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New Encryption Licenses Gaining Popularity

Two new versions of the Encryption Licensing Arrangement (ELA) that are not yet published in the Export Administration Regulations (EAR) or on the Bureau of Industry and Security (BIS) website are growing increasingly popular among exporters who know of their availability. Since early 2009, BIS has been allowing encryption exporters to obtain what are being called Worldwide ELAs and Single-Country ELAs, according to Randy Pratt, director of the BIS information technology controls division.

> The first Worldwide ELA was issued in June 2009, she told an encryption conference sponsored by the American Conference Institute April 19 in San Francisco. Information on the new license options will be posted on the BIS website, she said. Under current EAR rules, BIS offers individual licenses for encryption items requiring a license or ELAs for multiple exports of the same encryption product to a single end-user.

The Worldwide ELA now allows exports to all destinations except terrorist countries and to less-sensitive government end-users. These licenses come with post-export reporting requirements. Pratt said license applications have been overwhelmingly approved with some exceptions for specific end-users of concerns. The other new ELA version is a Single-Country ELA that permits multiple exports of approved encryption products to one country. Pratt said BIS policy for these two new ELAs is evolving. Many decisions still need to be made on how to apply the new licenses to multiple intermediate consignees, government end-users and government-controlled entities, such as national banks.

Justice Aims to Increase Prosecution of FCPA Cases

The multimillion dollar fines imposed on companies in the last year for violations of the Foreign Corrupt Practices Act (FCPA) will continue to be seen in future cases as the Justice Department increases the staff and resources devoted to prosecution of the antibribery law.

The key word for the department is “more,” said Nathaniel Edmonds, assistant chief of Justice’s fraud section. Not only will the department bring more cases against corporations, but it is also stepping up its prosecution of individuals involved in corruption, he told the Washington International Trade Association May 6. Of the 77 cases brought against individuals in the last four years, 46 are currently pending trial. “We are getting more resources for the fraud section and the FCPA unit in particular,” he said. “It is very clear that we are going to get more

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prosecutors, a significant number of new FCPA prosecutors," Edmonds reported. He also said there will be more cooperation with foreign law enforcement agencies which have increased their prosecution of bribery laws. The U.S. is working especially close with the United Kingdom which recently enacted a new bribery law.

> In prosecuting FCPA cases and reaching settlements, Justice is considering the "collateral consequences" a company may face under other laws and at other departments, Edmonds indicated, citing the example of the plea agreement it reached with BAE Systems, plc. (see **WTTL**, March 22, page 3). "In the BAE Systems case, for example, we made a specific identification of how to bring charges against the corporation of the potential collateral consequences of debarment that result from a plea to corruption," he said.

He conceded that there was no global settlement that would have included the State Department's treatment of the company. "The Department of Justice has no other agreement with BAE other than what is put forth in public papers," he said. "In other situations, there are global settlements internally, internal to the U.S. government. That is not what happened in this case," he said.

Edmonds also noted a new type of inquiry that trade lawyers are calling "a come-in-and-talk letter." Instead of issuing search warrants or calling a grand jury, the department may ask companies to come in to discuss information the department has on a potential FCPA violation, he said. "If we simply call and say hi or send a letter and say hi, we have some thoughts that you might be involved in some potential criminal conduct," he said. "That is a more friendly way of going about this," he added. "That said, we do not do it without credible specific evidence of potential wrongdoing," Edmonds stated.

OFAC Takings New Approach to Pre-Penalty Notices

When Treasury's Office of Foreign Assets Control (OFAC) issues a pre-penalty notice, the agency has already weighed most mitigating and aggravating factors in an alleged violation and the fine it proposes is the amount it wants to settle the case, according to OFAC officials. "When a pre-penalty notice comes out, it comes out at the number we actually expect the case to be resolved at absent receiving new information," OFAC Director Adam Szubin told an American Conference Institute program on OFAC enforcement April 29. The new approach to pre-penalty notices differs from past practice when OFAC would use the notice to state the maximum penalty facing a party.

> "When we are at the pre-penalty notice point in an effort, we are 90% done," said Michael Geffroy, OFAC assistant director of enforcement. Firms can still try to reach a settlement before the notice is issued, he said. "So, if you want to settle, let us know so we can get the right people in the room," he said.

Szubin said the change in the pre-penalty notice reflects OFAC's implementation of new enforcement guidelines it published in 2009 and is aimed at shedding more light on the thought process at OFAC. "When a pre-penalty notice goes out, in the past, it would typically include the maximum statutory penalty that could attach to a set of violations," Szubin said. That penalty did not take into account the party's standard of conduct or level of compliance. "Our feeling is that is not very helpful," he said. Companies still have the opportunity to contest OFAC's findings or to present new evidence in their support. The new policy allows firms "to reach better results, but in particular, it allows you to have much better insights into where we are in a case and where it's going," he said.

Szubin also addressed the multimillion-dollar fines the agency has imposed in the last year on foreign banks that have violated U.S. trade sanctions. He said the fines were as large as they were because the conduct of the banks had been willful and lasted over decades. When cases such as those are found, "you will see a commensurate response from us," Szubin said. At the

same time, he said such fines are not going to be common. The settled cases were "far, far out in the bell curve...and were exceptionally egregious," he said. "The run-of-the-mill penalty at OFAC is not going to be in the tens or hundreds of millions of dollars, and as we said when we put out our enforcement guidelines, the run-of-the-mill case at OFAC is not even going to be egregious," Szubin said.

Justice OKs Payments to Foreign Official under U.S. Contract

A Justice Department advisory opinion has told one firm that the department would not prosecute it under the Foreign Corrupt Practices Act (FCPA) for paying a foreign official to manage a project being funded by a U.S. government contract. The unidentified company had filed a request with the department for advice under its FCPA advisory opinion procedure. "Based upon all of the facts and circumstances, as represented by the Requestor, the Department does not presently intend to take any enforcement action with respect to the proposed service contract described in this request," the Justice said in its April 19 opinion.

> "While the Individual is a 'foreign official' within the meaning of the FCPA, and will receive compensation as Facility Director, through a subcontractor, from the Requestor, the Individual is being hired pursuant to an agreement between the U.S. Government Agency and the Foreign Country, and will not be in a position to influence any act or decision affecting the Requestor," Justice stated.

The opinion said the requestor is contractually bound to hire and compensate the individual as directed by the U.S. government agency. "The Requestor did not play any role in selecting the Individual, who was appointed by the Foreign Country based upon the Individual's qualifications. Moreover, the Individual's position is separate and apart from the Individual's position as a Foreign Officer," Justice explained. "In neither position will the Individual perform any services on behalf of, or receive any direction from, the Requestor. Accordingly, the Individual will have no decision-making authority over matters affecting the Requestor, including procurement and contracting decisions," Justice said.

Industry Seeks to Overcome "Earmark" Blockage of Tariff Bill

The business community is trying to prod Congress into action on languishing miscellaneous tariff legislation and the roadblock created by a Republican stand against enactment of any "earmark" bills. In a May 5 letter to Democratic and Republican leaders in the House, the National Association of Manufacturers (NAM) and 130 companies urged passage of a pending Miscellaneous Tariff Bill (MTB) to eliminate the tariffs firms have had to pay since previous duty suspensions expired in December (see **WTTL**, Dec. 21, page 3).

> Ironically, Republicans who usually support trade legislation are blocking an MTB because of a decision by the Republican Conference in March to oppose any "earmarks" in legislation. While earmarks are normally considered to benefit individual firms, organizations or communities, the definition that the GOP adopted swept in tariff suspensions intended for specific products and the benefit of specific importers.

Republicans and business representatives are now trying to figure out a way around the Conference decision for tariff bills without upsetting the party's opposition to earmarks. All of the 764 bills included in legislation (H.R. 4380) that acting House Ways and Means Committee Chairman Sandy Levin (D-Mich.) and Rep. Kevin Brady (R-Texas) introduced in December have been vetted through the International Trade Commission (ITC) and House members to assure that they are noncontroversial and face no opposition. A new bill is likely to be needed to add measures that have completed House and Senate vetting since then. With duty suspensions having expired in December, importers are now paying tariffs on imported goods and materials that are not available from domestic sources. This could mean millions of dollars in

tariff payments. "Without the MTB's suspension of tariffs, companies must pay duties on these imported products – which is a tax that is then passed on to consumers," the industry letter says. "Any request for a tariff suspension that has domestic competition is rejected during the vetting process," it notes.

> "NAM members do not believe that the tariff suspensions in the MTB are earmarks," the letter argues. "Further, we believe that the interpretation that House rules do not define the limited tariff benefits in the MTB as Congressional earmarks is the correct interpretation. Our manufacturing members believe that the MTB process is a transparent, bipartisan way to reduce the costs of manufacturing in America," it states. " Our competitors maintain similar programs to benefit manufacturing in their countries, and we cannot afford to add another cost disadvantage to manufacturing in America," the letter adds.

Textile Industry Gave Conditional Support to Haiti Bill

The House on May 5 and the Senate on May 6 approved legislation by voice votes to extend trade benefits for Haiti after winning the conditional support from the U.S. textile industry (see **WTTL**, May 3, page 4). The quick action after introduction of companion, bipartisan bills (S. 3127 and H.R. 5160) shows that Congress can move trade measures that are narrowly focused and supported by massive public sympathy for the plight of the Haitian people. But to get even this modest bill passed, lawmakers had to satisfy opposition from the U.S. textile industry.

> Two groups representing textile interests wrote to House Ways and Means Committee and Senate Finance Committee leaders April 26 to give their approval to the bills but with the caveat that their support was limited to the situation in Haiti and not a formula for future trade deals. "We must stress, however, that this package does not set a precedent for any future trade preference legislation," wrote representatives of the American Manufacturing Trade Action Coalition and National Council of Textile Organizations.

"After lengthy negotiations with your staffs, we are pleased that we were able to reach an acceptable compromise on this important legislation," they said. A key compromise was on the increase in duty-free treatment for certain items through Tariff Preference Levels (TPLs) with sub-limits on highly sensitive products. "The sub-limits were a key priority for the domestic industry and will prevent over concentration of exports in one or two key areas that could be particularly damaging to U.S. producers," the two groups said.

* * * Briefs * * *

SOMALIA: OFAC in May 5 Federal Register issued final Somalia Sanctions Regulations to implement executive order that President Obama issued April 12 to restrict trade and financial relations with 11 Somalian individuals and one entity.

OCTG: ITC May 3 made final ruling in antidumping case against imports of oil country tubular goods from China, with four commissioners finding threat of injury to U.S. industry from imports and two finding current injury.

EXPORT ENFORCEMENT: Star CNC Machine Tool Corp. of Roslyn Heights, N.Y., agreed to pay $16,000 civil fine April 29 to settle BIS charges that it committed four violations of EAR with exports of Swiss lathe machines from U.S. to Brazil, Colombia and Costa Rica without approved export licenses.

FCPA: Ousama Naaman, who was extradited from Germany to U.S. on charges of violating FCPA, pled not guilty May 3 in D.C. U.S. District Court, but sources say he is expected to cooperate with government prosecutors. Naaman was charged with serving as agent for Innospec, Inc., which pled guilty March 18 to violating FCPA with bribery of Iraqi officials, violating Cuba embargo and defrauding U.N. Firm agreed to pay $14.1 criminal fine and, in deal with SEC, disgorge $11.2 million in profits and pay $2.2 million civil fine (see **WTTL**, March 22, page 4). Magistrate Alan Kay agreed to place Naaman in secure area of D.C. jail where he can be provided medical care for his heart condition that will require bypass surgery.