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Agreement Clears Way for Proposal on Toxin Exports

Obama administration officials have reached an agreement that has cleared the way for a proposal to revise export controls on toxins and biological products and to resolve concerns of federal laboratories and universities about restrictions on their research. Bureau of Industry and Security (BIS) Assistant Secretary Kevin Wolf said he signed a Federal Register notice June 9 for the creation of controls for these products on the Commerce Control List (CCL), while the Directorate of Defense Trade Controls (DDTC) was expected to issue a parallel rule amending U.S. Munitions List (USML) Category XIV controls on these items. The proposals are expected to be published by end of June.

The proposals address the concerns of Department of Homeland Security (DHS) laboratories, the Centers for Disease Control (CDC) and universities that their health-related work on some toxins and biologics has forced them to be controlled under the International Traffic in Arms Regulations (ITAR) even when their work is not military related. These objections have blocked interagency agreement on Category XIV for more than two years.

Under the agreement, the list of controlled toxicological, chemical and biological agents in Category XIV will be modified to clarify which ones are controlled and to emphasize existing language aimed at applying controls only in connection with “increasing their capacity to produce casualties in humans or livestock, degrade equipment or damage crops.” Research that is not aimed at these uses won’t be ITAR controlled.

Wolf told WTTL that DHS, CDC and some universities that were consulted on the proposal are satisfied with the proposed changes. The proposal on Category XIV will also include proposals on Category XVIII (directed energy weapons), which will see little change. Administration officials say they are aiming to have all export control reform rules published in final form and in effect by mid-2016 before the traditional stop to the publication of regulatory changes before the presidential election in the fall.

After TPA’s Passage, Democrats Under Pressure to Save TAA

Most Democrats face four days of soul searching and White House pressure to decide whether to change their votes against Trade Adjustment Assistance (TAA) legislation and

support the worker training program now that their negative votes failed to block fast-track trade promotion authority (TPA) June 12. After TAA was defeated on a 126 to 302 vote, House Speaker John Boehner (R-Ohio) entered a motion under House procedures to reconsider the vote, with a second vote likely to be held Tuesday, June 16.

The vote against TAA was a union-backed ploy to defeat TPA by prying away pro-TPA Democrats for whom TAA and TPA were a package deal. The scheme failed, and TPA garnered 28 Democratic votes along with 191 Republican votes to pass by a 219 to 211 margin. The number of Democrats voting aye was close to the 25-30 votes that many sources had predicted and gave President Obama the support he was seeking.

After the votes, Rep. Steve Israel (D-N.Y.) said it would be unthinkable for the process to end up having a trade bill on the president's desk without TAA. "If Democrats are faced with the reality that after some twists and turns you end up with trade promotion authority likely to be law and Trade Adjustment Assistance dead, many of my colleagues will consider changing their votes," Israel said.

Rep. Gerald Connolly (D-Va.), one of the pro-trade Democrats, said he couldn't predict how the second TAA vote will go. "The dust has to settle," he said. Connolly, however, said he sees two groups of Democrats who might change their votes. One group includes those who would have voted for it the first time but decided not to when it was clear the measure would be defeated. "They didn't want to make labor unhappy" and "didn't want to fall on their swords," he said. The second group were those who voted against it in hopes of blocking TPA. "It didn't kill TPA and it's not certain you would if you voted that way again," Connolly said.

In the morning before the votes on TAA, TPA and an amended version of the Senate's Customs enforcement bill (H.R. 644), President Obama made a last-minute trip to the House to meet with House Minority Leader Nancy Pelosi (D-Calif.) and members of the Democratic Caucus. According to lawmakers who attended the meeting, Obama not only pleaded for support for TPA but also urged Democrats not to vote against TAA in an effort to block the fast-track bill.

Some members said the president was persuasive on behalf of TPA although his visit to Congress came too late. They also said the White House was caught off guard by the push of trade critics, particularly the AFL-CIO, to use a vote against TAA as leverage against TPA. Before the caucus meeting, the AFL-CIO issued a legislative alert to all Democrats urging them to vote against TAA, TPA and the enforcement bill.

Obama told the Democrats that if they were against TPA they should vote against it and if they were for it, they should vote for it, "but on TAA, play it straight;" don't vote against it to get at TPA, Rep. Henry Cuellar (D-Texas) told reporters after the caucus meeting. Cuellar, who was whipping for TPA, claimed the White House lobbying was effective. "I wish there would have been much better outreach on everything," he said.

The anti-TPA and AFL-CIO changed their strategy to push for a vote against TAA as well as TPA just a few days before the votes when they saw TPA would have enough votes to pass. "When they shifted, the response from the White House and the president, in my personal opinion, was not fast enough," Cuellar said. With a likely re-vote on TAA, House Republican leaders are looking at several legislative maneuvers to send

TAA and TPA to the president for his signature or TPA alone. If TAA passes on the second try, the combined TAA-TPA measure (H.R. 1314), which already passed the Senate, would go to the president without any further action needed. If TAA is defeated a second time, the leadership might ask the House Rules Committee to issue a new rule to send TPA back to the Senate without TAA and hope the Senate would accept a stand-alone TPA. A House-Senate Conference might be needed to sort that out.

Pro-trade Democrats had hoped that Republicans would provide more support for TAA than they had on past votes on the program, which has always been a keystone for Democrat support for trade legislation. The 86 GOP votes for TAA are believed to be the largest number of Republican votes ever for the program. Republican leaders will need to keep those votes even though some their members may have voted aye only because they want to protect TPA.

“We are not done with this,” House Majority Leader Kevin McCarthy (R-Calif.) told reporters after the votes. “The president has some work yet to do with his party to complete this process,” House Ways and Means Committee Chairman Paul Ryan (R-Wis.) said. “This isn’t over yet. I hope they can get together so we can finish this,” he added.

Maneuvering Leaves All Sides Claiming Victory on Trade Votes

Deals were made, arms were twisted, bluffs were called, ploys were tried and failed, speeches and more speeches were made, but, in the end, both pro- and anti-trade forces came out of the House trade votes June 12 unsatisfied. The Republican leadership’s decision to split the Senate-passed trade bill (H.R. 1314) into two parts – one for Trade Adjustment Assistance (TAA) and the other for Trade Promotion Authority (TPA) – angered Democrats and helped lead to the defeat of TAA, but Democrats’ votes against TAA didn’t stop TPA.

The House Rules Committee presented lawmakers with three measures to vote on: TAA, TPA plus the Trade Facilitation and Trade Enforcement Act (H.R. 644), which included an amendment offered by Ways and Means Committee Chairman Paul Ryan (R-Wis.), who added the language as part of deals to get more TPA votes (see **WTTL**, June 8, page 1).

The final vote for TAA was 126-302, with 40 Democrats voting yes. At last call, 86 Republicans voted yes. The TPA final vote was 219-211 with 28 Democrats voting yes. On the separate enforcement bill, the final vote tally was 240-190 with only 12 Democrats voting for it. Ryan’s amendment added language sought by House conservatives to prohibit the U.S. from including in any trade deals provisions on climate change and immigration and tougher trade remedy rules favored by the Congressional Steel Caucus.

After an impassioned statement on the House floor against TAA and TPA, Minority Leader Nancy Pelosi (D-Calif.) voted no on all three bills. Minority Whip Steny Hoyer (D-Md.) voted no on TPA and enforcement but yes on TAA. Pelosi had kept her views on TAA to herself up until the last minute. Some sources thought she might support it after she negotiated a deal with Ryan to eliminate the Medicare cut that would have paid for TAA (see related story page 4). Later, Pelosi sent a letter to Democratic colleagues: “The overwhelming vote today is a clear indication that it’s time for Republicans to sit

down with Democrats to negotiate a trade promotion authority bill that is a better deal for the American people.” During her floor speech she emphasized the need to deal with the highway trust bill and to allow environmental provisions in trade deals.

Labor unions saw Pelosi’s speech and vote against TAA and TPA as a victory and perhaps the final straw in the TAA bill’s defeat. “Nancy Pelosi has always fought for working families and today her leadership on the trade package vote was instrumental in the House voting against another bad trade deal,” said AFL-CIO President Richard Trumka said in a statement.

The Sierra Club called the TAA vote “a major victory” for those who think trade should be fair and responsible. “The era of free trade deals that harm workers and the environment is coming to a close,” said its executive director Michael Brune said in a statement.

Presidential candidate Sen. Bernie Sanders (I-Vt.) applauded the House vote, supposedly on TAA but not TPA. “While the fight will no doubt continue, today’s vote is a victory for America’s working people and for the environment. It is clearly a defeat for corporate America, which has outsourced millions of decent-paying jobs and wants to continue doing just that,” he said in a statement.

On the other hand, the TPA vote “is an absolute win for soybean farmers,” American Soybean Association President Wade Cowan in a statement. The Business Roundtable said TPA will “ensure the United States can negotiate the best possible trade agreements for our U.S. businesses, farmers and workers.” It said it also supports TAA and urged lawmakers “to resolve the current impasse so Trade Promotion Authority and Trade Adjustment Assistance can be signed into law.” Corporate lobbyists were all around the House the day of the vote and on their phones trying to wrangle up more votes for TAA, but one executive conceded to WTTL before the votes that the effort wouldn’t succeed.

House Passes Preference Bill with Fix for TAA Offset

The first of four major trade bills sailed through the House June 11 with provisions to extend three trade preference programs and a fix to the way Congress will pay for Trade Adjustment Assistance (TAA). After just one hour of debate, the House voted 397-32 to pass the Trade Preferences Extension Act of 2015 (H.R. 1295).

The version of TAA passed by the Senate in May would have paid for the worker training program by slightly cutting funds from Medicare. This enraged trade legislation opponents, unions and progressives and was used as another argument against TPA. Ways and Means Committee Chairman Paul Ryan (R-Wis.) had said he knew this change had to be made to hold on to Democratic votes for TPA (see **WTTL**, June 8, page 1).

“This bill will eliminate the Medicare sequester that was in the TAA bill. In exchange it has stronger tax compliance laws,” Ryan explained during the House debate. “We’ve reached a bipartisan compromise here. This fixes the concerns that members on both sides of the aisle, particularly on the Republican side, the Doctor Caucus as we call it, had about the Medicare sequester and it now removes the Medicare sequester,” he said. Because of this change and several others the House will now need to go into a Conference Committee with the Senate to merge the differences. The legislation extends

the African Growth and Opportunity Act (AGOA) would be extended 10 years to September 30, 2025. The Generalized System of Preferences (GSP) is extended four and a half years to December 2017, and the Haiti trade preference program is extended to 2025. Because GSP lapsed in July 2013, the measure would apply the tariff reductions retroactively to that date, including opportunities for reliquidation, a step that previous GSP bills have done when passed after the law had expired.

The measure would amend AGOA's regional apparel and third-country fabric programs. It would extend GSP to certain cotton products produced in least-developed countries and for purses, luggage and backpacks after a review confirms that it would not hurt import-sensitive domestic industries.

The legislation also contains new tariff headings and definitions for recreational performance outerwear and recreational outdoor footwear. During the House debate, Rep. Earl Blumenauer (D-Ore.) held a colloquy with Ryan on a drafting error in the bill that could actually raise the tariffs on these products.

"I share both your interest in assuring that the recreational outerwear provisions in this bill do, in fact, achieve their intended result in a revenue-neutral fashion," Ryan told Blumenauer. He said he will raise the issue in the House-Senate conference on the Customs enforcement bill. Ryan promised to make a "good faith effort" to work through these technical issues in a very quick time frame, understanding that the incorrect definition in the preference legislation would go into effect 15 days after the president signs it.

Defense Firms Urged to Assure Contracts Note Non-Military Uses

Defense contractors need to assure that their Pentagon contracts contain clear language when electronic purchases involving development equipment will have both military and non-military uses to avoid the items from being controlled under the International Traffic in Arms Regulations (ITAR) by default, BIS Assistant Secretary Kevin Wolf said June 9. The default rule in U.S. Munitions List (USML) Category XI(a)(7) becomes effective for Defense-funded contracts entered into after July 1, Wolf reminded the President's Export Council Subcommittee on Export Administration (PECSEA).

"Anybody involved in military electronics should be paying attention," Wolf told the subcommittee. Unless the contract includes language indicating both military and non-military intended uses of the developmental products, those not in production, the equipment is subject to ITAR. If it does cite both uses, "it is not ITAR controlled," Wolf advised.

If a contract does not include this dual-use language, a contractor has the alternative option of seeking a commodity jurisdiction (CJ) ruling from State, which could use its discretion to declare goods funded by DoD to not be ITAR controlled, he said. Wolf also noted that the Defense Technology Security Administration (DTSA) is working with the Defense Security Cooperation Agency (DSCA) on plans to educate Defense contract officers on the need to include appropriate language in the contracts they negotiate.

"The long-term hope of DTSA is getting provisions into the DFAR, Defense Federal Acquisition Regulations, to reflect this," he said. Until then, "I'm sure you are going to find lots of contractors that are used to using the same boilerplate they have used since

World War II or wishy-washy phrases,” Wolf said. “To the extent that you are involved in government contracting, you need to be working with your government contracting officers or whomever you are dealing with at the Defense Department and show them the regulations to the extent they haven’t yet heard about it,” he added.

House Takes First Step Toward COOL Repeal

By an overwhelming bipartisan majority, the House voted 300-131 June 10 to repeal country-of-origin labeling (COOL) requirements that have put the U.S. at risk of retaliation from Canada and Mexico. With passage of the House bill (H.R. 2393), it is up to the Senate to pass the legislation to before Canada and Mexico make good on their retaliation threats (see **WTTL**, June 8, page 9).

After the House vote, Senate Agriculture Committee Chairman Pat Roberts (R-Kan.) applauded the bipartisan and decisive House action. “I am continuing to take suggestions from my colleagues in the Senate for alternatives that meet our trade obligations. However, almost a month has passed since the WTO ruling was announced, and repeal remains the surest way to protect the American economy from retaliatory tariffs,” he said in a statement.

Roberts didn’t say when the Senate would act, but his press secretary told **WTTL** that something should happen “fairly quickly,” with a committee hearing likely in June. Although there is no distinct timeline for the committee to act, “members are seeing the handwriting on the wall” and the likelihood that Canada and Mexico will retaliate if COOL isn’t repealed, Press Secretary Meghan Cline said. It is likely that the Senate will take up the House bill rather than introduce a separate measure.

The House vote drew a favorable reaction from Canadian Agriculture Minister Gerry Ritz. “Today’s vote in the U.S. House of Representatives sends a strong bipartisan message that COOL must be repealed once and for all,” he said in a statement. “While this marks a positive step, the only way for the United States to avoid billions in retaliation by late summer is to ensure legislation repealing COOL passes the Senate and is signed by the president,” he added. Canada and Mexico asked the WTO June 4 for authority to impose nearly \$4 billion in retaliation against U.S. exports if COOL isn’t repealed.

Opposition to repealing the measure came mostly from Democrats, with 121 voting against it. Trade critics such as Rep. Rosa DeLauro (D-Conn.) also used the bill and the WTO decision against the labeling requirements as an argument for why Congress should reject TPA and TPP.

House Agriculture Committee Chairman Michael Conaway (R-Texas) called the original COOL legislation first enacted in 2002 a marketing program and failed experiment. The U.S. has lost four WTO rulings against the measure, he noted during floor debate on the bill. “Some have asked why we should act on the basis of a WTO decision. If COOL worked, perhaps there would be a response other than repeal, but the fact is COOL has been a marketing failure. In an April 2015 report to Congress, USDA explained that COOL requirements result in extraordinary costs with no quantifiable benefits,” he said.

“Although some consumers desire COOL information, there is no evidence to conclude that this mandatory labeling translates into measurable increases in consumer demand for

beef, pork, or chicken,” he continued. “Meat sold in the U.S. will continue to be inspected for safety by the USDA Food Safety and Inspection Service. This bill does nothing to change that and will simply repeal a heavy-handed, government-mandated marketing program that has proven to be unsuccessful,” he declared.

Census Still Considering Option 4 Alternatives

Exporters who use Option 4 for post-departure Customs filings have heard for years that a change was coming, that Customs and Border Protection (CBP) needed more information prior to export. According to Census officials, they’ll have to keep waiting for the change. A pilot project that might have led to changes in filing rules could undergo some changes, they indicate.

Census is working with National Association of Manufacturers (NAM) to “see if there other alternatives that could help solve what CBP needs in advance, if there’s another place we could get it, if there are certain elements that could be provided by the industry,” Kiesha Downs, chief of Census Bureau’s trade regulations branch, told the BIS’ Regulations and Procedures Technical Advisory Committee (RAPTAC) June 9.

In January 2014, Census launched the Advance Export Information (AEI) pilot, under which participating exporters file 10 specific data elements pre-departure along with any additional information they would file post-departure under Option 4 (see **WTTL**, Feb. 3, 2014, page 7). “NAM had proposed an alternative of revamping the Option 4 process, the vetting process. Now there is a new working group for Option 4,” Downs said, adding that her agency has invited people from different industries to comment on the ideas.

Downs also noted that the pilot currently has 12 participants, many of which have joined just in the past couple of months. Preliminary feedback has shown Census the challenges exporters have faced in providing pre-departure information. “The process was quite difficult at the beginning. However filers have found a way to comply and it has become a little less difficult. Some of the information we’re requiring, shipping weight, value, might not be known at the beginning of the transaction, so it makes a little bit difficult for them to do,” Downs said.

DDTC License Load Dropping Faster Than Anticipated

The Directorate of Defense Trade Controls (DDTC) is seeing export license applications drop faster than expected for the first U.S. Munitions List (USML) that had items transferred to the Commerce Control List (CCL) as export control reforms have moved into the implementation stage. The number of licenses it has received has declined 56% since the first transfers became effective in October 2013. It had expected a 45% drop, Gerry Horner, director of BIS’ Office of Technology Evaluation, told the agency’s Regulations and Procedures Technical Advisory Committee (RAPTAC) June 9.

In April, DDTC’s Office of Defense Trade Controls Licensing (DTCL) reorganized from five subject-area licensing divisions to four to accommodate the reduced licensing load from export control reform (ECR) (see **WTTL**, April 13, page 3). At that time, DDTC

said reforms had caused a 36% drop in licensing volume and “has created a disparity in the volume of cases among the current divisions.” In categories VIII (aircraft) and XIX (gas turbine engines), the first categories transferred to CCL jurisdiction, monthly caseload has dropped almost 66% to 518 applications since October 2013. Ground vehicles and items in categories VI, VII, XIII and XX have seen a 39.5% decline to an average monthly caseload of 293, based on the latest data.

Category XV (satellites) constitute the biggest change in caseload, dropping 79% to an average of just 77 per month since transfers became effective in July 2014, Horner told RAPTAC. In all the categories transferred so far, officials saw a spike in the percentage of licenses returned without action (RWA), but that number has come down dramatically, according to the most recent data from April 2015.

On the Commerce side, BIS approved over 2,800 licenses in April, up from a pre-ECR average of about 1,700. For 600-series items and 9x515 (satellites), 1178 were approved in April. The agency is expecting to process 55,000 licenses per year after full ECR implementation compared to 25,000 before the reforms. The number of users of License Exception Strategic Trade Authorization (STA) and the number of shipments under STA remained “stable,” Horner said.

Earlier in the meeting BIS Assistant Secretary Kevin Wolf urged exporters to start using STA. “There are significant, significant percentages shipments going out of 600 series that are absolutely STA eligible. You’re making your lives much harder than it needs to be,” he said. Wolf estimated that 98% of all licensed shipments to Japan, the top destination for licensed exports, are STA-eligible. Since October 2013, over 10,800 shipments worth \$775 million were shipped to Japan under the 600-series or 9x515.

PEC Supports Trade Agenda, Ex-Im Bank

At a meeting June 10, the President’s Export Council (PEC) adopted seven letters, which among other recommendations, endorsed the president’s trade agenda, a U.S.-China Bilateral Investment Treaty (BIT) and reauthorization of the Export-Import (Ex-Im) Bank. One letter welcomed efforts “to make tangible progress in advancing the American trade agenda,” including ongoing talks on Trade Promotion Authority, Customs reauthorization, AGOA and other preference programs, Trade in Services Agreement, Trade Facilitation Agreement and Information Technology Agreement.

In addition to that busy agenda, PEC members urged the administration to also “elevate the following key priorities”: cross-border data, regulatory cooperation, intellectual property rights, investor-state dispute settlement and localization policies.

The PEC said it strongly supports administration efforts to work with Congress to reauthorize the Ex-Im Bank before its June 30 deadline when its charter expires. Private sector PEC members offered six specific recommendations for the bank: grant a five-year reauthorization; raise the bank’s exposure cap; fill remaining vacancies on bank’s board of directors; adopt operational reforms, such as revitalizing the Medium-Term Delegated Authority Program; continue to improve access to export credit financing for small and medium-sized enterprises; and increase funding for the services sector exports, including

information technology services. The council also urged the president to conclude negotiations on a high-standard BIT with China. Key elements of the BIT should include: clear rules preventing discrimination against companies based on nationality; core protections for investments and investors; strong rules to prevent performance requirements relating to goods, services and intellectual property; and protections for cross-border data flow, the PEC recommended.

*** * * Briefs * * ***

EXPORT ENFORCEMENT: Alexander Brazhnikov Jr. of Mountainside, N.J., June 11 pleaded guilty in Newark, N.J., U.S. District Court to conspiracy to violate International Emergency Economic Powers Act (IEEPA) and money laundering. He admitted to illegally shipping \$65 million worth of sensitive electronics, including semiconductor microchips, to Russian military and security services from July 2010 to February 2014. Brazhnikov, naturalized U.S. citizen born in Moscow, was owner of four N.J. microelectronics export companies. He was arrested in June 2014. Sentencing is scheduled for Sept. 15, 2015.

KAZAKHSTAN: Kazakhstan June 10 completed negotiations on WTO accession terms with WTO Working Party meeting. Draft WTO Accession Package will be submitted for formal approval when meeting reconvenes June 22. Package will consist of (1) Draft Working Party Report; (2) Draft Goods Schedule; and (3) Draft Services Schedule. Members called accession “one of the most challenging negotiations” in 20-year history of WTO, press release said.

RUSSIA: G-7 countries June 8 renewed commitment to Russia sanctions. “The duration of sanctions should be clearly linked to Russia’s complete implementation of the Minsk agreements and respect for Ukraine’s sovereignty. They can be rolled back when Russia meets these commitments,” said joint statement released after G-7 meeting in Germany. “However, we also stand ready to take further restrictive measures in order to increase cost on Russia should its actions so require. We expect Russia to stop trans-border support of separatist forces and to use its considerable influence over the separatists to meet their Minsk commitments in full,” statement said.

CUBA: BIS is drafting amendment to EAR to reflect removal of Cuba from list of terrorism-supporting countries, BIS Under Secretary Eric Hirschhorn told President’s Export Council Subcommittee on Export Administration June 9. Rule changes could be published in July, he said (see **WTTL**, June 1, page 1).

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