

Kyl Identifies Concerns Blocking Hirschhorn's Confirmation

The confirmation of Eric Hirschhorn to be under secretary of the Bureau of Industry and Security (BIS) could depend on answers the White House National Security Council (NSC) staff is drafting to questions Sen. Jon Kyl (R-Ariz.) raised in a letter to National Security Advisor James Jones. Kyl has been using a Senate maneuver called a "hold" to prevent a vote on Hirschhorn's confirmation since December. While not mentioning Hirschhorn by name in his letter, Kyl makes it clear that he wants assurances that Congress will be consulted before any changes are made in export control policies (see **WTTL**, Jan. 25, page 1).

The Feb. 23 letter, which also was signed by Sen. Russ Feingold (D-Wis.), includes 15 detailed questions the lawmakers have about controls on both defense and dual-use exports, including whether there has been a recent National Intelligence Estimate (NIE) to determine the extent to which controlled goods and technology are being diverted to terrorists and countries developing weapons of mass destruction. "Will the administration commit that prior to undertaking any regulatory changes or asking Congress to consider statutory changes, it will conduct a new NIE or Intelligence Community assessment focusing on the above?" they asked.

The questions go into great detail about export licensing and enforcement procedures and practices. The two senators asked whether Commerce would agree to suspend the Validated End-User (VEU) program and "disclose the terms relative to the VEU program in China." They also asked what Commerce intends to do improve, update and expand the Entity List. "Does the Department of Commerce support revising the Export Administration Regulations to require a license for the export of any item on the Commerce Control List when the exporter knows or is informed that the item is intended for military end use?" they queried. They also wanted to know if the administration is considering any changes in rules that require notification to Congress of defense exports or easing controls based on foreign availability.

Brazil Cross Retaliates Against U.S. Intellectual Property

As Brazil March 15 announced new cross-retaliation against U.S. intellectual properties due to Washington's failure to eliminate cotton subsidies that the World Trade Organization (WTO) has deemed to violate WTO rules, bilateral negotiations aimed at settling the dispute have been postponed (see **WTTL**, March 15, page 1). Although U.S. Trade Representative (USTR) Ron Kirk said a team of U.S. negotiators was to go to Brazil the week of March 15, no trip took place. "Discussions continue with Brazil, but no date has been set for our next meeting," a USTR



spokesperson told WTTL. “We have engaged with Brazil many times on this issue, including at the senior official level, in an effort to reach a solution. The United States, of course, prefers a negotiated resolution to the issues in the cotton dispute, instead of countermeasures,” the spokesperson said.

Meanwhile, Brazilian sources say they are still waiting to hear proposals from Washington on how to resolve the dispute. “Brazil is willing to listen and see what the U.S. has in mind,” one Brazilian official told WTTL. “We want the U.S. to comply” with the WTO ruling, he said.

After identifying 102 products that will face increased tariffs in retaliation for the U.S. cotton subsidies, Brazil published a list of 21 American intellectual properties, including patents, trademarks and copyrights that will be hit with various sanctions. Brazil will withdraw patent protection for certain veterinary medicines, agriculture biotechnology products, plant varieties and agriculture chemicals. It will drop copyrights for recorded music. It also will allow compulsory licensing for certain drugs, agriculture chemicals and biotechnology products. In addition, it will permit the import of some patent-infringing products, increase patent registration fees and impose additional duties on the transfer on intellectual property into the country, including on computer programs.

Encryption Review Changes Remain Unclear

It remains unclear whether the changes President Obama promised in the pre-export review of encryption products will apply to all software and commodities that now require such reviews or only to mass-market software (see **WTTL**, March 15, page 1). Clarity on the issue may come at a briefing BIS reportedly is planning to give the business community the week of March 22 on how changes coming out of the White House export control review will affect exports subject to the Export Administration Regulation (EAR). Separately, the president’s pledge to amend rules on dual-nationals appears aimed at changing State’s regulations.

Confusion about the encryption policy stems from a White House fact sheet that said the change would apply to about 85% or 2,800 of the 3,300 notifications BIS receives annually, but a different explanation comes from BIS officials. “It’s limited to mass market,” said BIS Assistant Secretary for Export Administration Kevin Wolf, who also cited 2,800 as the number of notifications that will be effected. “We’re still working out the little tweaks on what’s exactly within the scope of the mass-market rule,” he told WTTL March 16. Only 627 of the 3,300 notices BIS reviewed in 2008 were for mass-market products.

The planned encryption changes would apply to encryption software and commodities classified under Export Control Classification Numbers (ECCN) 5A002 and 5D002, Wolf said. Currently, exporters of those items – when they meet certain criteria in the rules and are going to countries not listed in Supplement 3 – must file an encryption review request with BIS and after waiting 30 days can ship the item unless the agency notifies them not to ship. Those notices can be filed electronically through the BIS SNAP-R system, but a separate paper copy has to be sent to the National Security Agency (NSA).

“We are going to flip that,” Wolf said. “Instead of having to wait for the 30-days clock to run out or for any other notification before shipping, it’s just file electronically a notice of what the product is, who designed it and what it contains,” he noted. It is the same information already required to be filed. “This is not intended to change substance; not intended to change notifications that go to NSA or the Commerce Department,” he said. “But it is just flipping the burden so you don’t have to wait for the 30 days. You can notify and ship and you don’t have to the biannual report thereafter,” he said. “So the point is, the NSA still gets the same information, the Commerce Department still gets the same information, the companies just don’t have to wait,” Wolf told WTTL. Meanwhile, Obama’s goal of harmonizing the treatment of dual-nationals under EAR and ITAR apparently will change State’s policy of basing nationality on a person’s

person's country of birth to the BIS policy of basing it on last country of citizenship and residency. "You should contact State to find out exactly the content and contour of that regulation," Wolf said. "I have no news of any change in the Commerce Department rules. So in terms of how the State Department implements its change, you'll have to talk with them," he said.

State Has Resumed Approving Some BAE Licenses

State's Directorate of Defense Trade Controls (DDTC) has resumed approving "some" export applications for U.S. subsidiaries of United Kingdom's BAE Systems (BAES), primarily for items going to U.S. government (USG) forces in Afghanistan and Iraq, a State official told WTTL. "On March 9, the Department lifted its hold on licenses supporting USG and coalition operations in Afghanistan and Iraq, license applications that include no foreign BAES subsidiaries, and license applications for items related to NATO and Major Non-NATO Allies," the official said in an e-mail. "The Department continues to review the other license applications that are being held to determine whether a decision can be made," he added (see WTTL, March 8, page 1).

Speculation is growing that BAES and its U.S. subsidiaries could face additional sanctions beyond the \$400 million fine it paid after pleading guilty to making a false statement to the Defense Department about its commitment to comply with the Foreign Corrupt Practices Act (FCPA). Negotiations between company executives and lawyers and DDTC about a consent agreement appear to be underway. The company is trying to avoid statutory debarment from conducting defense exports as mandated by the International Traffic in Arms Regulations (ITAR).

"There remains a temporary hold on approving many – but not all – BAES-related licenses at this time, as the department studies the plea agreement and other information as it develops a general policy to address future export guidelines for BAES and its subsidiaries," the State official told WTTL. "While we have resumed processing and approving some BAES-related licenses, we will not be in a position to process all such licenses until we issue this general policy," he explained.

The official continued: "We are working intensively to complete our review of the conviction and plea agreement as well as our review of additional information received after the conviction in order to develop the policy. BAES has a large number of subsidiaries and understanding their activities will take a significant amount of time. In prior comparable situations, it took the department months to complete all the policy details. The department continues to work this as quickly as possible and we expect to complete our policy within weeks."

Harsh Words and Legislation Heat Up U.S-China Relations

A week of inflammatory language by Chinese officials and members of Congress, as well as a new report warning about what may be unfair Chinese subsidies and trade practices to aid their growing clean energy industries, is testing the Obama administration's effort to "manage" Sino-American relations. The verbal fight, which it is for now, also is raising questions about whether large multinational U.S. firms will oppose legislation (S. 3134) aimed at Chinese currency manipulation as strongly as they have before. Bilateral disputes and political pressure could reach a crescendo on April 15 when the Treasury Department is supposed to issue its biannual report on foreign currency manipulation and whether or not it names China a manipulator.

The week's tensions began with statements from Chinese Premier Wen Jiabao blaming the confrontation over currency on U.S. protectionism. It escalated March 17 when Sens. Charles Schumer (D-N.Y.) and Lindsey Graham (R-S.C.) and 12 other senators introduced a new version of legislation to make it easier for Treasury to tag China a currency manipulator and for Commerce to consider the undervaluation of the renminbi as a factor in antidumping and countervailing duty cases. The "left turn" Beijing has taken with the U.S. could threaten future U.S. investment in China and weaken the willingness of major corporations to fight against the Schumer-Graham measure, said NFTC President Bill Reinsch. While companies are not likely to pull out of China,

they may direct more of their investments toward India instead, he suggested. “We don’t want to miss the next opportunity and the next opportunity is India,” Reinsch said. “As China becomes less attractive as a new market, people are going to find it will be easier in internal corporate decisions to spend new money somewhere else, and India has certain attractions,” he said.

Reinsch also warned that business can’t be counted on to fight currency legislation as strongly as it has in the past. “As I talk to our members, increasingly they are less patient with the Chinese, and I think the bottom line will be not so much criticism but less willingness to stand up and defend them,” he said. Although industry’s response to the legislation will be negative, “you’ll probably find a much quieter reaction than the last time,” Reinsch said. “It comes down to how much time and energy do you want to spend on something,” he stated. “My guess is a lot less than they spent two years ago,” he suggested.

The report on China’s support for its clean and renewable energy industries was written by lawyers with the firm of Dewey & LeBoeuf in Washington for the National Foreign Trade Council (NFTC). Without judging whether China’s policies qualify as unfair trade practices or violate WTO rules, the report identifies programs to aid the development of wind, solar and biomass energy programs through favorable financing, local-content requirements and Buy-Chinese-Only procurement requirements.

Despite the bilateral friction, Washington and Beijing March 17 were able to reach agreement on reopening the Chinese market to U.S. pork products. In talks in Beijing with Agriculture Under Secretary James Miller and Assistant USTR Jim Murphy, China’s Administration of Quality Supervision, Inspection and Quarantine accepted a U.S. proposal to resume exports of U.S. pork. “I am also pleased that China affirmed in our meetings that they will base their decisions on international science-based guidelines,” said USTR Ron Kirk.

Procurement Proposal Would Target Unclassified Information

Defense contracts for goods or technology subject to the ITAR or EAR could face additional requirements for protecting “unclassified information” and reporting hacking attempts under a proposed change the Pentagon is considering to the Defense Federal Acquisition Regulation (DFAR). In an Advance Notice of Proposed Rulemaking (ANPR) in the March 3 Federal Register, the Defense Department (DoD) asked for public comments on the idea of adding information protection and reporting requirements to the DFAR for a wide range of unclassified information. “The changes would add a new subpart and associated contract clauses for the safeguarding, proper handling, and cyber intrusion reporting of unclassified DoD information within industry,” the notice explained. A public hearing on the ANPR is schedule for April 22.

If the policy were adopted, a new DFAR section would require government agencies and contractors to provide adequate security to safeguard DoD information on their unclassified information systems from unauthorized access and disclosure. Contractors would also be required to report certain cyber intrusion events that affect covered information.

*** * * Briefs * * ***

ANTIBOYCOTT: GM Daewoo Auto & Technology Company in Incheon, Korea, after making voluntary self-disclosure, has reached settlement with BIS to pay \$88,500 civil fine for 59 alleged violations of antiboycott rules for allegedly providing boycott information when it shipped Korean-origin goods to Libya through Egypt. BIS has suspended fine and will waive it after six months.

FCPA: Innospec, Inc., pled guilty March 18 to violating FCPA, Cuba embargo and defrauding U.N. as part of Oil-for-Food program and agreed to pay \$14.1 million criminal fine. In separate settlement with SEC on FCPA charges, it agreed to disgorge \$11.2 million in profits and pay \$2.2 million civil penalty.