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DDTC Offers Sample Questionnaire for "Substantive Contacts"

Defense firms that want to take advantage of revised International Traffic in Arms Regulations (ITAR) rules for hiring dual nationals and third-country nationals will have to probe intrusively into the "substantive contacts" those employees have with countries subject to U.S. arms embargoes. In July 26 guidance that State's Directorate of Defense Trade Controls (DDTC) posted on its website, the agency includes a sample questionnaire with 17 questions that firms should ask their dual and third-country nationals to determine if contacts they have with their country of birth raise questions that might prevent them from having access to controlled technology under the new rules (see **WTTL**, May 16, page 4).

> The questions range from simple inquiries, such as "Do you hold/use a passport from another country?" to more probing questions such as "Do you have contacts with any other individuals or groups involved in acquiring controlled defense articles, including technical data, illegally or otherwise circumventing export control laws? Please explain the nature of that contact."

In addition to the guidance on application of the new rules, which go into effect Aug. 15, DDTC posted advice on filing for licenses under the revised regulations, along with a series of frequently asked questions (FAQs). Although the compliance guidance provides detailed examples of behavior that might constitute "substantive contacts," it doesn't answer all questions that exporters have been asking. For example, exporters have been asking how often they need to update the records of their dual and third-country employees. Do they need to ask the sample questions once or periodically or every time an employee comes back from vacation?

The new regulations exempt certain dual and third-country nationals from export licensing requirements if they have received a security clearance from the host nation or have been screened for substantive contacts with their country of birth. Where these individuals don't qualify for the exemption, licenses must still be obtained from DDTC. When these individuals are included in a license application or agreement request, "DDTC does consider the country of origin or birth in addition to citizenship," the guidance notes.

Chinese Object to AD/CVD Certification Requirements

China has submitted comments to the International Trade Administration (ITA), protesting interim rules the agency published in February to impose stricter certification requirements on parties filing data in antidumping (AD) and countervailing duty (CVD) cases (see **WTTL**,

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Feb. 7, page 1). "Contrary to the claims of these parties, primarily U.S. industries who are petitioners in such proceedings, no justification exists for any conclusion that the Department's long-standing previous certification requirements are insufficient in the case of submissions by foreign governments such as the GOC," the Chinese wrote.

> "The imposition of burdensome, overreaching, and unlawful new certification requirements on foreign governments that have no specific connection to any detailed instances of significant and recurring problems is not justified by the record of government participation in actual prior cases, nor by applicable U.S. law and relevant international agreements," the comments declared. The Chinese also pointed to a United Nations convention that grants sovereign countries immunity from such requirements and also noted that World Trade Organization rules can be applied instead.

"A 'reasonably diligent inquiry' should include a 'duty to investigate,' at the very least obligating a representative to conduct some form of due diligence into the veracity of a clients' facts before certifying to the truth of those facts," commented attorneys with the firm of Kelley Drye & Warren. "To certify to 'the best of their ability' that facts are complete and truthful, some investigation beyond merely taking a client's word as unbending truth must occur," they added.

Similarly, in comments filed on behalf of U.S. Steel, attorneys with Skadden Arps cited numerous recent cases where parties "have been found to have fabricated documents, altered documents, backdated documents, withheld documents and destroyed documents." For each of the accusations they cited specific cases. "U.S. Steel strongly urges the Department to exercise the full extent of this authority by not only strengthening the certification language but also taking steps to ensure that the certification requirements are actually enforced when parties violated them," the comments declared.

Attorneys with Troutman Sanders questioned a requirement for certification statements even when parties ask for an extension of time in a case. "The Department should rescind this practice immediately," they urged, arguing that such requests do not involve the submission of factual information. They also objected to a requirement for foreign government officials to sign certifications that say they will be personally liable and subject to criminal sanctions if the data are false. "Would U.S. officials sign such a certification in countervailing duty cases brought against the United States? We think the answer is no," they wrote.

Comments from the firm of King and Spalding supported proposals to allow the use of electronic signatures on certifications under certain specific rules. "So long as the Department identifies an electronic signature standard that it believes effectively can be implemented, the Domestic Interested Parties support the use of electronic signatures," the firm stated.

TAA-FTA Deal Is Still Mostly Smoke and Mirrors

A purported deal between Senate Majority Leader Harry Reid (D-Nev.) and Minority Leader Mitch McConnell (R-Ky.) to move legislation on renewing Trade Adjustment Assistance (TAA) and three pending free trade agreements (FTAs) still lacks details on how and when the Senate and House will vote on the measures. "None of the sequencing details has been worked out," one congressional source told WTTL. Most of the statements put out by lawmakers and administration officials basically said nothing new.

A statement from Reid said he believes his discussions with McConnell "have provided a path forward in the Senate after we return for passage of the bipartisan compromise on the Trade Adjustment Assistance program, followed by passage of the three FTAs." He did not say what that path is, but said he would "not support movement on the FTAs, which I have never supported, until TAA has passed." A McConnell statement said he agreed that "we have a path forward on TAA and the Free Trade Agreements," even though he would not support TAA. U.S. Trade Representative (USTR) Ron Kirk issued a statement saying he was pleased that Reid

and McConnell have agreed on a "path forward," but he did not say he was part of the deal or when President Obama would send the FTAs with Colombia, Panama and Korea to Congress for approval. Nor did he say that both the House and Senate would have to pass TAA before the president sends the FTAs to Congress (see **WTTL**, Aug. 1, page 1).

> House Democrats, who are still divided over the FTAs, aren't confident the deal will lead to passage of TAA. They weren't convinced by a statement from House Speaker John Boehner (R-Ohio), who said he looks forward "to the House passing the FTAs, in tandem with separate consideration of TAA legislation, as soon as possible." The Democrats are uncertain what that means or whether Boehner will bring up TAA under regular rules of order for a House vote or under suspension rules that would require a two-thirds majority that could kill the bill.

"The path forward in the House as well as the Senate must be ironclad in its assurance that TAA will be renewed, otherwise TAA should be attached to the Korea FTA as [we] urged many months ago," said House Ways and Means Ranking Member Sander Levin (D-Mich.) and Rep. Jim McDermott (D-Wash.) in a joint statement.

Weatherford Reveals Investigations, Plus Millions Spent on Fees

In a filing with the Securities and Exchange Commission (SEC) July 29, Weatherford International, an oilfield services and equipment company, revealed that its trade practices are under investigation. The company said the Justice Department (DOJ) and SEC "are investigating our compliance with the Foreign Corrupt Practices Act (FCPA) and other laws worldwide. We have retained legal counsel, reporting to our audit committee, to investigate these matters and to cooperate fully with the DOJ and SEC."

> Since September 2007, Weatherford has been discontinuing business in countries subject to U.S. sanctions, specifically Cuba, Iran and Sudan, as well as Syria, it said in its filing. "Through June 30, 2011, we have incurred $49 million for costs in connection with our exit from sanctioned countries and incurred $117 million for legal, professional and related fees in connection with complying with and conducting these ongoing investigations," the company noted.

It warned that its costs could go up. "To the extent we violated trade sanctions laws, the FCPA, or other laws or regulations, fines and other penalties may be imposed," the SEC filing cautioned. "Because these matters are now pending before the indicated agencies, there can be no assurance that actual fines or penalties, if any, will not have a material adverse effect on our business, financial condition, liquidity or results of operations," it continued.

Court Upholds ITA Wage Methodology in NME Case

Court of International Trade (CIT) Judge Donald Pogue has upheld an interim methodology ITA devised to determine surrogate-country wages in nonmarket economy (NME) antidumping cases, but he declined to rule on a revised wage policy the agency published in June. In an Aug. 3 ruling (slip op. 11-95), Pogue affirmed an ITA remand determination on wooden bedroom furniture from China that resulted from a Court of Appeals for the Federal Circuit decision in May 2010 in *Dorbest*, which found the old methodology "unbalanced."

"The court notes that Commerce recently announced a new methodology for calculating surrogate wage rate in proceedings initiated on or after June 21, 2011," Pogue noted. "Under the new methodology, Commerce will no longer use multiple countries to calculate surrogate wage rate, and will instead rely on data from the primary surrogate country. While Dorbest urges the court to hold that Commerce's current methodology is unlawful when considered in light of Commerce's recent announcement, the court cannot do so because Commerce's change in methodology is not retroactive," he ruled. ITA issued its new methodology in the June 21 Federal

Register after receiving public comments (see **WTTL**, Feb. 28, page 1). "In NME antidumping proceedings initiated on or after the date of publication of this Federal Register notice, the Department will base labor cost on ILO [International Labor Organization] Chapter 6A data applicable to the primary surrogate country, rather than the Chapter 5B it currently uses. For ongoing NME proceedings, the Department expects to consider on a case-by-case basis whether it is feasible to implement the new labor methodology within statutory deadlines," it stated.

> In rejecting a new suit by Dorbest against the remand ruling, Pogue wrote: "Commerce has provided sufficient reasonable explanation for choosing the country count methodology in this instance." ITA made it clear this methodology was intended to satisfy the complaints made by the appellate court. The remand determination calculated a dumping margin of just 2.40%.

* * * Briefs * * *

CIT: President Obama July 28 nominated CIT Judge Evan Wallach to seat on Court of Appeals for Federal Circuit. Wallach, on CIT since 1995, "possesses a keen intellect and a commitment to fairness and integrity that will serve him well as a judge on the Federal Circuit," Obama said. In addition to private practice and combat service in Vietnam, where he was awarded Bronze Star, he served in Nevada Army National Guard and from 1987-1988 was general counsel and advisor to Sen. Harry Reid (D-Nev.).

EXPORT ENFORCEMENT: Jianwei Ding of Singapore, who is currently in prison in Texas, agreed to pay $100,000 to settle one charge of conspiracy to export items from U.S. to China without required licenses. Ding has been serving 46-month prison term since his Oct. 8, 2009, conviction on related export violations. BIS had charged him with exporting Toray M40JB-6000-50B and M60JB-6000-50B carbon fiber to China Academy of Space Technology, BIS announced in Federal Register Aug. 4. BIS also imposed 25-year export denial order on Ding,

MORE EXPORT ENFORCEMENT: Toll Global Forwarding USA Inc., of Rosedale, N.Y., agreed July 28 to pay $200,000 to settle BIS charges that freight forwarder it acquired in 2008 took part in scheme to export electronic components and other items from U.S. to India without licenses. Acquired firm, Baltrans Logistics, allegedly exported electronic components designated as EAR99 to Bharat Dynamics Limited in India, which was on BIS' Entity List, without licenses in 2005 and 2006. It also allegedly exported platinum pellets, designated as EAR99 to India's Solid State Physics Laboratory,which is also on Entity List, without licenses in 2007. Toll Global neither admitted nor denied charges.

MORE EXPORT ENFORCEMENT: Andrew Vincent O'Donnell of Villa Rica, Ga., was sentenced Aug. 1 in Atlanta U.S. District Court to three years in prison on charges of violating AECA, conspiring to violate AECA and possessing short-barrel rifles. He pleaded guilty on Feb. 25. O'Donnell had operated eBay online store through which he sold various gun parts and accessories, including export controlled military holographic weapons sights, which have night vision capability and are designed to enhance precision shooting. He also sold gun parts used to assemble M4 rifles.

MORE EXPORT ENFORCEMENT: Swiss Technology (Swiss Tech), Inc., in Clifton, N.J., pleaded guilty in Newark U.S. District Court July 12 to one count of conspiracy to violate AECA from August 2004 to about July 2009. It also agreed to pay $1.1 million in restitution to Defense for fraudulent contracts. Swiss Tech was under contract with Pentagon to manufacture components for M249 machine gun. To lower manufacturing costs, it sent defense articles, including specification drawings and parts samples, to company in China so that Chinese company could make these machine gun components for Swiss Tech. Swiss Tech did not have license from State, which would have denied it anyway. After receiving components from Chinese company, Swiss Tech then shipped defense articles and other parts to Defense, purporting that defense articles were made by Swiss Tech in conformance with its contract.

EVEN MORE EXPORT ENFORCEMENT: Henson Chua, of Manila, Philippines, pleaded guilty July 28 in Tampa, Fla., U.S. District Court to violation of AECA. According to plea agreement, Chua knowingly and willfully caused temporary import into U.S. of unmanned aerial vehicle on U.S. Munitions List. Chua initially listed item for sale on eBay and then engaged in communications with undercover ICE agents, which culminated in recovery of item by U.S. officials.

ITC: Paul J. Luckern, ITC Chief Administrative Law Judge (ALJ), retired Aug. 3. Luckern had been ALJ at Commission since 1984 and was named Chief ALJ in 2008. Prior to that, he had served as ALJ at Social Security Administration and as trial attorney at Justice. He was patent examiner at PTO from 1956 to 1960 after working as chemist with Eastman Kodak.