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30-Minute Rule for Encryption Exports Will Be Complicated

As details emerge about how the Bureau of Industry and Security (BIS) will implement President Obama's promised reform of export controls on encryption products, exporters are saying they see less and less benefit from the coming changes. Even BIS officials concede the revisions to the Export Administration Regulations (EAR) will result in a more complicated system and still retain some post-export reporting requirements (see **WTTL**, March 22, page 2). Draft versions of the so-called "30-Minute Rule" have run more than 60 pages in length, according to sources familiar with the text, which will be published as a proposal to amend the EAR.

> The coming proposal will apply only to items subject to "License Exception ENC-Unrestricted and mass-market encryption items," Randy Pratt, director of the BIS information technology controls division, told an encryption conference sponsored by the American Conference Institute April 19 in San Francisco. "This rule is limited in scope; it will not remove any classification requirement; it will not change the classification of any item," she said.

Pratt stressed that the rule has not yet been finalized but certain issues have been decided. As a result, the changes "will make the encryption provisions of the EAR even more complicated than they are and probably require a new layer of reporting and another layer of exclusions," she said. The proposed rule will "remove the 30-day review requirement and encryption questionnaire, the so-called Supplement 6, for most but not all mass-market and unrestricted items," Pratt explained. She said "unrestricted" refers to those items that fall into the basket of items covered by subsection (b)(3) of License Exception ENC.

"However, the mass-market provisions and License Exception ENC provisions will continue to require 30-day review for 'encryption components', which includes chips, chip sets and software development kits," Pratt stated. In addition, items under ENC subsection (b)(2) for network infra-structure, crypt-analytic and higher-level items will continue to face 30-day review requirement, she said. Post-export reporting requirements will be reduced to require only product descriptions and not sales data. Another improvement will allow BIS to review classification requests without concurrent examination by the National Security Agency.

Court Trims ITA's Use of Petitioner Margin Claims

The International Trade Administration (ITA) cannot rely on the dumping margins claimed by petitioners in applying "adverse facts available" (AFA) in antidumping cases without demon-

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strating that the rate it applies is related to commercial reality and is a reasonably accurate estimate of the actual dumping rate, the Court of Appeals for the Federal Circuit (CAFC) ruled April 16 in *Gallant Ocean (Thailand) v. U.S.* The court reversed and remanded a Court of International Trade (CIT) decision sustaining the ITA's order in an administrative review of imports of dumped warm water shrimp from Thailand. Because Gallant had not responded to requests for information in the review, ITA applied an AFA rate based on margins alleged in the original petition in the case.

> The ruling could open the door for more challenges of ITA decisions to apply AFA rates based on margins alleged by petitioners. At a minimum, it could force ITA to undertake more extensive investigations to corroborate alleged dumping rates in AFA situations.

"Instead of relying on the adjusted petition rate, Commerce should have relied on more reliable 'facts otherwise available' such as the representative dumping rates of similarly-sized and similarly-situated exporters in the original investigation and in the administrative review," wrote CAFC Judge Randall Rader for the three-judge panel. "Given that over a dozen respondents submitted timely questionnaires during the administrative review, Commerce had abundant resources from which to calculate a reasonable AFA rate. Although Commerce has discretion in choosing from a list of secondary information to support its adverse inferences, Commerce must select secondary information that has some grounding in commercial reality," he wrote.

Kirk Hopes Release of ACTA Text Will Dispel "Disinformation"

U.S. Trade Representative (USTR) Ron Kirk had hoped the public release of the draft text of a proposed Anti-Counterfeiting Trade Agreement (ACTA) April 21 would calm the fears of some trade groups and companies about the pact, but the reaction of ACTA critics to the draft indicates that those anxieties remain strong (see **WTTL**, March 29, page 3). Kirk told WTTL that the goal of the proposed deal is "to come up with an agreement that is as strong as it can be....but within that, we are going to accommodate as many interests as we can."

> Kirk, however, sounded annoyed at the tactics of ACTA critics who spread "misinformation or outright disinformation" about the proposed agreement. "I urge everyone to read it. We're still not done," he told WTTL.

Release of the draft "was important, given the anxiety and, frankly, some of the misinformation or outright disinformation that was out there," he said. The USTR's office "has been open and responsive and has heard the concerns of all of those on both sides of this and we are still in a period of working with other members to try and come up with an acceptable resolution," he added. "The important thing of what has been released is at least it will dispel some of the nonsense that's out there in terms of what the agreement did or did not do," Kirk stated. "Some of the noise out there was, in fact, noise," he told WTTL.

The draft text, most of which is still inside brackets indicating that no final agreement has been reached on its provisions, spells out a broad agreement that could provide for stronger civil and criminal penalties against infringers of either copyrights and trademarks or, more broadly, intellectual property rights. The brackets around what is protected indicates that the scope of the agreement is still undecided. Adoption of a broad protection of intellectual property rights would extend the pact to patents as well as copyrights and trademarks.

The text also addresses safeguards for activities on the Internet or in the "digital environment" with provisions that could protect providers of these services from penalties if they unknowingly carry protected materials. It calls for strong border measures and transparency in the publication of ACTA implementing rules and policies. But critics of the agreement claim the safeguards for communications carriers and Internet providers still are inadequate and would make such services vulnerable to liabilities or the need to establish burdensome mechanisms to monitor their content and remove infringing materials. They also claim the effort to strengthen

the protections would impede legitimate extensions and uses of intellectual property and copyrighted material. The released text "made ACTA marginally better," Rep. Mike Doyle (D-Pa.) told the April 21 annual dinner of the Consumer Electronics Association (CEA), which had just awarded him its Digital Patriots Award. "But even with what some analysts call only slightly less awful than expected, it doesn't mean it's ready for enactment yet," he said to a standing ovation from many members of the audience.

Export Reform Plans Win Praise But Raise Many Questions

The Obama administration's plans for reforming U.S. export controls drew broad praise from industry groups and members of Congress, but the three-phase strategy spelled out by Defense Secretary Robert Gates April 20 for implementing those plans also raised questions about specific issues that weren't addressed and doubts that legislation that will be needed to adopt many of the proposed changes can be enacted this year (see **WTTL**, April 19, page 2). As expected, particular concern has been voiced about Phase 3 of the plan, which calls for unification of all export licensing responsibilities into a single agency. The key question being asked is: Where will this new agency go or will it be an independent agency? (see story below).

> "If it is anywhere but Commerce, business will fall on its sword to prevent that," said Bill Reinsch, president of the National Foreign Trade Council and a former BIS under secretary. "If it goes to Commerce, the political right wing will fall on its sword to stop it," he said.

The idea of creating a single export licensing agency is not new. As far back as 1982, then-Sen. Jake Garn (R-Utah) introduced a bill (S. 2837) to create an independent Office of Strategic Trade and reintroduced the idea in 1989 (see **WTTL**, Jan. 3, 1983, page 1). Any new proposal would probably face the same troubles that Garn's measure did, particularly a jurisdiction fight between the Senate Banking Committee, which has jurisdiction over BIS and the Export Administration Act, and the Senate Foreign Relations Committee, which has jurisdiction over the Directorate of Defense Trade Controls (DDTC) and the Arms Export Control Act (AECA). Creation of an independent agency also would raise questions about how the president and Cabinet secretaries could assert their national security policies over such an agency.

House Foreign Affairs Committee Chairman Howard Berman (D-Calif.) said he shared the goals that Gates and Obama have expressed to achieve more effective export controls for both military and dual-use exports. Berman is working on legislation to reenact the EAA with new authority for the president to take some of the steps Gates outlined. "I expect to have legislation ready for committee and House action shortly," he said in a statement. Berman was more cautious about the idea of a single agency. "Secretary Gates also set forth his own vision of how the two export control systems might be fully merged. Should the president propose such a step later this year, I will carefully consider it," Berman said.

Representative Brad Sherman (D-Calif.), who chairs the House Foreign Affairs Committee's terrorism, nonproliferation and trade subcommittee, told WTTL that he agreed with almost everything Gates said. "The devil is in the details, of course," he said in an e-mail to WTTL. But Sherman said he is also worried about the export of technology that might lead to the offshoring of jobs. "If we decontrol an item or decide to grant a license for technology transfer, and the result of that action is that production is outsourced to China, that is a far different calculus than in the case where a U.S. manufacturer simply wants to sell an item overseas. The export control laws have to take account of that," he stated.

Gates Speech Outlines Plans for Export Control Reforms

As the Obama administration moves forward with its plan to consolidate the myriad licensing, data processing, application and law enforcement activities that regulate export controls, questions about which agency will handle the job remain unanswered. Suggestions that the

proposed single export licensing agency might end up at the Defense Department sent chills up the spins of many exporters. The chance exists that Defense could become the government's ultimate arbiter of export trade licenses, a Defense official told reporters at a background briefing April 19, the day before Defense Secretary Robert Gates unveiled the administration's reform plans (see **WTTL**, April 19, page 2). "It's fair to say at this point [that] none of the national security agencies involved in this have been ruled out," the official said.

> Gates also responded to this question after his speech to the Business Executives for National Security (BENS). "We're developing the options on that, which we hope the president will be able to make a decision on," Gates said.

Gates also acknowledged the resistance the proposed reforms could face. "The impediments are mostly entrenched bureaucracies," Gates said. "Let's just say that my building has not overflowed in the past with enthusiasts for this kind of change. That's also true of other buildings in town," he said. Nevertheless, Gates said, Secretary of State Hillary Clinton, Under Secretary of State for Arms Control Helen Tauscher and Secretary of Commerce Gary Locke have embraced the plan. "We are going to be driving this process from the top down," he said.

Gates told one questioner that the White House reform review did not address so-called "deemed exports" involving transfer of technology to certain foreign nationals in the U.S. He said he had to address the issue while serving briefly on Commerce's Deemed Export Advisory Committee and as president of Texas A&M University. Citing the necessity of academia and industry to attract and retain the best engineers and scientists from around the world, Gates said, "The notion that you could have a graduate student from a foreign country working for an American professor in a laboratory setting and have that student singled out and denied access to that laboratory is, on a day-to-day basis, unworkable."

In his April 20 speech to BENS, Gates said "The United States is thought to have one of the most stringent export regimes in the world, but stringent is not the same as effective." He recalled his days in 1982 when he served as deputy director of the Central Intelligence Agency and was responsible for tracking illegal transfers of U.S. technology. "It soon became apparent that the length of the list of controlled technologies outstripped our finite intelligence-monitoring capabilities and resources," Gates said. "We were wasting our time and resources tracking technologies you could buy at Radio Shack," he declared.

Gates outlined a three-phase process for overhauling the export control system that will begin taking shape in the coming year. First, the administration will seek to take administrative steps to improve licensing, reduce interagency conflict and coordinate enforcement. In phase two, criteria would be developed for a single, tiered control list which would eventually lead to the merger of the Commerce Control List (CCL) and the U.S Munitions List (USML) in phase three. Improvements in export licensing procedures also would aim to reduce licensing requirements. Phase 3 would see the actual merger of the control lists, the establishment of a single enforcement agency, creation of a single licensing agency and consolidation of information technology systems, Gates explained.

While both initial phases could be implemented through executive order, Gates said, the final step – "a thorough overhaul of the current system [including] a single licensing agency and a single enforcement coordination agency" – would require legislative support from Capitol Hill. Change will not come without overcoming significant bureaucratic obstacles, he admitted.

Although the present system is intended to provide "checks and balances" of Defense, State, and Commerce interests, the end result is "confusion about jurisdiction and approval on the part of companies and government officials alike," he said. Gates has been the administration's point man on export control reform because of his personl interest in the subject and also to emphasize the national security impetus behind the reform effort, acknowledged James Hursch, the director of the Pentagon's Defense Technology Security Administration. Gates' presence in the forefront affirmed the administration's position that the issue is one of national security,

not commerce, he told a roundtable discussion after the secretary's speech. "This is a national security reform," Hursch said. "That is the reason why DoD is out in front on it," he said.

Colombia Steps Up Push for FTA Approval This Year

With the term of Colombian President Uribe ending in August, Colombian officials are stepping up their efforts to get the U.S.-Colombia Free Trade Agreement (FTA) approved by Congress before Uribe leaves office. The new case the Colombians are making to gain support for the pact is based on data showing a drop in U.S. farm exports to Colombia because of FTA's Bogota has reached with Argentina and Brazil and a sharp growth in the number of unions and union membership, despite complaints U.S. unions have made about violence against labor leaders in the country.

> While not citing Uribe's departure as a reason for approving the FTA, Colombian officials tout the accomplishments he has achieved during his eight years in office, helping to bring Colombia from being nearly a failed state to ranking as one of the leading economic reforming countries by the World Bank. Uribe has made the U.S. FTA one of his major goals.

Rather than stressing the new export opportunities for U.S. companies, Colombian officials are now arguing that U.S. industries are losing market share in Colombia because of Washington's failure to approve the FTA and Bogota's new FTAs with other countries. Speaking to reporters in Washington April 21, Colombian Trade Minister Luis Guillermo Plata cited a drop in U.S. exports of yellow corn, wheat and soybean meal in 2009 after Colombia's FTA with Mercosur went into effect. Mercosur is a customs union comprising Brazil, Argentina, Paraguay and Uruguay. U.S. farm imports, which dropped by nearly $700 million in 2009, are being displaced by Argentine and Brazilian products not subject to the 15% import tariff facing American production. Plata also noted the growth of unions in Colombia, with the number of union growing from 1,444 in 2002 to 2,035 in 2009, while union membership during that period rose more than 75% from about 850,000 to more than 1.5 million.

Prospective Dumping Idea Draws Expected Reactions

A request for comments on the idea of eliminating the use of retrospective calculation of dumping margins in administrative reviews and the adoption of a prospective-only method of setting margins has drawn the usual divided reaction from industries and law firms that are often on the petitioning side of these cases and those on the respondent's side. ITA's call for comments, which was mandated by Congress, drew 38 comments (see **WTTL**, April 5, page 4).

> The claim that retrospective reviews produce more accurate dumping margin calculations "is largely a myth," commented the Consuming Industries Trade Action Coalition (CITAC). "In cases where imports are relatively small, a review cannot be justified financially by the exporters and importers involved. Thus, the deposit rate remains the final duty, even where margins have declined," it argued. "In larger cases where exporters and importers have a significant financial stake, the processes are burdensome and uncertain. The prospect of 'facts available' margins, surrogate country assumptions, among other uncertainties and the expense of participation makes reviews a daunting prospect for most exporters," it said.

Elliot Feldman of Baker & Hostetler also argued against the retrospective system. "Exporters to the United States, as a matter of prudence and precaution, invariably raise prices when an investigation is initiated," he noted. "The main cause of the problem is the very low standard in the United States for accepting petitions, but retrospective duty assessment exacerbates the problem because importers know that were an order to be imposed, their liability would be unlimited and would not be determined until well after the subject merchandise had been imported," he wrote. Attorneys with the law firm of King & Spalding defended the current

system and urged ITA to maintain it. If the margins were fixed at the investigation rate, this would allow foreign producers to "game the system," they told ITA. "The retrospective system, on the other hand, is fairer to both U.S. companies bringing successful AD and CVD cases and also to foreign producers that are subject to such cases," they said. "This rewards exporters who have altered their pricing behavior or who have reduced their subsidies, but it also permits duty rates to rise if dumping or subsidies increase," they argued.

> The Committee to Support U.S. Trade Laws (CSUSTL) filed comments saying retrospective assessment system affords interested parties, including importers, the opportunity to obtain determinations of duties that are based on the most recent information on U.S. and home market prices and costs. "No prospective system affords the same level of accuracy in addressing unfair trade practices or provides the same ongoing incentive for foreign producers to charge and/or importers to pay a fair price," the group asserted. "Prospective systems are by their design not focused on an accurate offset of all unfair trade practices found. Some systems, like the EU's, actually can reward behavior that is the opposite of a return to fair pricing," it said.

ITC Report on Thai Tires Replays Case against Chinese Imports

The International Trade Commission (ITC) didn't reveal what advice it gave the USTR's office April 21 on the potential impact of granting a competitive need waiver under the Generalized System of Preferences (GSP) to imports of radial motorcar tires from Thailand, but the sanitized report it released on its investigation replayed the same debate that took place over the Section 421 case against tire imports from China (see **WTTL**, Jan. 11, page 1). Supporters and opponents of the waiver represented many of the same firms and unions that fought over the Chinese tire case.

> According to comments ITC received in its investigation, the United Steelworkers (USW) opposed the waiver, warning that Thai tires would replaced tires that have been sourced from China and would subvert the intent of the Section 421 relief. "USW also expressed its belief that the Thai industry is already thriving and does not need additional support under the GSP," the ITC report noted.

Supporters of the waiver petition, including tire makers Bridgestone, Falken, Sumitomo Rubber, and Yokohama, told the ITC that Thai tires would be highly unlikely to harm the U.S. industry for several reasons, including their "negligible percentage of total U.S. imports and a trivial percentage of the total U.S. market." Bridgestone "cited industry forecasts of rising domestic demand for the subject tires following the bottoming out of shipments (in terms of quantity) in 2009," the report noted. Bridgestone also said denial of the waiver would not result in any increase in U.S. production because firms would source their imports from other foreign countries, including some that still benefit from GSP duty-free treatment.

* * * Briefs * * *

FCPA: Charles Paul Edward Jumet was sentenced to 87 months in jail April 19 based on his November guilty plea to conspiracy to violate FCPA in scheme to bribe Panamanian officials and making false statement to federal agents (see **WTTL**, Nov. 16, page 4). "Today's sentence – the longest ever imposed for violating the FCPA – is an important milestone in our effort to deter foreign bribery," said Assistant Attorney General Lanny Breuer. "As this case confirms, foreign corruption carries with it very serious penalties, which can include substantial prison time for individuals who violate the law."

SUDAN: Hilton International Co. agreed to pay $735,407 civil fine to settle OFAC charges that it committed 142 violations of Sudanese Sanctions Regulations between June 2002 and February 2006 in connection with its unlicensed operation of two Hilton brand hotels in Sudan. Hilton voluntarily disclosed this matter to OFAC.