

Vol. 32, No. 9

February 27, 2012

Industry Concerned USML-CCL Moves May Increase Burdens

Some exporters are still concerned that the move of thousands of items from the U.S. Munitions List (USML) to the Commerce Control List (CCL) might increase their export control burdens rather than ease them, according to comments the Bureau of Industry and Security (BIS) and the Directorate of Defense Trade Controls (DDTC) have received on proposed shifts of controls on surface vehicles and submersible vessels. In their comments, companies questioned how transferred goods will be treated when comingled with items still subject to International Traffic in Arms Regulations (ITAR) and the lack of CCL exemptions some USML items currently enjoy.

Comments addressed proposed changes and moves involving USML Category VI (Vessels of War and Special Naval Equipment) and Category XX (Submersible Vessels, Oceanographic and Associated Equipment) (see **WTTL**, Jan. 2, page 3). Huntington Ingalls Industries acknowledged the proposed changes will allow for more efficient processing of hardware shipments. “However, greater analysis will be required on a case-by-case basis for technical exchanges and assistance when involving foreign parties and products that exist on ECCN 8A609 which will ultimately be installed on a USML controlled Category VI vessel,” it noted.

The Association of University Export Control Officers noted ITAR licensing exemptions. “Without...reciprocal licensing exemptions under the EAR, moving items and technologies from the USML to the CCL may create an increased licensing burden for universities,” the group said. BIS Assistant Secretary Kevin Wolf has previously said the agencies are working on a transition rule that should address some of these outstanding issues.

Other comments highlighted still-unclear or overly general definitions. United Technologies cited the definition of “mission systems” in the proposed rule. “If interpreted broadly, the definition of ‘mission systems’ ... would effectively preclude the transfer of all or most submersible vessels ... because such vessels are routinely equipped with USML-controlled communication and navigation equipment,” the company wrote. “We suggest amending the definition of ‘mission systems’ to achieve a more balanced result by revising the definition to exclude communications and navigation equipment for submersible vessels,” it suggested.

China Agrees to Open Film Market after Five-Year Dispute

At the end of his successful charm tour of the U.S., Chinese Vice President Xi Jinping announced Feb. 17 that Beijing will bow to a World Trade Organization (WTO) ruling requiring it to



open its film market. Since the WTO Appellate Body upheld a dispute-settlement panel ruling that China's restrictions on foreign films and DVDs violated its WTO obligations in December 2009, the Chinese have dragged their feet on complying (see **WTTL**, Jan. 4, 2010, page 4).

"The agreement allows more American exports to China of 3D, IMAX, and similar enhanced format movies on favorable commercial terms, strengthens the opportunities to distribute films through private enterprises rather than the state film monopoly, and ensures fairer compensation levels for U.S. blockbuster films distributed by Chinese state-owned enterprises," USTR's office explained. U.S. first filed a complaint against China's restrictions in April 2007.

Dismissal of FCPA Cases Puts Use of Stings in Question

The dismissal of all charges Feb. 21 against 19 gun dealers who were charged with violating the Foreign Corrupt Practices Act (FCPA) could dampen Justice's future use of sting operations to enforce the antibribery law, according to defense lawyers involved in the case. D.C. U.S. District Court Judge Richard Leon dismissed the charges based on a Justice motion that admitted the department doubted it could win new trials against the defendants after the outcome of two trials. The motion said Justice had carefully considered the outcomes of the first two trials "in which, after extensive deliberations, the juries remained hung as to seven defendants and acquitted two defendants, and one defendant was acquitted on the sole charge against him."

In announcing his ruling from the bench, Leon criticized the government's case against the original 22 dealers who were caught in a sting that supposedly was aimed at getting them to pay bribes to a defense minister of Gabon in exchange for sales of police weapons and supplies. "I for one hope this very long, and I'm sure very expensive, ordeal will be a true learning experience for both the department and the FBI as they regroup to investigate and prosecute FCPA cases against individuals in the future," Leon declared (see **WTTL**, Feb. 6, page 3).

"Two years ago, at the very outset of this case I expressed more than my fair share of concerns on the record regarding the way this case had been charged and was being prosecuted. Later, during the two trials that I presided over I specifically commented again on the record regarding the government's very, very aggressive conspiracy theory that was pushing its already generous elasticity to its outer limits. Of course, in the second trial that elastic snapped in the absence of the necessary evidence to sustain it," Leon said.

According to one attorney, Justice's case may have failed because the government agent meeting with the dealers and the cooperating co-conspirator, Richard Bistrong, had avoided using the words bribe or kickback in describing the deal and had used the term commission instead. In the hours of recordings of those meeting played for the juries, the defendants had never admitted they considered the commission a bribe or that what they were doing was illegal.

Leon dismissed all charges against Amaro Goncalves, John M. Mushriqui, Jeana Mushriqui, David Painter, Lee Wares, Pankesh Patel, Ofer Paz, Israel Weisler, Michael Sacks, John Benson Wier III, Yochanan R. Cohen, Saul Mishkin, R. Patrick Caldwell, Stephen Gerard Giordanella, Andrew Bigelow, Helmie Ashiblie, Lee Allen Tolleson, John Gregory Godsey and Marc Frederick Morales. A jury had previously declared Caldwell and Godsey not guilty and Leon had dismissed all charges against Giordanella in December.

Three defendants, Daniel Alvarez, Jonathan Spiller and Haim Geri, had pleaded guilty to conspiracy charges early in the case. Leon asked Justice attorney Joey Lipton what was going to happen to them. "We have reached out to defense counsel for those defendants. And in fairness to those defendants we wanted to give them an opportunity to be heard on those issues. And so we are going to be meeting with them in the near future to do so," Lipton reported. Defense attorneys have different views on whether the three will be able to back away from statements they made in court admitting to their crimes. Alvarez's lawyers, Asa Hutchinson, who practices

in Rogers, Arkansas, and Damon Wright of Venable, told WTTL they have been in contact with department lawyers but no date has been set for formal discussions. They are more optimistic about the chances that their client will be able have his plea reversed. “The judge has total discretion...the rules are designed for fairness and discretion,” Hutchinson said. Wright and Hutchinson became Alvarez’s lawyers after he had entered his guilty plea. Eric Bruce of Kobre & Kim, who represented Geri, would not comment on his client’s case, but said he thought Justice “will and should think carefully about which cases they’re pursuing, given overall limited resources, and given very expansive problem of corruption,” he told WTTL.

Industry Asks for Guidance on FCPA Enforcement Policies

The U.S. Chamber Institute for Legal Reform, an offshoot of the U.S. Chamber of Commerce, is taking an additional route toward its goal of curbing government prosecution of FCPA cases. In addition to its legislative proposals, the institute and 23 other trade associations want Justice to use promised FCPA guidelines to exempt certain activities from prosecution. In November, Assistant U.S. Attorney Lanny Breuer announced plans for the creation of guidelines that would clarify department policy in FCPA enforcement. In a letter Feb. 21 to Breuer and Robert Khuzami, director of enforcement for the Securities and Exchange Commission (SEC), the groups outlined advice they would like to see in the guidelines (see **WTTL**, Nov. 14, page 4).

Industry has raised most of these issues in past statements and in testimony to Congress. “Detailed, authoritative guidance on these matters will enhance companies’ compliance with the FCPA by clarifying the ‘rules of the road’ and by mitigating the significant interpretive challenges,” the letter argued.

Among areas that need clarification are the definitions of “foreign official” and “instrumentality,” it said. “The guidance should identify the percentage ownership or level of control by a foreign government that ordinarily will qualify a corporation as an ‘instrumentality,’” the letter suggested. In addition, guidelines should clarify that for a company to be considered an ‘instrumentality,’ it typically must perform governmental or quasi-governmental functions.

The associations also want advice on what would be considered an effective FCPA compliance program that would merit favorable consideration in enforcement decisions. They called for the guidelines to “clarify and confirm that both the Department and the SEC consider parent company liability under the FCPA’s anti-bribery provisions to extend only to circumstances in which the parent actually authorized, directed or controlled the improper activity of its subsidiary.” Another issue is successor liability. Justice and SEC “should clarify that they ordinarily will not pursue an enforcement action against a company for pre-acquisition violations by an acquiree” when a company conducts reasonable due diligence prior to an acquisition, they said.

Obama Repackages Ex-Im Programs to Beat Foreign Financing

The series of measures President Obama announced Feb. 17 to make the Export-Import Bank competitive with export financing of other export credit agencies (ECAs) in developed and developing countries includes programs the bank already has used or could use under its existing charter. A White House statement said the goal of the measures is to put Ex-Im “on an even footing” with other countries, particularly China, but the steps could also target Canada, which has been considering providing subsidized export aid to Bombardier to sell its new line of larger passenger planes in the U.S. (see **WTTL**, Feb. 13, page 1).

The White House said “the administration will actively employ its existing authorities so that the Export-Import Bank can provide U.S. firms competing for domestic or third-country sales with matching financing support to counter foreign non-competitive official financing that fails to observe international disciplines.” Under Section 1912 of the Ex-Im charter, U.S. firms already can ask the Treasury to grant the bank authority to match foreign ECA financing in the U.S. Under the White House plan, Ex-Im will be encouraged to use other authority in its

charter, which allows its board to approve funding for sales in the U.S. without making American firms go through the 1912 process. Ex-Im in late 2010 used other authority to offer to match low-interest funding China was prepared to give Pakistan to buy Chinese locomotives. Ex-Im financing was supposed to help General Electric win the nearly \$500 million contract for 150 locomotives. Bidding on that contract has just been reopened. When Ex-Im offered the financing, Chairman Fred Hochberg told WTTL the bank was ready to offer similar aid when it can be shown that a foreign ECA is offering low rates that are undercutting U.S. sales. Obama also said Ex-Im will launch a pilot program, Global Credit Express, “to help small business exporters access hard-to-find short-term working capital lines of credit.” An Ex-Im official said the pilot will be quicker than the bank’s existing Working Capital Guarantee Program.

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VEU: BIS in Feb. 24 Federal Register amended conditions for VEUs in China for Applied Materials (China), Inc., Boeing Tianjin Composites Co., Ltd., CSMC Technologies Corporation, Lam Research Corporation and Semiconductor Manufacturing International Corporation. BIS also changed name for GE India to GE India Industrial Pvt Ltd., and amended list of its eligible items and eligible destinations.

EXPORT ENFORCEMENT: Jeng “Jay” Shih, U.S. citizen, was sentenced Feb. 17 in D.C. U.S. District Court to 18 months in prison, while his company, Sunrise Technologies and Trading Corporation in Queens, N.Y., was sentenced to 24 months corporate probation for conspiracy to illegally export U.S.-origin computers from U.S. to Iran through UAE (see **WTTL**, Oct. 17, page 4).

MORE EXPORT ENFORCEMENT: 3M Attenti, based in Tel Aviv, Israel, agreed Feb. 14 to pay \$230,000 to settle 20 BIS charges of exporting crime control commodities, software and technology to China without required licenses from 2008 through 2010, and one charge of exporting crime control technology to Israeli national without required license in 2009. 3M Attenti neither admitted nor denied charges.

OFAC: Richland Trace Homeowners Association, Inc., condo community in Dallas, Texas, was fined \$9,000 Feb. 21 for violating OFAC’s Liberian Sanctions Regulations. Association used \$9,500 of proceeds from February 2009 sale of property of blocked individual to reimburse itself for past assessments and late fees. Richland said it received OFAC license to sell property, but OFAC claimed authorization excluded association from receiving “any taxes, costs, or legal, administrative, or other fees incurred or accruing prior to the court authorized foreclosure of the Blocked Premises.”

ZEROING: U.S. “zeroing” fight at WTO isn’t over despite deals reached with EU and Japan. WTO Dispute-Settlement Body (DSB) agreed Feb. 22 to establish panel to hear Korea’s complaints against U.S. antidumping practices, including zeroing, against corrosion-resistant carbon steel flat products from Korea.

SHRIMP: Vietnam requested consultations Feb. 20 with U.S. at WTO to challenge antidumping order on certain frozen warmwater shrimp from Vietnam.

COTTON: At request of USTR’s office, ITC Feb. 22 asked for public comments on proposal to grant least-developed countries (LDCs) access to U.S. market for several cotton products under GSP. USTR Ron Kirk in December announced intent to seek GSP status for LDC producers of upland cotton as part of initiative for LDCs and particularly four African cotton-producing nations (see **WTTL**, Dec. 19, page 5).

FCPA: Albert “Jack” Stanley, former CEO of KBR, was sentenced Feb. 23 in Houston U.S. District Court to 30 months in prison, followed by three years’ supervised release, for conspiring to violate FCPA in decade-long scheme to bribe Nigerian government officials. He pleaded guilty to charges in September 2008 and agreed to pay \$10.8 million restitution to KBR. KBR was member of TSKJ joint venture, along with Technip S.A., Snamprogetti Netherlands B.V., and JGC Corporation (see **WTTL**, Jan. 23, page 2).

SYRIA: OFAC issued General License No. 15 Feb. 23 to exempt from Syrian sanctions transactions that involve fees connected to patents, trademarks, copyrights or other intellectual property protections.

TPP: U.S. and Japanese officials held talks again Feb. 21-22 on Tokyo’s interest in joining Trans-Pacific Partnership (TPP) negotiations. Meeting followed Feb. 13 meeting USTRers had with Canadians and Feb. 16 session with Mexican officials on prospects of joining TPP talks (see **WTTL**, Feb. 13, page 4).

KORUS: U.S.-Korea Free Trade Agreement will go into effect March 15, USTR Ron Kirk announced following receipt of letter from Seoul Feb. 20 confirming that 22 Korean laws and regulations have been amended or adopted to comply with conditions of accord.