

Vol. 30, No. 36

September 13, 2010

BIS to Focus Enforcement on Individual Violators

The Bureau of Industry and Security (BIS) intends to give exporters with good compliance programs lower penalties in administrative settlements, while it increases its targeting of individuals who are responsible for intentional violations of U.S. export controls, BIS Under Secretary Eric Hirschhorn told the agency's annual Update conference Aug. 31. "Where appropriate, we will seek to minimize penalties for companies that have good internal compliance programs and make demonstrably unintentional errors. But—and this is important—we are planning increased efforts against individuals who flout the rules and against companies whose inadequate internal compliance programs tell us that they are indifferent to whether they follow the rules," Hirschhorn told an audience of nearly 1000.

Later, he repeated that message at a press conference. "In the past, enforcement cases have generally been against companies and typically not against individuals. That is something we are planning to change," Hirschhorn declared. "There are individuals in companies – and I don't mean people who make a goof or mistake – people who deliberately flout the rules," he said.

The next day, David Mills, assistant secretary for export enforcement, also addressed this new policy. Individuals could face "the denial of export privileges, fines and imprisonment," he said. "The same will hold true for a supervisor who is complicit in these deliberate violations by subordinates," Mills added.

John Sonderman, acting director of BIS' Office of Export Enforcement, further explained this policy. "On the criminal side, a corporation may have a certain level of knowledge and willfulness that any given individual does not possess," he said. "So, in order to prosecute that individual, the individual has to have knowledge and intent to commit the violation," he explained. "On the administrative side, there is strict liability. For prosecuting individuals on the administrative side, I think we would need to see some sort of willfulness, some sort of ill intent on the part of the individual, not just somebody who in doing their job in the normal course of business made a mistake," Sonderman stated. "There may theoretically be liability issues, but we would be looking at the corporation if it was an honest mistake," he added.

Bush Neglect of Commercial Service May Hamper Obama's Plans

The Bush administration's neglect of Commerce's U.S. Commercial Service (CS) may hamper President Obama's National Export Initiative (NEI), the Government Accountability Office



(GAO) told congressional committees in an Aug. 31 report. The new leadership at Commerce has taken steps to improve the situation, but it lacks adequate workforce planning and “its 2011 budget request has some weaknesses that could affect its ability to meet its goals,” says the GAO, which is the investigatory arm of Congress.

According to the report (GAO-10-874), Commerce allowed the CS staff, which includes export promotion specialists in the U.S. and in foreign offices around the world, to decline from 2004 to 2009, dropping to 1,492 positions from 1,731, due to declining budgets. “As CS’s financial constraints grew, officials delayed their impact through a variety of financial management practices such as using unobligated funds from prior years’ appropriations,” the GAO notes.

“However, as the availability of these offsetting funds declined and costs continued growing, CS leadership failed to recognize the risks entailed by the financial problems, and the organization reached a ‘crisis’ situation in 2009,” it reports. In response to this situation, officials froze hiring, travel, training, and supplies, “compromising CS’s ability to conduct its core business,” the GAO contends.

Congress has approved significant increases in the CS budget, in part, because of President Obama’s NEI proposals, which supposedly include providing more help for exports through CS local and regional offices in the U.S. and assistance from foreign posts (see **WTTL**, March 15, page 2). That money, however, is not all going to help rebuild the CS staff, the report says. Even with the additional budget, the CS staff will be below their 2004 level because nearly 150 staffers became eligible to retire after March 2010 and may not be replaced under the staff budget request for fiscal 2011, which starts Oct. 1, 2010.

Moreover, a senior CS official “noted that rather than using funds to hire people in 2010, CS is focused on creating more exports sooner by increasing marketing, the number of companies going on trade missions, the number of potential trade partners brought to the United States on reverse trade missions, and matchmaking efforts,” the GAO reports. “The rationale was to focus on activities that could provide quick results, according to CS officials, as it takes about 18 months to prepare a company to export, whereas it takes about 6 to 9 months to assist a company that has already exported to one market with exporting to a second market,” it adds.

Ruling Limits Ability of Courts to Review BIS Civil Charges

The D.C. U.S. Court of Appeals has presented another reason why renewal of the Export Administration Act (EAA), sooner than later, may be necessary, ruling it lacks jurisdiction to review BIS administrative actions despite a presidential executive order purporting to keep the EAA’s authorities in place through the invocation of the International Economic Emergency Powers Act (IEEPA). On Sept. 3, the appellate court transferred a suit filed by Micei International against BIS to the D.C. U.S. District Court where the case will have be heard under the Administrative Procedure Act (APA) (see **WTTL**, March 1, page 2).

With the lapse of EAA in 2001, the circuit court no longer has the authority granted in EAA Section 13(c)(3) to review civil penalties or civil sanctions, the appellate court ruled in a July 16 decision preceding the transfer of the case. Even with the president’s invocation of IEEPA through an executive order to maintain other functions of the EAA, IEEPA doesn’t grant the president the power to give the court authority to review civil penalties, it declared. As a result, targets of administrative penalties no longer have any right to appeal their case on substantive grounds.

Micei, a Macedonian firm, had sued Commerce in the D.C. Circuit Court pursuant to the EAA and Secion 766.22(e) of the Export Administration Regulations (EAR) to seek revocation of a five-year denial order and \$126,000 civil fine BIS imposed on it for allegedly aiding and abetting in the violation of an earlier denial order against Yuri Montgomery. The company

claimed IEEPA doesn't give BIS authority to impose a denial order against all exporting as a civil penalty. The court ruling sidestepped the question of BIS authority and focused only on whether the court had jurisdiction to hear the case. In its decision, the court drew a distinction between this case and its 2003 ruling in *Wisconsin Project* in which it upheld the president's power to main the confidentiality protections of the EAA through his executive order.

BIS recognized the appellate court's position even before the court issued its ruling. In a "technical amendment" to the EAR published in the June 15 Federal Register, BIS deleted Section 766.22(e) from the regulation without adding new appeal instructions. "Federal court jurisdiction to review these orders is governed by statute, not by regulation," it conceded.

While the court ruling makes it clear that it doesn't have jurisdiction to hear appeals from BIS civil actions, it left unanswered the difficult question of whether or not the sanctions authorized by the EAA can be invoked by executive order. "This is not a case in which the general savings statute provides an exception to this rule," the opinion states. "Under the general savings statute, a temporary enactment that has expired and does not provide otherwise is 'treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement' of 'any penalty, forfeiture, or liability incurred under such statute'," it notes citing earlier court precedents. "This provision can perpetuate the jurisdiction granted in a statute beyond its expiration,...but only if the liability that is the subject of the suit for which jurisdiction is sought was 'incurred under [the] statute'...meaning while the statute was in effect," it adds, citing federal law.

"Here, Micei's alleged violations occurred in 2003, well *after* the EAA's expiration. The general savings statute saves nothing in this case," the court says. "There remains, however, the question of what effect, if any, the executive order sustaining the export regulatory scheme has on this court's jurisdiction," it continues. "We conclude that the President lacks that power. Nothing in the text of IEEPA delegates to the President the authority to grant jurisdiction to any federal court. Nowhere does the statute even refer to the jurisdiction of federal courts. It never mentions the direct-review provision of the expired EAA or, for that matter, the EAA itself," the court declares.

Steelworkers Ask USTR to Investigate China's "Green" Trade

In the days before the Uruguay Round agreements and establishment of the World Trade Organization (WTO), U.S. industries regularly used Section 301 of the Trade Act to seek retaliation against unfair foreign trade practices. With the stricter rules of the WTO, the submission of Section 301 complaints with the U.S. Trade Representative's (USTR) office has become rare and the number of cases accepted via this provision even rarer. The use of Section 301 will get a new test with the United Steelworkers' (USW) filing of a petition Sept. 9 asking the USTR to investigate and bring a WTO complaint against "five major areas of protectionist and predatory practices utilized by the Chinese to develop their green sector at the expense of production and job creation here in the U.S."

The 5,800-page submission identifies such practices as: restrictions on access to critical materials; prohibited subsidies contingent on export or domestic content; discrimination against foreign firms and goods; technology transfer requirements for investors; and trade-distorting domestic subsidies.

"This case draws a line in the sand," said USW President Leo Gerard in a statement announcing the case. "The petition presents comprehensive facts and data regarding China's illegal acts under international trade rules," he said. "We can't rely on unending diplomatic niceties and non-productive photo opportunities masquerading as serious talks. We're hemorrhaging jobs, seeing our bilateral trade deficit skyrocket and jeopardizing our future," Gerard stated. Beijing's aid to its renewable power industry was detailed in a March 2010 report prepared for the National Foreign Trade Council (see **WTTL**, March 22, page 3). Under Section 301 rules,

the USTR's office will have to decide whether to accept the petition and undertake the requested review within 45 days. "USTR will review the petition in accordance with established procedures. USTR will make a decision on whether to initiate a Section 301 investigation in response to the petition within 45 days of the date of filing," said a USTR spokeswoman.

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BIS PEOPLE: Donald Salo named deputy assistant secretary for export enforcement. Previously, he was assistant director for Recovery Accountability and Transparency Board, which oversees programs funded by American Recovery and Reinvestment Act. He retired from U.S. Army Military Police as colonel after 27 years of service. In addition, Jeannette Chu has returned to U.S. after long tour as BIS export control officer (ECO) stationed in Beijing. Her replacement, Lawrence Panigot, who is now BIS special agent in Dallas, starts work in China in October. Second ECO for office is being recruited. Also, BIS will open its first office in Singapore in October, with Donald Pearce filling ECO post. He is currently export compliance specialist in Staten Island, N.Y., and previously was ECO in Moscow from 2004 to 2007.

EXPORT ENFORCEMENT: Yi-Lan Chen, who pled guilty in May to conspiracy to export dual-use items to Iran without approved licenses, was sentenced Aug. 27 to three and a half years in jail. His Taiwan-based company, Landstar Tech Company Limited, was sentenced to one year of probation. Chen was arrested in Guam in government sting operation (see **WTTL**, Feb. 8, page 4).

MORE EXPORT ENFORCEMENT: Xe Services LLC of Moyock, N.C., formerly known as Blackwater Worldwide, entered agreement Aug. 18 with DDTC to pay \$42 million to settle charges that it committed 288 violations of Arms Export Control Act and ITAR. DDTC claimed the violations reflected "serious and systemic compliance problems." Xe can apply \$12 million of fine toward remedial measures.

SUDAN: OFAC Aug. 13 announced settlements in separate cases with two firms for alleged violations of Sudanese Sanctions Regulations. Without admitting or denying OFAC charges, Compass Bank of Birmingham, Ala., agreed to pay a \$607,500 civil penalty. In second case, OFAC fined Custom Polymers, Inc., of Charlotte, N.C., \$57,800 to settle charges that firm attempted to make payment involving Sudan on behalf of affiliate without OFAC license.

SOFTWOOD LUMBER: U.S. has dropped 10% duty imposed on softwood lumber from four Canadian provinces since April 2009 following agreement with Ottawa, which imposed export tax instead, USTR's office announced in Aug. 30 Federal Register. U.S. imposed import tax after Canada failed to comply with arbitration panel ruling that found provinces in violation of Softwood Lumber Agreement. "Per an understanding between the Governments of the United States and Canada, Canada will collect the additional 10 percent charge on exports until the total of the amounts collected under the U.S. import duty and the Canadian charge on exports is equal to CDN \$68 million," notice said (see **WTTL**, May 31, page 4).

IRAN: OFAC Sept. 7 named Iran's Europäisch--Iranische Handelsbank (EIH) of Hamburg, Germany, as Special Designated National (SDN). EIH is the first financial institution designated by Treasury for facilitating Iran's proliferation activities since it issued Iranian Financial Sanctions Regulations Aug. 16 to implement Comprehensive Iran Sanctions Accountability and Divestment Act of 2010 (see **WTTL**, Aug. 23, page 4). "EIH has acted as a key financial lifeline for Iran," said Treasury Under Secretary Stuart Levey.

WASSENAAR ARRANGEMENT: BIS amended EAR in Sept. 7 Federal Register to implement some change in control lists regime adopted at its December Plenary (see **WTTL**, Dec. 14, 2009, page 3). Revisions amend entries controlled for national security reasons in Categories 1, 2, 3, 4, 5 Part I (telecommunications), 6, 7, and 9. Changes to ECCNs 5A002, 5D002, 6A002, 6A003, 8A002 and all related ECCNs "will be implemented in a separate rule because of the sensitivity of the items and complexity of procedures and controls for these items," BIS said. "The changes agreed to at the Plenary that pertain to raising the Adjusted Peak Performance (APP) for digital computers in ECCN 4A003 will be implemented in a separate rule when the President's report for High Performance Computers has been sent to Congress that sets forth the new APP in accordance with the National Defense Authorization Act for FY1998," it added.

TRADE FIGURES: U.S. goods exports in July of \$107.7 billion were up 22% from July 2009 and were highest since August 2008, Commerce reported Sept. 9. Good imports were up 23% from year ago to \$163 billion. Services exports edged up 10% to \$45.6 billion from July 2009, while services imports rose 8% from year ago to \$33 billion.

TRANSSHIPMENTS: BIS in Sept. 1 Federal Register asked for comments on updating "Best Practices for Transit, Transshipment, and Reexport of Items Subject to the Export Administration Regulations."