 2018. The proposed rule will likely be conducted

as a pilot project for a new license amendment process, Timothy Mooney, senior export policy analyst with the agency's Regulatory Policy Division, told BIS Update attendees Oct. 4. The rule will propose "adopting a license amendment process, including making changes to SNAP-R system to allow for licensees to request certain changes (amendments) to currently valid licenses," Mooney said.

"The idea with this, you have your existing license and then be able to come into SNAP and request certain changes to your license. For example, perhaps, requesting adding additional parties to your license, removing certain parties from your license, adding additional items to your license. It's still in the works, so we're still trying to determine what's going to be the scope of permissible changes," he added.

Other proposed changes include "updating permissible non-material changes that can be made to licenses, by making certain clarifications and expansions to the section of the EAR [Export Administration Regulations] that specifies what changes may be made to a BIS license without contacting BIS and adopting a more efficient process for requesting license transfers by adopting a process to allow submissions of requests for license transfers to be made via SNAP-R and expand the process to allow requests to transfer reexport and in-country transfer licenses," according to BIS slides.

Mooney and his colleagues believe that the benefits of adopting the proposed license amendments process will create a more "efficient and transparent" process for requesting changes and reduce the number of new licenses that need to be reviewed.

## **ITC Washer Decision Pits Ohio Senators vs. S.C. Lawmaker**

In a decision that could pit Ohio workers against those in South Carolina, the International Trade Commission (ITC) Oct. 5 voted 4-0 to move forward with the global safeguard petition seeking relief from imports of large residential washers Whirlpool filed in May. Whirlpool had the support of Ohio Sens. Sherrod Brown (D) and Rob Portman (R), who called the practice of moving production to avoid duties "trade whack-a-mole," at a hearing in September (see **WTTL**, Sept. 11, page 6).

As expected, Whirlpool and the Ohio senators applauded the vote. "For the third time since 2013, the ITC has found that Samsung and LG engaged in unlawful conduct by violating U.S. trade laws. This vote sets the stage for the administration to put in place an effective remedy to create a level playing field for American workers and manufacturers, said Whirlpool Chairman Jeff M. Fettig in a statement.

"We can't let LG and Samsung get away with dumping their washers into the U.S. and hurting Ohio workers," said Brown. "The President and ITC must make a strong recommendation that provides real relief for workers in Clyde [Ohio plant] and around the U.S. who've been hurt by this surge of cheap washers."

In its own statement, Samsung said it was "disappointed" with the ITC decision, but said it was committed to building manufacturing plant in South Carolina, the district of Rep.

Ralph Norman (R-S.C.). “We urge the Commission to consider carefully how potential remedies might hinder the establishment and operations of this facility and affect American consumers,” it said.

“We believe that safeguard remedies should not discriminate in favor of one group of U.S.-based workers over another and should not negatively impact a fair appliance marketplace for consumers,” the company added. “Restrictions on imports of Samsung washing machines will negatively affect American consumers by limiting choices, raising prices, and offering less innovative washing machines,” it said.

All four commissioners made negative findings with respect to imports from Canada and Mexico and all other free trade agreement (FTA) countries. The commission will hold a remedy hearing Oct. 19.

## **KORUS Headed for Amendment**

While Korea and the U.S. agreed Oct. 4 to begin the process of amending the U.S.-Korea Free Trade Agreement (KORUS) following the second round of the special Joint Committee meetings in Washington, neither side presented any specific areas of discussion or potential changes.

“I initiated Joint Committee discussions at the direction of the President to improve outcomes under this agreement for all Americans. I now look forward to intensified engagement with Korea in an expeditious manner to resolve outstanding implementation issues as well as to engage soon on amendments that will lead to fair, reciprocal trade,” Lighthizer said in a statement. The administration is required to give Congress 90 days’ notice of its intent to amend KORUS.

The first Joint Committee session in August concluded in an impasse (see **WTTL**, Sept. 25, page 9). But this time around, Korea seems to be more amenable to the U.S.’ wishes. “The two sides shared an understanding of the need to amend the free trade agreement to further strengthen the mutual benefits of the Korea-U.S. FTA,” read the statement from Korea’s Trade Ministry. The ministry needs to conduct an economic feasibility study, consult with stakeholders, organize public hearings and consult with parliament as part of the amendment process, it said.

## **Finance Committee Questions Trade Nominees**

With many trade relationships up in the air, Senate Finance Committee held a confirmation hearing Oct. 5 for three important trade nominees: Jeffrey Gerrish to be deputy U.S. Trade Representative (USTR), Gregory Doud to be chief agricultural negotiator at USTR, and Jason Kearns to be a member of the International Trade Commission (ITC). The hearing, which was sparsely attended by committee members due to other pressing Senate business, got off to a rocky start for Gerrish, primarily over non-

trade matters. Sen. Ron Wyden (D-Ore.) took Gerrish to task for allegedly casting his vote illegally in the 2016 general election. Gerrish and his family moved from Virginia to Maryland in June 2016, but he proceeded to vote in Virginia in November, despite being well outside 30-day grace period. “I have a hard time understanding how an attorney as accomplished as Mr. Gerrish can walk out of his house in Maryland, travel all the way to Virginia and cast his vote in that state without thinking there may be an issue,” Wyden said.

“You obviously can’t flash a Maryland driver’s license when a Virginia polling place worker asks where you live,” he added. “This seems to me to be a serious error in judgment on a part of the law that’s pretty unambiguous,” Wyden noted.

In response, Gerrish called it an “honest, good faith oversight on my part.” That seemed to satisfy Committee Chair Orrin Hatch (R-Utah), who remains in support of the nominee.

Sen. Pat Roberts (R-Kan.), who heads the Agriculture Committee, was less concerned with voting and more concerned about the impact of NAFTA on U.S. farmers. Roberts expressed the feeling of many in the agricultural sector that trade negotiations should first “do no harm.” Gerrish agreed and said where trade has been successful the U.S. “should build on that” and fix the various problems associated with NAFTA and KORUS.

Given the same question, Doud, a former Senate Agriculture Committee Republican aide and a former chief economist of the National Cattlemen’s Beef Association, had details ready. “It’s hard to overstate the importance of NAFTA to U.S. agriculture. Those are our second and third biggest markets. I think the number is – they account for \$38 billion of about \$138 billion in U.S. agricultural exports are just to those two countries.” Korea is an “enormously important market for meat,” he added.

Kearns, who may be familiar to the committee, as he served as House Ways and Means democratic chief trade counsel, and is up for much less glamorous job, got less attention. Sen. Robert Menendez (D-N.J.), who returned to Washington for the first time since his federal corruption trial began, asked Kearns, “How much value and weight do you think the Commission should place on submissions from purchasers and end-users?” Kearns said that he believes their input could be “very valuable” to the process.

## **Industry Lays Out Concerns Ahead of China IPR Hearing**

Not surprisingly, industry had much to say about China’s policies toward technology transfer, intellectual property rights (IPR) and innovation and made their opinions known ahead of an interagency Section 301 Committee hearing Oct. 10. As USTR received more than 50 comments from industry, China raised its concerns with Commerce about the hearing in a recent meeting in Hong Kong (see **WTTL**, Oct. 2, page 4).

“While there may be some legitimate national security concerns in these areas, China’s acts, policies, and practices sweep far more broadly than is reasonable or necessary. They

often seem to operate under an assumption that any and all non-Chinese ownership, control or commercialization of key technologies and IP in the Chinese market is an inherent security threat to be minimized by any means necessary,” wrote Wiley Rein, LLP in its comments.

The U.S.-China Business Council tried to thread the needle between restricting trade and changing policy. “While Section 301 provides a variety of options that the United States may use when it finds that trading partners’ policies are unreasonable or discriminatory, the ultimate goal of the U.S. statute – and the goal of U.S. companies who face discrimination – is the elimination of those policies. Eliminating those policies would allow greater access to what is currently at least a \$400 billion market for the U.S. economy, but should be much more,” they wrote.

“Rather than simply seeking to impose penalties or restrict trade, which could have the effect of inhibiting commercial cooperation that benefits U.S. companies and U.S. citizens, the preferred approach should be to develop and achieve enduring solutions – changes to Chinese policies and practices that resolve the issues,” the Council stated.

**\* \* \* Briefs \* \* \***

**TRADE FIGURES:** Merchandise exports in August jumped 4.1% from year ago to \$129.2 billion, Commerce reported Oct. 5. Services exports gained 4.4% to record-high \$66.1 billion from August 2016. Goods imports increased 4.5% from August 2016 to \$193.6 billion, as services imports gained 2.0% to \$44.1 billion.

**STEEL FITTINGS:** Bonney Forge Corporation and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union filed countervailing and antidumping duty petitions Oct. 5 with ITA and ITC against imports of forged steel fittings from China, Italy and Taiwan.

**FRESH GARLIC:** In 4-0 “sunset” vote Oct. 4, ITC said revoking antidumping duty orders on imports of fresh garlic from China would renew injury to U.S. industry.

**STAINLESS STEEL FLANGES:** In 4-0 preliminary vote Sept. 29, ITC found U.S. industry may be injured by allegedly dumped and subsidized imports of stainless steel flanges from China and India.

**EX-IM BANK:** White House Oct. 3 sent Senate nominations of Claudia Slacik and Judith Delzoppo Pryor to be Ex-Im Bank board members (see **WTTL**, Oct. 2, page 7). Slacik was bank’s senior VP for export finance from 2013 to May 2016...At same time, President Trump renominated former Rep. Spencer T. Bachus II (R-Ala.) to be board member and Kimberly Reed to be Ex-Im Bank first VP. Reed most recently was president of nonprofit International Food Information Council Foundation.

**AGRICULTURE:** Senate Oct. 3 confirmed by voice vote Ted McKinney to be first Agriculture under secretary for trade and foreign agricultural affairs. “Secretary Perdue described the trade undersecretary position as one focused on ‘waking up every morning seeking to sell more American agricultural products in foreign markets,’” National Pork Producers Council President Ken

Maschhoff said in statement. "That's a worthy and much-needed mission and Ted McKinney is a great champion to fulfill it," he added.

**ANTIBOYCOTT:** Oxyde Chemicals, Inc. of Houston agreed Sept. 28 to pay \$59,600 civil penalty to settle 17 violations of BIS antiboycott regulations. Oxyde allegedly refused to do business, furnished information about business relationships with boycotted countries or blacklisted persons and failed to report receipt of request to engage in restrictive trade practice or foreign boycott against country friendly to U.S. from May 2010 through April 2014 during transactions with Bahrain, Lebanon, Libya and UAE.

**OFAC:** BD White Birch Investment LLC (White Birch USA) of Greenwich, Conn., agreed Oct. 5 to pay OFAC \$372,465 to settle three charges of violating Sudanese Sanctions Regulations. Firm facilitated sale and shipment of 543.952 metric tons of Canadian-origin paper from Canada to Sudan worth \$354,602.26 in April and December 2013. "Various personnel within White Birch USA and its Canadian subsidiary, White Birch Paper Canada Company NSULC, were actively involved in discussing, arranging, and executing the export transactions to Sudan," OFAC said. Company did not voluntarily disclose apparent violations.

**FCPA:** Malcolm Harris was sentenced Oct. 5 in Manhattan U.S. District Court to 42 months in prison for his role in scheme to bribe foreign official in Middle East to land real estate deal. Harris pleaded guilty in June to wire fraud and money laundering charges (see **WTTL**, June 26, page 8). Indictment was unsealed in January against Harris and father-son defendants, Ban Ki Sang of South Korea and Joo Hyun Bahn, aka Dennis Bahn, of Tenafly, N.J., for violating Foreign Corrupt Practices Act (FCPA), money laundering and wire fraud. Two allegedly conspired to pay \$2.5 million in bribes to close \$800 million skyscraper deal in Vietnam. "Instead of using the funds to pay the purported upfront bribe to Foreign Official-1 as he had promised Bahn, Harris spent the money on lavish personal expenses," Justice sentencing memo noted. Bahn was arrested in Tenafly in January and released on \$250,000 bond. Ban is at large, believed to be in South Korea.

**EXPORT ENFORCEMENT:** Three Miami area residents pleaded guilty Oct. 3 in Miami U.S. District Court to illegally exporting aviation parts and equipment, including micro switches, to Syria between September 2013 and March 2014. Ali Caby, Arash Caby and Marjan Caby, all employees of Miami export company AW-Tronics, were arrested and charged in February with conspiracy to violate International Emergency Economic Powers Act (IEEPA) by exporting parts and equipment to Syrian Arab Airlines, Syrian government airline, which is blocked entity (see **WTTL**, Feb. 27, page 4). Eight others were also charged in indictment, including Syrian Arab Airlines aka Syrian Air. Sentencing is set for Dec. 19.

**MORE EXPORT ENFORCEMENT:** Ali Eslamian agreed to pay BIS \$250,000 civil penalty to settle charge of violating Temporary Denial Order (TDO) issued in August 2011 and renewed in February 2017 against Mahan Airways and 14 other entities including Eslamian. Between October 2011 and February 2012, he "carried on negotiations concerning, and ordered a U.S.-origin International Aero Engine (IAE) aircraft engine, bearing manufacturer's serial number V12535," BIS settlement noted. Engine is classified under ECCN 9A991.d, controlled for anti-terrorism reasons and valued at approximately \$7.7 million. Eslamian sought to purchase used IAE aircraft engine from Brazilian airline, which raised concerns in January 2012 about Eslamian's name appearing on U.S. government sanctions list, BIS added. Of penalty, \$150,000 will be suspended for four years then waived if Eslamian commits no further violations.

**STILL MORE EXPORT ENFORCEMENT:** Anastasia Diatlova, ARC Electronics salesperson, was sentenced Sept. 14 in Brooklyn U.S. District Court to time served followed by two years'

supervised release on charges of unlicensed export of microelectronic products to Russian military and intelligence agencies between 2008 and 2012. She was convicted in October 2015. Codefendant Alexander Posobilov of Houston was sentenced in February to 135 months in prison for his role (see **WTTL**, March 6, page 6). In all, 11 Russian and U.S. naturalized citizens were indicted in scheme.

**CUBA:** State Oct. 3 ordered departure of 15 Cuban officials from its Washington embassy over mysterious “attacks” that affected health of diplomatic staff in Havana. “This move does not signal a change of policy or determination of responsibility for the attacks on U.S. Government personnel in Cuba. We are maintaining diplomatic relations with Havana,” State official said in briefing. Decision “was taken due to Cuba’s inability to protect our diplomats in Havana, as well as to ensure equity in the impact on our respective operations,” official said. State Sept. 29 ordered home non-emergency personnel and family from U.S. Embassy in Havana (see **WTTL**, Oct. 2, page 8).

**ROUTED EXPORT TRANSACTIONS:** In Federal Register Oct. 6, Census requested public comments on “clarity, usability, and any other matters” related to requirements on routed export transactions. In particular, bureau is interested in comments on definition of routed export transaction as well as responsibilities of parties. Comments are due Dec. 5. BIS suggested removing phrase from its regulations in 2014, but industry disagreed (see **WTTL**, Dec. 22, 2014, page 6).

**IRAN:** President Trump hinted he may not certify Iran nuclear agreement by Oct. 15 deadline. Seeking to address those rumors, reporter Oct. 5 asked White House Spokesperson Sarah Huckabee Sanders for clarity. “The President has, as he said, made a decision on this, and he’ll make that announcement at the appropriate time. The main focus that he has had has been a comprehensive strategy on how to deal with Iran. That is what he wanted his team to put in place, and I think you will see that announced in short order. And that will be a comprehensive strategy with a unified team behind him supporting that effort,” said Sanders. Sen. Tim Kaine (D-Va.) tweeted next day: “WH tells Sens POTUS will decertify Iran deal but asks Congress NOT to reimpose sanctions. ‘Pay no attention to the man behind the curtain.’”

**TRADE PEOPLE:** Former USTR Michael Froman appointed next James R. Schlesinger Distinguished Professor at University of Virginia’s Miller Center for Public Affairs, school announced Oct. 2. Froman served as USTR under President Obama from 2013-2017. He is currently distinguished fellow at Council on Foreign Relations.

**AIRCRAFT:** Commerce announced Oct. 5 affirmative preliminary determination in antidumping duty investigation of 100- to 150-seat large civil aircraft from Canada. Commerce calculated a 79.82% margin based on adverse facts available due to Bombardier’s failure to provide information. Same rate applies to all other producers/exporters. Petitioner is Boeing. Commerce hit same aircraft with preliminary subsidy rate of 219.63% in countervailing duty investigation Sept. 26 (see **WTTL**, Oct. 2, page 1).

**WINE SALES:** U.S. Oct. 2 requested WTO consultations with Canada regarding sales of wine in British Columbia grocery stores. U.S. says British Columbia measures discriminate against wine imports because only provincial wine can be sold on store shelves, while imports are relegated to “store within a store.” U.S. first filed request in January (see **WTTL**, Jan. 23, page 1). New request includes updates to provincial measures previously not covered.

**SUDAN:** Administration Oct. 6 revoked certain sanctions on Sudan. “As a result of the revocation of these sanctions provisions, effective October 12, 2017, U.S. persons will no longer be prohibited from engaging in transactions that were previously prohibited under the Sudanese Sanctions Regulations,” Treasury said in Frequently Asked Question (FAQ) posted Oct. 6. White House in July extended review period by three months for revocation of sanctions (EO 13761) issued in January (see **WTTL**, July 17, page 6). Decision does not remove Sudan from State Sponsors of Terrorism (SST) list or affect OFAC sanctions related to conflict in Darfur, Treasury noted. At same time, department issued General License A authorizing exports of agricultural commodities, medicine or medical devices. “Any further normalization of ties will require continued progress by the Government of Sudan,” State spokesperson Heather Nauert said in statement.

**STEEL:** Commerce Secretary Wilbur Ross told BIS Update attendees Oct. 4 that Section 232 investigations into steel and aluminum are ongoing. Ross initially said reports would be completed in June (see **WTTL**, Sept. 18, page 5). At Senate Finance Committee trade hearing next day, Sen. Ron Wyden (D-Ore.) criticized investigations. “In April the president ordered the launch of investigations into steel and aluminum imports. He said it was a historic day, but so far, it’s been a historic blunder. Failing to follow through on this tough talk has led to steel imports jumping by 21%,” Wyden said.

**FALSE CLAIMS:** Garment wholesaler Notations, Inc. agreed Oct. 3 to pay \$1 million in damages to settle civil fraud claims brought under False Claims Act. U.S. intervened in September 2016 in complaint against Yingshun Garments, N.Y. subsidiary of China-based clothing manufacturer, former managing director and Notations in Manhattan U.S. District Court (See **WTTL**, Oct. 3, 2016, page 9). Suit claimed Yingshun engaged in double-invoice scheme where Yingshun presented falsely undervalued invoices to CBP for the purpose of avoiding import duties on garments sold to Notations between 2009 and 2014. Under settlement, Notations admits and accepts responsibility for failing to act in response to “multiple warning signs” and agrees to implement measures designed to prevent future fraud.

**ITAR:** DDTC is drafting notices of inquiry in review of USML categories V (explosives), X (protective personnel equipment) and XI (electronics), DDTC Chief Brian Nilsson told BIS Update attendees Oct. 4. “Why those? Because, particularly categories V and XI, are ones where we’re seeing the most problems, so we’re taking them out of order from the original publication. That’s driven in large part by the CJs that we get,” Nilsson said.