

Vol. 39, No. 1

January 7, 2019

## Government Shutdown Delays USTR Product Exclusions

With the best of intentions, the U.S. Trade Representative (USTR) Dec. 28 published its first list of Section 301 product exclusions, covering approximately 1,000 separate requests from tariffs on \$34 billion worth of Chinese imports. Due to the government shutdown, however, Customs and Border Protection (CBP) cannot implement the product exclusions.

“At the conclusion of the government funding hiatus, CBP will issue instructions on entry guidance and implementation. Any updates to the Automated Customs Environment (ACE) will be implemented 10 business days after the shutdown has concluded,” CBP noted in its cargo systems messaging service (CSMS) Dec. 31.

“Once CBP issues guidance and implements ACE enhancements, a Post Summary Correction (PSC) or a Protest may be submitted for a refund,” the agency added.

USTR published seven 10-digit Harmonized Tariff Schedule (HTS) subheadings that cover 918 separate requests, and 24 specially drafted product descriptions that cover approximately 66 separate requests, the Federal Register notice said. Additional decisions on product exclusion requests will be announced periodically, the agency added.

Excluded products with specific HTS subheadings include hydraulic motors, water coolers, injection type molds, three types of radial bearings and radio transceivers. Products with drafted descriptions include: spark-ignition engines, welded hydraulic linear acting (cylinders) engines and motors, stainless steel stretchers, roller machines, salad spinners, nonelectric water filtration apparatus, winches, elevators, belt conveyors, stainless steel guards, workstands designed to use with miter saws, and thermostats for air conditioning or heating systems.

## Polycom Settles SEC Bribery Charges of Chinese Subsidiary

Communications solutions provider Polycom Inc. in San Jose, Calif., agreed Dec. 26 to pay the Securities and Exchange Commission (SEC) more than \$16 million to settle charges

that it violated the Foreign Corrupt Practices Act (FCPA) in connection with its Chinese subsidiary facilitating improper payments to government officials. “From 2006 through at least July 2014, Polycom’s Vice President of China at Polycom’s China subsidiary, along with senior managers, provided significant discounts to Polycom’s distributors and/or resellers, knowing and intending that the distributors and/or resellers would use the discounts to make payments to officials at Chinese government agencies and government-owned enterprises in exchange for those officials’ assistance in obtaining orders for Polycom’s products,” the SEC order noted.

“When a distributor sought to make such a payment, it requested that Polycom provide it with a discount on the equipment that was to be sold to the public-sector customer. As senior management at Polycom China knew, these discounts were not passed on to the end customer, but instead were intended to cover the cost of the payments the distributors made to the Chinese government officials,” the SEC noted. Without admitting or denying the allegations, the company agreed to pay the SEC disgorgement of \$10.7 million, prejudgment interest of \$1.8 million, and a civil penalty of \$3.8 million.

At the same time, Justice declined to pursue charges under its new FCPA Corporate Enforcement Policy. In its declination letter, the department cited the firm’s “full cooperation,” and its agreement to continue to cooperate in the department’s ongoing investigations and/or prosecutions. In addition, it cited Polycom’s remediation, “including the steps that Polycom took to enhance its compliance program and its internal accounting controls,” the department said.

Polycom was taken private in 2016 and is now a wholly owned subsidiary of Plantronics. “We are very pleased that the investigation into some of Polycom’s foreign operations has concluded,” said Plantronics CEO Joe Burton in a statement. “Plantronics has been, and remains, committed to operating with ethical and financial integrity, and we look forward to the future with Polycom.”

## **Grassley Will Review Tariff Authority, Trade Deals**

In what could pass for a primer on traditional Republican views on trade, incoming Senate Finance Committee Chair Chuck Grassley (R-Iowa) laid out his trade priorities in a floor speech Dec. 20. He cited access to new markets, implementation of the U.S.-Mexico-Canada Agreement (USMCA), potential restrictions on Section 232 authority, WTO reform and oversight of trade agreements.

The incoming chair applauded potential new agreements with Japan, the European Union (EU) and the United Kingdom (UK). However, he said he expects the EU and UK agreements to address agriculture, which the EU has rejected (see **WTTL**, Nov. 19, page 1). “The notion that some people in the EU think there could be an agreement that doesn’t address the many ways they block our good agricultural products from being sold in Europe is ridiculous,” he said.

Grassley said he intends to review the president's use of Section 232 legal authority to impose tariffs in the name of national security. "Senator Portman and others have already introduced legislation to narrow the scope of how an administration can use the power that Congress authorized in 1962 under the influence of the Cold War," he said. "I believe these efforts serve as a prudent starting point for the discussion we need to have," Grassley added.

"As long as Section 232 tariffs on steel and aluminum imports from Canada and Mexico remain, U.S. farmers and others facing retaliation, along with the American businesses that rely on those imports, will be unable to realize the full potential benefits of USMCA," Grassley said. "I am certainly not opposed to being creative in negotiations with other countries. But I strongly disagree with the notion that imports of steel and aluminum, automobiles, and auto parts somehow could pose a national security threat," he added.

### **Eletrobras Pays \$2.5 Million to Settle SEC FCPA Charges**

Brazilian utility Centrais Elétricas Brasileiras S.A. or Eletrobras agreed Dec. 26 to pay the Securities and Exchange Commission (SEC) a \$2.5 million civil penalty for an "illicit bid-rigging and bribery scheme" involving the construction of a nuclear power plant from approximately 2009 until 2015.

Former officers at Eletrobras Termonuclear S.A (Eletronuclear), Eletrobras' majority-owned nuclear power generation subsidiary, "used their influence at Eletronuclear in favor of a bid-rigging scheme among certain private Brazilian construction companies. The officers also misused their official positions in authorizing unnecessary contractors and inflating the cost of Eletronuclear's infrastructure project. In return, the construction companies involved in the scheme agreed to pay, and did pay, the former Eletronuclear officers approximately \$9 million," the SEC order said.

"Eletronuclear paid invoices related to the inflated contracts in the ordinary course of its business because Eletrobras had failed to devise and maintain a sufficient system of internal accounting controls," the order noted. The subsidiary "recorded payments made to UTN Angra III contractors, a percentage of which was used for bribes, as money legitimately spent to acquire and improve assets," it added.

The SEC considered Eletrobras' cooperation, which included "sharing facts developed during an internal investigation and voluntarily producing and translating documents," and its "remedial acts, which included disciplining involved employees, enhancing internal accounting controls and compliance functions, remediating material weaknesses, and adopting new anti-corruption policies and procedures," the commission said.

"The resolution does not represent an admission of an illegal act on behalf of Eletrobras," the utility said in a statement." Given the approval of this resolution there are no further issues pending before the U.S. regulatory agencies; thus, ending the investigations before the mentioned authorities," it added.

## OFAC Set to Remove Russian Firms from Sanctions List

Armed with a promise that a blocked Russian oligarch has relinquished ownership, Treasury's Office of Foreign Assets Control (OFAC) Dec. 19 notified Congress of its intent to terminate sanctions on three Russian firms -- En+ Group plc (En+), UC Rusal plc (Rusal) and JSC EuroSibEnergO (ESE) -- in 30 days.

"OFAC has determined that the significant restructuring and corporate governance changes will enable them to meet the criteria for delisting. Russian oligarch Oleg Deripaska will remain sanctioned, and his property will remain blocked," the agency said in a press release. Congress will now consider the OFAC notification and has 30 days to either approve or reject it. Unless Congress passes a resolution of disapproval, OFAC can move forward with the removal of the firms from its Specially Designated Nationals (SDN) List.

In April OFAC designated En+ for being owned or controlled by, directly or indirectly, Deripaska and other entities he owns or controls (see **WTTL**, April 9, page 1). In that same action, OFAC designated Rusal, the world's second largest aluminum company, for being owned or controlled by, directly or indirectly, En+; ESE, a wholly owned subsidiary of En+, was also designated.

"Deripaska will have no direct ownership stake in ESE and will retain only a 0.01 percent direct ownership stake in Rusal. En+ will own and control Rusal and ESE, which operates to isolate and freeze Deripaska's indirect ownership in Rusal and ESE," the agency wrote in a letter to Congress. OFAC made clear that sanctions remain against Deripaska himself.

"OFAC will continue to enforce its sanctions on Deripaska aggressively, including by closely monitoring the Petitioners' compliance with the Terms of Removal (TOR). Should one or all of the Petitioners fail to abide by the binding TOR, OFAC will consider all remedies at its disposal, including re-designating the offending entity," it wrote.

In addition to the change in ownership, the firms committed to "full transparency with Treasury by undertaking extensive, ongoing auditing, certification, and reporting requirements," OFAC said. These include providing OFAC monthly certifications of compliance, quarterly company reports and board minutes for En+ and Rusal, as well as "immediately notifying OFAC of any change in the composition of the independent En+ board."

The agency also responded to concerns that the sanctions would negatively impact the global aluminum market. "The designation of Rusal, the world's second largest aluminum producer, was felt immediately in global aluminum markets. The price of aluminum soared in the weeks following the designation, and Rusal subsidiaries in the United States, Ireland, Sweden, Jamaica, Guinea, and elsewhere faced imminent closure without limited sanctions mitigation in the form of OFAC general licenses," it said.

Since imposing the sanctions on Deripaska and his companies, OFAC had extended the expiration date of general licenses related to GAZ Group, EN+ Group PLC, RUSAL and other companies multiple times to allow for wind-down of operations or maintenance of existing contracts.

Most recently OFAC Dec. 20 issued general license (GL) 13I, extending a previous GL that expanded sanctions relief for certain designated firms. Specifically, OFAC extended the GL expiration date for those firms to March 7 from Jan. 21. OFAC also issued GL 15D extending authorization for transactions related to GAZ Group to the same date. GAZ Group was not included in the removal of sanctions (see **WTTL**, Dec. 10, page 5).

Simultaneous with the removal notification, OFAC designated Boyarkin, a former GRU officer who reports directly to Deripaska and has led business negotiations on Deripaska's behalf. Boyarkin was also designated for operating in the Russian energy sector with entities 50% or more owned by designated persons.

Rusal advised its shareholders that the removal could stall. "There is no assurance that termination of sanctions imposed on the Company will materialize or eventually be consummated as contemplated or at all. Shareholders and potential investors are advised to exercise caution when dealing in the securities of the Company and if they are in any doubt about their position, they should consult their professional adviser(s)," the company said on its website. "At the current stage the Company remains of the same view that the impact of U.S. sanctions may be materially adverse to the business and prospects of the Group," it added.

## **BIS Corrects Control Gap in Global Satellite Systems**

Two years after the fact, Bureau of Industry and Security (BIS) revealed a potential gap in controls on Global Navigation Satellite Systems (GNSS) receiving equipment. In the Federal Register Dec. 20, BIS corrected two Export Control Classification Numbers (ECCNs) -- 7A005 and 7A105 -- that control the systems.

"It was brought to BIS' attention that it did not implement controls over items that no longer warrant control under the United States Munitions List (USML) in a previous published rule," the agency wrote.

BIS and State's Directorate of Defense Trade Controls (DDTC) published final changes to USML Category XII (night vision) and corresponding changes to the Commerce Control List (CCL) in October 2016 (see **WTTL**, Oct. 17, 2016, page 3). At that time, the BIS rule was supposed to change the License Requirement section of ECCN 7A005 to modify the CCL to cover 7A005.b, GNSS receiving equipment employing 'adaptive antenna systems.' "This equipment was removed from the USML. However, BIS inadvertently did not update the CCL as intended," the notice said. BIS estimates that there will be 12 annual license applications as a result of this rule.

## Mo. Firm Pays \$7.7 Million to Settle OFAC Sanctions Charges

Zoltek Companies, Inc., a holding company in Bridgeton, Mo., agreed Dec. 20 to pay Treasury's Office of Foreign Assets Control (OFAC) \$7,772,102 to settle 26 charges of violating Belarus sanctions between January 2012 and October 2015. Specifically, Zoltek U.S. allegedly approved 26 purchases of acrylonitrile (ACN), a chemical used in the production of carbon fiber, between Zoltek ZRT, the firm's Hungarian subsidiary, and JSC Naftan, a blocked Belarusian entity.

"In direct response to OFAC's designation of Naftan approximately five days before, a Zoltek ZRT employee notified the COO [chief operating officer] of Zoltek U.S. about OFAC's designation of Naftan and questioned whether the sanctions posed any issues for Zoltek ZRT's continued purchase and acquisition of ACN from Naftan," OFAC said in its settlement. "Zoltek U.S. continued to review and approve transactions that dealt in the property or interests in property of Naftan," it added. Zoltek and Zoltek U.S. voluntarily self-disclosed the apparent violations.

"This enforcement action highlights the risks for companies with overseas operations that do not implement OFAC compliance programs or that implement compliance programs that fail to address the sanctions regulations administered by OFAC," the agency said. "Additionally, this case highlights the need for U.S. parent companies to take care to segregate certain business operations of their overseas subsidiaries so that the U.S. parent and its employees do not violate U.S. sanctions regulations by facilitating the actions of its subsidiaries."

"Zoltek voluntary self-reported the conduct to OFAC and fully cooperated with OFAC's investigation. Zoltek is committed to full compliance with all applicable laws and has strengthened its compliance program to prevent any recurrence of the conduct described in the settlement agreement," Leigh Culian, the firm's general manager global compliance, wrote in an email to WTTL. Carbon fiber maker Toray Industries Inc. agreed to buy Zoltek for \$584 million in September 2013, completing the sale in March 2014.

## Propulsion Device Stands Alone in STA Eligibility

With all of the hubbub surrounding License Exception Strategic Trade Authorization (STA), from its slow start to Commerce outreach, to its seeming ease of use, Bureau of Industry and Security (BIS) has only approved one eligible product since 2013, according to BIS guidance issued Dec. 17. The agency determined the STIDD Diver Propulsion Device (DPD) under Export Control Classification Number (ECCN) 8A620.a to be eligible in March 2016. It is the only product under 9x515 and "600 series" to be deemed as such.

The DPD "is the most widely used military-grade underwater mobility platform in the world," according to the STIDD website. The device "enables divers to travel farther and faster with more payload than previously possible with any other diver propulsion device," the company notes.

As was specified in the final rule published in April 2013, applicants may submit a License Exception STA eligibility request for end items described in ECCN 0A606.a, 8A609.a, 8A620.a or .b, “spacecraft” in ECCN 9A515.a.1, .a.2, .a.3, .a.4, or .g, ECCN 9A610.a or 9E515.b, .d, .e, or .f. (see **WTTL**, April 22, 2013, page 1). Otherwise, items in those ECCNs are excluded, a nod to those in government who feared sensitive technology moved from State to Commerce jurisdiction would be too easily exported.

## **WTO Panel Agrees with Turkey in OCTG Dispute**

The World Trade Organization’s (WTO) Dispute Settlement Body (DSB) panel Dec. 18 upheld several of Turkey’s complaints against U.S. countervailing duty measures on certain oil country tubular goods (OCTG), welded line pipe (WLP), heavy walled rectangular welded carbon steel pipes and tubes (HWRP) and circular welded carbon steel pipes and tubes.

The DSB granted Turkey its second request for the establishment of a WTO panel in June 2017 (see **WTTL**, June 26, 2017, page 7). For one, the panel upheld Turkey’s claims that Commerce’s selection of “facts available” in the OCTG, WLP and HWRP investigations was inconsistent with the WTO’s Agreement on Subsidies and Countervailing Measures (SCM Agreement) because it failed to engage in a process of reasoning and evaluation in selecting facts as a “reasonable replacement” for the missing necessary information.

The panel also upheld Turkey’s claims that the International Trade Commission (ITC) follows a practice of cumulatively assessing the effects of subsidized imports with those of dumped, non-subsidized imports from all countries in original investigations, if petitions were filed on the same day and if such imports compete with each other and the like U.S. domestic product. This practice, both “as such” and as applied, is inconsistent the SCM Agreement, the panel found.

The panel rejected Turkey’s claim that Commerce’s practice of systematically rejecting in country prices as benchmarks in assessing whether a good is provided for less than adequate remuneration based solely on evidence of government control of a substantial portion or majority of the market was, as such, in violation of the SCM Agreement.

## **Former Florida CEO Pays \$17 Million for Export Violations**

Eric Baird, the former owner and CEO of mail and package forwarding company Access USA Shipping, LLC, in Sarasota, Fla., which does business as MyUS.com, agreed Dec. 14 to pay \$17 million to settle 166 Bureau of Industry and Security (BIS) charges of causing, aiding or abetting a violation related to the company’s business model

Access USA in March 2017 settled 150 BIS charges of exporting controlled goods without required licenses from April 2011 through January 2013 (see **WTTL**, March 20, 2017, page

4). Access USA also entered into a non-prosecution agreement (NPA) with the U.S. Attorney's office for the Middle District of Florida covering the same conduct. "Baird founded Access USA and developed its business model, which provided foreign customers with a U.S. address that they used to acquire U.S.-origin items for export without alerting U.S. merchants of the items' intended destinations," BIS said. "Baird also established, directed, controlled, and/or authorized Access's 'personal shopper program' or 'alternative program,'" it added.

"Under this program, Access or an Access employee was presented to U.S. merchants as the purchaser and/or end-user of the items in situations where foreign customers were seeking products from U.S. merchants that did not accept foreign payment methods or had raised concerns that Access was not an end user and refused to sell or ship to Access because they wished to prevent the export of their goods, such as companies that sell weapons or weapon parts," the BIS order noted.

"Through this evasive program, Access purchased items for export to its foreign customers without informing the U.S. merchants that the items were intended for export. Foreign customers would email an Access employee their shopping list, and the Access employee would purchase the items using credit cards in Baird's name, or using a credit card account or other payment mechanisms opened in the name of the individual employee, whom Access would subsequently reimburse," it added.

"At times, shipments were delivered to the homes of Access employees so that, in addition to being misled to believe that a domestic customer was involved, the U.S. merchant would be misled to believe that Access itself was not involved in the transaction," the order said.

Baird also pleaded guilty Dec. 12 in Tampa, Fla. U.S. District Court to one count of smuggling. Sentencing is set for Jan. 30, 2019. Of the civil penalty, \$7 million will be suspended for two years and then waived if Baird commits no further violations. He also agreed to a five-year export denial order, of which one year is suspended.

## **WTO Agrees to Fifth Dispute Panel over Retaliatory Duties**

Call it a not very harmonious quintet. At its monthly meeting Dec. 18, the WTO Dispute Settlement Body (DSB) agreed to establish a panel on Russian retaliatory duties on certain U.S. imports in response to the U.S. duties on steel and aluminum imports. This is the fifth DSB panels established over additional duties imposed by Canada, China, the European Union (EU), Mexico and now Russia on U.S. imports. At a special meeting Jan. 11, the DSB will consider the U.S. request for a sixth panel with Turkey.

At the same time, the U.S. blocked China's request for a panel over Section 301 tariffs. Beijing said it requested consultations on the matter in April and talks were held in August and October, without success. The U.S. said separate, ongoing trade negotiations, not WTO dispute settlement proceedings, are the appropriate forum for addressing the technology transfer issues covered by the U.S. investigation.

In case anyone was wondering, the U.S. again rejected a Mexican proposal on behalf of 71 WTO members to deal with the four Appellate Body vacancies. “The considerable number of members submitting this joint proposal reflects a common concern with the current situation in the Appellate Body that is seriously affecting its workings and the overall dispute settlement system against the best interest of its members,” Mexico said in a statement at the meeting.

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

INSURANCE: Treasury and USTR Dec. 19 signed covered agreement with UK that covers reinsurance, group supervision and exchange of insurance information between supervisors (see **WTTL**, Dec. 17, page 6). Agreement is “important step in providing regulatory certainty and market continuity” as UK prepares to leave EU, agencies said in press release.

EXPORT ENFORCEMENT: Russian national Dmitrii Makarenko was arrested in Guam Dec. 29 on charges of conspiring to illegally export military-grade night vision rifle scopes, thermal monoculars and ammunition primers to Russia without State licenses. Co-defendant Vladimir Nevidomy, Ukraine-born naturalized U.S. citizen of Hallandale Beach, Fla., was sentenced in June in Miami U.S. District Court to 26 months in prison, followed by three years’ supervised release (see **WTTL**, June 11, page 9). Makarenko would order defense articles from Nevidomy, who would procure articles from U.S. vendors and receive in Broward County, Fla., June 2017 indictment. Nevidomy then would ship defense articles from U.S. to Makarenko in Russia. He pleaded guilty in March 2018; Nevidomy was arrested in June 2017 and released on \$250,000 bond.

MORE EXPORT ENFORCEMENT: Rasheed Al Jijakli, CEO of Orange County, Calif., check cashing business, was sentenced Dec. 20 in Santa Ana U.S. District Court to 46 months in prison for illegally exporting day- and night-vision rifle scopes, laser boresighters, flashlights, radios, bulletproof vest and other tactical equipment to Syria without licenses. He pleaded guilty in August 2018 (see **WTTL**, Aug. 20, page 5). He was arrested in August 2017 and released on \$250,000 bond. Indictment was unsealed same day.

FCPA: Former Embraer sales executive Colin Steven, UK citizen residing in UAE, was sentenced Dec. 12 in Manhattan U.S. District Court to time served and \$25,000 fine for his role in scheme to bribe high-level Saudi government official in exchange for assistance in securing Embraer’s aircraft sale to Saudi Arabia’s national oil company. He pleaded guilty in December 2017 to violating Foreign Corrupt Practices Act (FCPA), conspiracy to violate FCPA, wire fraud, conspiracy to commit wire fraud, money laundering, conspiracy to launder money and making false statement (see **WTTL**, Jan. 1, 2018, page 9). Embraer S.A. in October 2016 agreed to pay more than \$205 million to settle charges of violating FCPA between May 2008 and February 2011.

MORE FCPA: Two former senior executives of Panasonic’s U.S. subsidiary agreed Dec. 20 to pay SEC penalties for knowingly violating federal securities laws and causing similar violations by parent company. Paul A. Margis, then-CEO and president of Panasonic Avionics Corp. (PAC), and Takeshi “Tyrone” Uonaga, PAC’s then-CFO, agreed to pay penalties of \$75,000 and \$50,000, respectively. Japan-based Panasonic and PAC agreed in April to pay \$280 million to settle SEC and Justice charges of violating Foreign Corrupt Practices Act (FCPA) and accounting fraud (see **WTTL**, May 7, page 1).

CUBA: President Dec. 20 signed 2018 Farm Bill (H.R. 2), including amendment that would allow farmers to use trade promotion funds to finance certain agricultural exports to Cuba. “I appreciate

the recognition of the Congress that these funds must not be used to undermine the foreign policy of the United States with respect to Cuba. As such, my Administration will not use any taxpayer funds from these Department of Agriculture programs to benefit the Cuban regime,” president said in signing statement. House passed conference report days earlier (see **WTTL**, Dec.17, page 3).

**TRADE PEOPLE:** Incoming Senate Finance Committee Chair Chuck Grassley (R-Iowa) Jan. 4 announced trade policy staff: Nasim Fussell, chief international trade counsel; Brian Bombassaro, international trade counsel; and Andrew Brandt and Rory Heslington, international trade policy advisors. Fussell previously served as deputy chief international trade counsel under former Chair Orrin Hatch (R-Utah); Bombassaro joined committee staff as international trade counsel in October 2017. Brandt previously served as legislative assistant for Grassley; Heslington joined Finance Committee in 2015.

**PERU:** USTR Jan. 4 requested first consultations with Peru under environment chapter of U.S.-Peru trade agreement to resolve concerns over Peruvian government move to fold nation’s independent forest auditor (OSINFOR) into Environment Ministry, despite provisions in trade deal that OSINFOR remain independent and separate agency. House Ways and Means Democrats two weeks earlier urged USTR to enforce environmental commitments of agreement. “We consider this to be a flagrant attack on the heart of the Forestry Annex that cannot go unchallenged,” Democrats wrote Dec. 19.

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