

Vol. 36, No. 5

February 1, 2016

## Proposed Night-Vision Rules Set for Publication in February

Final rules amending night-vision controls under U.S. Munitions List (USML) Category XII and a final companion Commerce Control List (CCL) rule could be published by June or July 2016, Bureau of Industry and Security (BIS) Deputy Assistant Secretary Matthew Borman predicted Jan. 26.

BIS Assistant Secretary Kevin Wolf previously told industry advisors that the new proposal will revert to the old use of “specially designed” to differentiate between military and commercial thermal imaging products (see **WTTL**, Dec. 14, page 5).

Revised proposals of the two regulatory changes are at the Office of Management and Budget (OMB) for interagency review and should be ready for publication in February, Borman told the BIS Sensors and Instruments Technical Advisory Committee (SITAC).

“I think folks have seen that these are substantially revised in large part based on public comments that have been received on the first proposed rule,” he said. “We’re going to try to move very promptly to review the public comments and go to final rules so we can get them published in final form by roughly the middle of this year, June or July of this year. So we are still shooting to get these done in this administration,” Borman told SITAC.

He also noted that the proposed transition of some Category XII items to the CCL will trigger a requirement under Section 38(f) of the Arms Export Control Act (AECA) for DDTC to give Congress 30 days advance notice of the move before it becomes final. That notification time should still allow for final rules to be published this summer, he said.

## Cuba, EU Renew Call for End of Restrictions on Rum

The European Union (EU) and Cuba renewed a request Jan. 26 for the U.S. to comply with a World Trade Organization ruling from 2002 to allow a Cuban company to sell

Havana Club rum in the U.S. under its trademark. The request at the WTO Dispute-Settlement Body (DSB) meeting came after the U.S. Patent and Trademark Office (PTO) Jan. 15 renewed the trademark held by Cubaexport, a unit of the Cuban government, which confiscated the brand from the Cuban family that originally owned it but abandoned the mark in 1973.

Despite the PTO trademark award, Cubaexport still can't sell its product in the U.S. because of the U.S. trade embargo on Cuba, and the legal status of the trademark remains cloudy because of provisions in Section 211 of the 1998 Omnibus Appropriations Act, which bars registration of trademarks for Cuban goods under certain conditions. The EU and Cuba want Section 211 repealed as the WTO had urged in its ruling on the case (see **WTTL**, Aug. 13, 2001, page 3).

“While Section 211 remains in force, Cuba will continue to demand its repeal for being a permanent violation of the TRIPS Agreement and the resolutions of this body, which declared it incompatible with the fundamental rules and principles of the WTO,” said Anayansi Rodriguez Camejo, Cuba’s ambassador to the WTO, in a statement to DSB, according to a translation she released.

She said the PTO action was a positive step by the U.S. “However, it should be noted that while Section 211 remains in effect, it prevents the recognition by the U.S. courts of Cuban trademarks and patents and thus, under this law, the possibility that the registration be canceled at any time by the decision of a U.S. court continues latent,” she said.

The Cuban diplomat noted long-running litigation in the D.C. U.S. District Court that Bacardi has been pursuing since 2004 to bar the trademark registration. Bacardi acquired the rights to the Havana Club brand from its original Cuban owners, the Arechabala family. The legal battle pits Bacardi against Pernod Ricard S.A., which has a joint venture with Cubaexport to sell Havana Club rum outside the U.S.

A U.S. official at the DSB meeting hailed “significant positive developments” in the dispute, including the PTO action, according to a prepared statement. “Several bills introduced in the current U.S. Congress would repeal Section 211 – those are H.R. 274, H.R.403, H.R. 635 and H.R. 735. Other bills – H.R. 1627 and S. 757 – would modify Section 211. The U.S. administration will continue to work on solutions to implement the DSB’s recommendations and rulings,” the official said.

“Bacardi is shocked and very concerned by this unprecedented action taken by the United States government,” the company said Jan. 15 after the PTO decision was revealed. “In essence, this administration has reversed long-standing U.S. and international public policy and law that protects against the recognition or acceptance of confiscatory actions of foreign governments,” it said. “With this decision, this U.S. administration clearly sends the message that it no longer supports U.S. law and accepted worldwide principles that prevent registration or renewal of trademarks obtained through confiscation, without compensation to the original owners,” the statement added.

## Ford Gets Fed Up Waiting for Japan to Open Auto Market

After waiting more than 35 years for Japan to keep its many promises to open its auto market to foreign cars, Ford has given up. The company announced Jan. 25 that it is pulling out of the country as well as from Indonesia, citing its failure to find a “path to sustained profitability” in Japan.

The move is a blow to the Trans-Pacific Partnership (TPP) and reflects Ford’s belief the accord won’t do any more than past deals to open Japan to American autos. Ford said it sold about 5,000 cars in Japan in 2015. A Commerce Department report in 1997 said the company had sold 27,945 units in 1995, including exports from the U.S. and Europe.

“Ford remains committed to serving global markets while aggressively restructuring parts of our business which have no reasonable path to achieve sales growth or sustained profitability, particularly in areas where market dynamics prevent us from competing effectively. After pursuing every possible option, it has become clear that there is no path to sustained profitability for us in Japan. Therefore, we will cease all operations in Japan before the end of 2016 and concentrate our resources elsewhere,” said an email from Karen Hampton, VP of Communications at Ford Asia Pacific.

“Japan is the most closed, developed auto economy in the world, with all imported brands accounting for less than 6% of Japan’s annual new car market (i.e. 94% of all cars sold in Japan are made in Japan by Japanese companies),” a Ford statement said. “Not a single foreign manufacturer is able to build cars in Japan,” it added.

Ford has been the leading corporate opponent of TPP, claiming the pact’s currency provisions won’t prevent Tokyo from manipulating its currency in the future as it has in the past (see **WTTL**, Jan. 11, page 3). In the 1980s, while Japanese carmakers were increasing their exports to the U.S. and building car plants in several states, some estimates suggested Japanese cars had more than a \$2,000 advantage over U.S. cars because of the low value of the yen.

In 2014, the latest year for which data are available, the U.S. imported \$33.8 billion worth of Japanese passenger cars and exported only \$663.7 million, according to Census numbers. Imports of Japanese parts and engines reached \$14.2 billion, while parts exports to Japan were \$1.3 billion. In 1991, the U.S. auto trade deficit with Japan was \$31 billion.

In addition to currency manipulation, U.S. car companies have complained about a long list of non-tariff and informal barriers to the Japanese market. Among those hurdles are government certification and inspection requirements for imported cars and auto parts, close financial ties between Japanese car companies and their dealers, the reluctance of Japanese car dealers to sell foreign cars because of their relationships with Japanese manufacturers, zoning laws that restrict the opening of repair and distribution centers and a cultural bias against imports. Every administration dating back Ronald Reagan’s has tried to pry open the Japanese market for foreign cars with limited or no success. In

1986 Reagan and Japanese Prime Minister Nakasone agreed to open Market-Oriented Sector Selective (MOSS) talks that included autos. The Clinton administration in 1995 reached a U.S.-Japan Agreement on Autos and Auto Parts.

As part of the TPP deal, the U.S. and Japan entered a side agreement on auto trade. Appendix D to the bilateral pact includes new assurances that each party “shall ensure that technical regulations related to motor vehicles are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade, to the extent provided in Article 2.2 of the TBT [WTO Technical Barriers to Trade] Agreement.”

It also includes promises to improve Japan’s Preferred Handling Procedures for imported cars and not maintain “central level government” zoning restrictions on distribution and repair facilities. It provides a cumbersome dispute-settlement mechanism to resolve complaints about future discriminatory actions.

## **Administration Eases Restrictions on Cuba Trade, Travel**

Slowly but surely, the Obama administration is chipping away at the restrictions on trade and travel to Cuba, as much as it can without Congress acting to remove the existing embargo. Toward this end, BIS and Treasury’s Office of Foreign Assets Control (OFAC) Jan. 27 took “coordinated actions in support of the President’s Cuba policy,” the two agencies announced.

In December, the first anniversary of President Obama’s renewal of relations with Cuba was marked with bilateral agreements to reopen direct mail delivery and resume normal commercial flights between the two countries (see *WTTL*, Dec. 21, page 8).

In the latest moves, BIS added a general policy of approval for certain exports and reexports previously subject to case-by-case review. These include “items for safety of civil aviation and safe operation of commercial aircraft engaged in international air transportation, certain telecommunications and agricultural items, items to human rights organizations or individuals and non-governmental organizations that promote independent activity intended to strengthen civil society in Cuba, and items for use by U.S. news bureaus,” BIS said in the Federal Register.

The agency has established a case-by-case review policy for “exports and reexports to meet the needs of the Cuban people,” including those “made to state-owned enterprises and agencies and organizations of the Cuban government that provide goods and services to the Cuban people,” the notice said. The final rule added the term “reexport” to the existing policy of case-by-case review of applications for aircraft or vessels on temporary sojourn to Cuba. “The change reflects BIS’s practice of generally applying the same licensing policy to exports and reexports of a given item,” it said. Both agencies issued multipage frequently asked questions (FAQs) and guidance explaining the changes and

what policies have not changed. “A general policy of denial continues to apply to exports and reexports of items for use by state-owned enterprises, agencies, or other organizations of the Cuban government that primarily generate revenue for the state, including those engaged in tourism and those engaged in the extraction or production of minerals or other raw materials,” a BIS FAQ said. It also said applications to export or reexport items to the “Cuban military, police, intelligence, and security services remain subject to a general policy of denial.”

Although these changes revise the licensing policy for certain exports, the U.S. “continues to maintain a comprehensive embargo on trade with Cuba. The export and reexport to Cuba of all items subject to the EAR still requires a BIS license, unless authorized by a license exception or exempted from license requirements,” BIS noted on its website.

At the same time, OFAC removed “former limitations on payment and financing terms” for all licensed exports and reexports to Cuba, other than agricultural items or commodities, its separate Federal Register notice said. Agricultural exports continue to be authorized only if one of the payment and financing terms specified in the Trade Sanctions Reform and Export Enhancement Act of 2000 is used, it added.

In parallel with BIS’ changes on civil aviation, OFAC authorized “the entry into blocked space, code-sharing, and leasing arrangements to facilitate the provision of carrier services by air.” It also authorized additional travel to Cuba “related to professional meetings and other events, disaster preparedness and response projects, and information and informational materials, including transactions incident to professional media or artistic productions in Cuba,” OFAC said.

Obama administration officials were quick to remind the Cuban government that more needs to be done to remove the full embargo. “Just as the United States is doing its part to remove impediments that have been holding Cubans back, we urge the Cuban government to make it easier for its citizens to start businesses, engage in trade, and access information online,” National Security Council Spokesperson Ned Price said in a statement.

Opponents of the new relationship with Havana such as Sen. Robert Menendez (D-N.J.) denounced the actions. The further easing of sanctions is a “contravention of the law,” Menendez said in a statement. “Put simply, exporting to Cuba means exporting to the regime and its state-owned enterprises solely controlled by the Castro family; it will do nothing to empower the Cuban people,” he added.

## **Another Day, Another Contentious Report on TPP**

Once again, U.S. Trade Representative (USTR) is touting another report that says the Trans-Pacific Partnership (TPP) will increase U.S. incomes and exports. And as usual, critics argue the report is based on a flawed model and will lead to fewer manufacturing jobs. As trade ministers prepare to sign the TPP in New Zealand Feb. 4, two TPP partners

are in the midst of major changes that may affect the deal's implementation. In Japan, Economic Policy Minister and chief TPP negotiator Akira Amari's resignation Jan. 28 amidst bribery allegations clouds the deal. Prime Minister Shinzo Abe quickly named former Environment Minister Nobuteru Ishihara to be Amari's replacement.

Three days earlier, Canadian Trade Minister Chrystia Freeland signaled the new administration's hesitancy to fully endorse the deal in an open letter to Canadians posted on the minister's website Jan. 25. "Just as it is too soon to endorse the TPP, it is also too soon to close the door," she said.

While she will attend the deal signing, "signing does not equal ratifying," Freeland noted. "Signing is simply a technical step in the process, allowing the TPP text to be tabled in Parliament for consideration and debate before any final decision is made," she added.

According to the new estimates the Peterson Institute for International Economics (PIIE) published Jan. 25, the deal will increase annual real income in the U.S. by \$131 billion, or 0.5% of Gross Domestic Product (GDP), and annual exports by \$357 billion, or 9.1% over baseline projections by 2030, when the agreement is nearly fully implemented.

"Delaying the launch of the TPP by even one year would represent a \$77 billion permanent loss, or opportunity cost, to the U.S. economy as well as create other risks. Postponing implementation will give up gains that compound over time and defer or foreclose new opportunities for the United States in international negotiations," PIIE notes.

Despite the benefits in income, the Peterson report also acknowledged a slowdown in the growth of manufacturing jobs. "While in absolute terms, employment in manufacturing continues to grow irrespective of the TPP, the agreement dampens the growth rate of manufacturing employment by about one-fifth. In absolute numbers, the lower trajectory of employment growth in manufacturing equals increases in employment in the service and primary goods sectors," the report notes. More detailed results show 121,000 fewer jobs created in the sector relative to the baseline by 2030, it adds.

Opponents jumped on that number. "You read that right. The report the administration *likes* says the U.S. will have 121,000 fewer manufacturing jobs as a direct result of the deal. And the report goes on to state that the deal will likely cause considerable hardship on workers who get booted out of good-paying manufacturing jobs and are told to retrain for lower-paying jobs. Ask any of the hundreds of thousands of displaced workers across the Rust Belt how that story ends," California Labor Federation President Steve Smith said in a statement.

In a conference call with reporters Jan. 26, USTR Michael Froman brushed off concerns about employment. "The model assumes that TPP has no effect on employment or the trade balance. That's one of its fundamental assumptions. It takes the economy as full employment," he said. "What trade does, in that circumstance is reallocate jobs into higher-paying jobs. That's one of its main conclusions is that in fact labor benefits

disproportionally, both skilled labor and unskilled labor, as almost 800,000 jobs will be added to U.S. exporting activities,” Froman added.

This is the second report on TPP’s impact that found mixed benefits and costs from the deal. A World Bank report on the accord earlier in the month estimated that GDP for all 12 participating countries would grow by 4/10<sup>th</sup> of 1% to 1.1% over the next 15 years, with the U.S. economy growing the least (see **WTTL**, Jan. 11, page 2).

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

**EXPORT ENFORCEMENT:** Sihai Cheng, aka Chun Hai Cheng and Alex Cheng, was sentenced Jan. 27 in Boston U.S. District Court to nine years in prison for conspiring to export MKS pressure transducers to Iran between November 2005 and 2012. He pleaded guilty in December 2015 (see **WTTL**, Dec. 21, 2015, page 15). Cheng was extradited from UK to U.S. in December 2014 to face charges and remains in custody. Indictment of Cheng and Seyed Abolfazl Shahab Jamili, along with two Iranian companies, Nicar Eng. Co., Ltd. and Eyvaz Technic Manufacturing Company, was unsealed in April 2014. Charges against Jamili were dismissed as part of prisoner swap in parallel with Iran nuclear deal Jan. 16. “The government is dismissing the counts against defendant Jamili based upon issues regarding securing extradition of the defendant and significant foreign policy interests,” Boston U.S. Attorney Carmen Ortiz wrote.

**BEEF:** Just in time for Colombian President Juan Manuel Santos’ visit to Washington, USTR and Agriculture Department reached agreement Jan. 26 with Colombia “to reduce burdensome certification requirements for U.S. beef and beef products for human consumption entering” that country, agencies announced. Countries agreed to changes in certification statements that will allow beef and beef products from all federally inspected U.S. establishments to be eligible for export to Colombia, rather than only those from establishments that participated in specific verification programs. U.S. exports of beef and beef products to Colombia topped \$14.4 million in 2014, up over 260% from \$4 million in 2011 before U.S.-Colombia free trade agreement. Santos will meet with President Obama Feb. 4.

**HIZBALLAH:** OFAC Jan. 28 added Hizballah-affiliated money launderers Mohamad Nouredine, Hamdi Zaher El Dine, and Nouredine’s company Trade Point International S.A.R.L to Specially Designated Nationals list. Designation was second under legislation (H.R. 2297) that President Obama signed in December (see **WTTL**, Jan. 11, page 7).

**NORTH KOREA:** Senate Foreign Relations Committee passed substitute version of bill (H.R. 757) Jan. 28 that would require president and Treasury to investigate Pyongyang’s proliferation, money-laundering, cyber warfare activities and human rights abuse and would mandate sanctions on those activities. House passed different version Jan. 12 by 418-2 vote. Senate bill includes “compromise language that builds upon the good work in the House version to target not only banned and illicit activities but also Pyongyang’s trade in key industrial commodities,” Sen. Robert Menendez (D-N.J.) said in statement (see **WTTL**, Jan. 18, page 7).

**AFRICA:** As required by trade preference legislation passed in June, USTR is preparing report to Congress on “prospects of putting us on a path to more permanent, reciprocal trade arrangements” with African countries, USTR Michael Froman told hearing Jan. 28. “We are truly open-minded

about where this discussion leads. We go into this process without preconceptions or prejudice about what it should produce,” he said. “Tariff preferences standing alone are often not sufficient to generate significant new trade and investment. The policy environment matters,” he added.

**ACE:** DDTC waived requirement for exporters to deposit permanent export licenses with Customs and Border Patrol (CBP) prior to filing in Automated Export System (AES) or Automated Commercial Environment (ACE). “Since CBP port officials will have access to the DDTC registration and licensing data through ACE, there is no longer a need for exporters to deposit permanent export licenses with CBP prior to filing in ACE,” said notice posted on DDTC website.

**SAFE HARBOR:** Senate Judiciary Committee Jan. 28 reported out Judicial Redress Act (H.R. 1428) to provide European citizens legal way to bring complaints in U.S. courts against breach of privacy. Bill passed on bipartisan 19-1 vote, with Sen. Jeff Sessions (R-Ala.) sole dissenter. Enactment of bill has been one of EU demands in Safe Harbor negotiations (see **WTTL**, Jan 25, page 7).

**WASHERS:** In 6-0 preliminary vote Jan. 29, ITC found U.S. industry may be injured by allegedly dumped large residential washers from China.

**TIRES:** United Steel Workers (USW) filed countervailing and anti-dumping duty petitions Jan. 29 at ITA and ITC against truck and bus tires from China. Complaint is only second antidumping and CVD case filed by workers without support of any domestic manufacturer since 1983. First was 2014 USW case against imports of certain passenger vehicle and light truck tires from China.

**POLYETHYLENE TEREPHTHALATE FILM (PET):** Court of Appeals for Federal Circuit (CAFC) affirmed Jan. 19 CIT ruling to uphold Commerce remand decision in administrative review of PET from Taiwan. Appellate court agreed with department’s use of adverse facts available and way it corroborated final dumping margin. “In the early 1990s, we began to use the terms ‘commercial reality’ and ‘accurate’ in our trade remedy decisions in a variety of contexts,” wrote CAFC Judge Evan Wallach for three-judge panel. “Our case law and the statute thus teach that a Commerce determination (1) is ‘accurate’ if it is correct as a mathematical and factual matter, thus supported by substantial evidence; and (2) reflects ‘commercial reality’ if it is consistent with the method provided in the statute, thus in accordance with law,” he wrote in *Nan Ya Plastics v. U.S.* “Commerce may use, as adverse facts available pursuant to 19 U.S.C. Section 1677e(b)(4), the highest transaction-specific margin on the record of the subject review. If Commerce selects the highest transaction-specific margin from the subject review from among the adverse facts available, it need not corroborate that information pursuant to Section 1677e(c),” he wrote.

**EDITOR’S NOTE:** With this issue of **WTTL**, Editor and Publisher Sam Gilston and Business Manager Tami Gilston are retiring. Martin Kalin becomes publisher of Gilston-Kalin Communications, LLC; Meredith Gilston, editor; Melissa Apter, associate editor; Cathy Bamji, circulation manager. Retirement for Sam comes after 44 years as professional journalist in Washington. His career began reporting on FDA’s expanded regulation of over-the-counter drugs, medical devices, drug marketing and quality control. Sam and Tami founded Washington Tariff & Trade Letter in 1981. In 2003, he became editor and publisher of *The Export Practitioner*, founded by Martin Kalin in 1987. Over following years, he reported on Israel, Canada and other FTAs, NAFTA, Uruguay Round, founding of WTO, Doha Round, trade disputes with Canada, EU, Japan, China and other trade partners, trade legislation and litigation, changing export controls and trade sanctions and for last five years administration’s export control reform initiative. He will remain editorial consultant to both publications.