

Hirschhorn Tells Confirmation Hearing What It Wants to Hear

Eric Hirschhorn, President Obama's nominee to be Bureau of Industry and Security (BIS) under secretary, followed the normal path of prospective political appointees and avoided saying anything controversial at his Nov. 5 confirmation hearing before the Senate Banking Committee. The only near pitfalls he had to avoid were from questions by Ranking Member Richard Shelby (R-Ala.), who asked Hirschhorn about previous testimony he had given in Congress arguing against unilateral controls. "I will have no trouble enforcing the laws that this Congress has passed," Hirschhorn responded (see **WTTL**, Sept. 14, page 1).

He also side-stepped a Shelby question on a statement he had made asserting that BIS should have a bigger role in export controls. "The team approach is an excellent approach," Hirschhorn demurred. In his prepared opening statement, Hirschhorn was also careful to avoid hinting that he had any opinion on how export controls should be applied other than in balanced manner.

"Working closely with the Departments of State, Defense, and Energy, BIS evaluates thousands of export license applications each year to ensure that items proposed to be sold abroad are going to suitable end users for appropriate end uses. Getting this right is very important. It is equally important to have an enforcement program ensuring that those who flout the rules are caught and punished. I am committed to ensuring that BIS does the best possible job of performing these important functions as well as overseeing its important role in ensuring an effective treaty compliance system and promoting continued U.S. leadership in strategic technologies," he testified.

Chip Makers Fear Being Captured by BIS Encryption Rules

U.S. semiconductor manufacturers and other makers of electronic products are concerned that the increasingly common practice of embedding encryption capabilities in their products will bring the items under the encryption requirements in the Export Administration Regulations (EAR) and recontrol items that have been essentially decontrolled for years. Several major chip makers and the Semiconductor Industry Association (SIA) have written to BIS Acting Assistant Secretary Matthew Borman urging the agency to clarify its current encryption regulation, Lillian Norwood of **IBM** told the BIS Information Systems Technical Advisory Committee (ISTAC) Nov. 4. According to Norwood, microprocessors that currently are largely decontrolled under Category 3 and Category 5 Part 1 of the Commerce Control List (CCL), or are EAR99, face the risk of being captured under Category 5 Part 2 controls due to the



inclusion of encryption. For chip firms, including IBM, Intel, Sun and Texas Instruments, this will become an increasing problem because semiconductor manufacturers are embedding encryption functionality into a larger portion of their high-volume commercial, civil products. Borman himself has coined the phrase “incidental encryption” to describe this process.

“With encryption, once you categorize that microprocessor as an encryption item, you have a ‘see-through’ rule, meaning that as you put that encryption item into a server, all of a sudden, your server can end up with an encryption classification,” Norwood told ISTAC. Even though an encryption item might qualify for a license exception, it still faces reporting requirements under the encryption rules. On the other hand, for technology the rules are less strict. “The key for us is that we can only work under one classification,” she said.

The issue is already being considered by BIS, Randall Pratt, director of the BIS information technology division, told ISTAC. “Internally, we are working on this,” she said. Former BIS encryption specialist Norman LaCroix, who is now with the National Security Agency, claims the encryption regulation was not intended to capture the items into which the encryption was embedded.

“Category 5 Part 2 absolutely does not determine what the control status of the subsuming item might be,” he told ISTAC. “Category 5 Part 2 simply says that the control status of the security part remains Category 5 part 2. This is necessary because encryption is never the outer part of anything,” LaCroix explained.

U.S. chip makers also are concerned that the encryption classification could impede exports because some countries impose restrictions on imported products with encryption capabilities. Countries such as China, France, Hong Kong, Israel, Poland and Russia impose restrictions on encryption products regardless of how the exporting government classifies them, ISTAC members noted. The encryption problem could work against U.S. efforts to open these markets for American high-tech products and to support common international standards, they said.

Customs Promises “Common Sense” in Enforcing 10+ 2 Rules

Customs will take a “common sense” approach to enforcing the “10+2” advance Import Security Filing (ISF) requirements when they become enforceable Jan. 26, Thomas Winkowski, Customs assistant commissioner for field operations, told the agency’s Advisory Committee on Commercial Operations (COAC) Nov. 4. “For us it is not about penalties; it is about compliance,” he said. “This has been three years in the making. I think we have done a really outstanding job in consulting and coordinating with the trade community,” he added.

To assure consistency in the enforcement of the new rules “any penalty or liquidated damages that is going to be assessed by the ports are all going to come into headquarters for review,” Winkowski said. “We need to make sure that we have consistency, continuity out there,” he continued. “This is not about nitpicking. This is not about saying they have missed this time frame by five minutes. It’s about educating the trade community as well as ourselves,” he told COAC.

“I wanted the penalties in the building so we can have a team of people” look at them and provide consistency, he said. Winkowski also said Customs and Border Protection (CBP) is working on enforcement guidelines. There may be people who don’t know about or understand the rules, he noted. “We will continue to work with them, but in some case, perhaps a penalty is appropriate,” he said. CBP published penalty mitigation guidelines in the July 17, 2009, Customs Bulletin, and in October it posted extensive Frequently Asked Questions (FAQ) on the ISF requirements and enforcement on its website.

COAC members expressed satisfaction with the extensive outreach and training CBP has conducted with the trade community since the interim rules for ISF were published in November 2008 (see **WTTL**, Dec. 1, 2008, page 2). They had concerns, however, about the potential

penalties, which can be \$5,000 for each violation. They also continued to question the requirement to file the ISF 24 hours prior to lading a cargo for maritime shipment. "There is really no accurate way to capture that specific piece of information or data in the system that exists now," said COAC member Karen Lobdell of Drinker Biddle & Reath in Chicago. An alternative that may be recommended would require filing when the first bill of lading is filed.

Ex-Im Bank Adopts "Carbon Policy" to Foster Green Exports

Producers of environmental and green energy products will get additional help in financing their exports under a new "carbon policy" that the Export-Import Bank board of directors adopted Nov. 3. The new policy also calls for developing new ways to monitor the carbon emissions associated with the projects that Ex-Im supports, suggesting that future financing for polluting programs may be harder to get approved. Ex-Im says its action makes it the first Export Credit Agency (ECA) to adopt such a policy. The adoption of the policy comes a month before an international meeting in Copenhagen, Denmark, will try to reach agreement on a new international commitment to reduce carbon emissions to address climate change.

"Ex-Im Bank will increase export credit support for U.S. renewable energy exports that produce very low to zero carbon dioxide or carbon dioxide equivalent of greenhouse gases (CO₂s) by increasing the resources devoted to promotion, marketing, and execution of such financing," the new policy states. The bank also will establish a \$250 million renewable energy facility and consider the introduction of a full range of incentives, including those terms available under the Environmental Exports Program, it says.

The bank says it will urge the Organization for Economic Cooperation and Development (OECD) and other multilateral fora to adopt "full reporting of CO₂ emissions associated with appropriate energy and non-energy projects including manufacturing and agriculture." In addition, it will "explore ways to further improve its transparency in the tracking and reporting of CO₂ emissions from projects it supports." Ex-Im will continue to make available the estimated amounts of CO₂ emissions expected to be produced from pending Category A and B projects on its website and encourage other financial institutions to do the same.

Kirk Skirts Chance to Set Date for Action on Korean FTA

U.S. Trade Representative (USTR) Ron Kirk Nov. 5 said he is working on trying to fix the U.S.-Korean Free Trade Agreement (KORUS) but wouldn't say when the Obama administration would be ready to take the pact to Congress for approval. Several hundred U.S. and Korean business executives were hoping to hear something more definitive in the speech he gave to the U.S.-Korea Business Council annual dinner, but instead they heard a repetition of previous statements about the need "to be mindful that important stakeholders have real concerns" about the accord. "We owe it to all of you, and to Korea, to make sure that we understand fully these concerns and work hard to address them," Kirk said in his prepared remarks.

"But I can tell you this, we are not standing still. President Obama has charged me with finding a way to address our substantive issues of concern and move the agreement forward," Kirk said. "Precisely because our political and economic relationship is so important, we have to get this right. And we need the broadest possible political support to move forward," he said.

Kirk acknowledged the U.S. business community's concern that Korea has initialed an FTA with the European Union (EU), which will give EU firms a competitive advantage in Korea. "I know that many of you are in competition with those firms in major sectors like electric machinery, chemicals, pharmaceuticals, medical devices, meats, and many others. So I understand that you may be concerned if the Korea-EU FTA is implemented while the KORUS FTA awaits Congressional consideration," Kirk said. The fix for KORUS involves three main areas,

autos, beef and nontariff barriers, he indicated. "We are now developing proposals that will enable us to address concerns with respect to automotive trade. We are also looking at concerns with respect to beef and non-tariff measures more broadly to see how they can be addressed most effectively," Kirk said. "As we move forward, we will consult closely with members of Congress and with American stakeholders to ensure that any proposals we make to Korea have broad political backing here at home," he stated.

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COATED-PAPER: On 6-0 vote Nov. 6, ITC made preliminary determination that U.S. producers of coated-paper suitable for high-quality print graphics using sheet-fed presses may be suffering injury due to allegedly dumped and subsidized imports from China and Indonesia (see **WTTL**, Nov. 2, page 3).

EXPORT ENFORCEMENT: In Oct. 29 settlement agreement with BIS, FSI International, Inc., of Chaska, Minn., agreed to pay \$450,000 civil fine to settle 66 BIS charges that it exported fluoropolymer-coated valves and pumps to China, Israel, Malaysia, Taiwan and Singapore without approved licenses on 66 occasions. FSI made voluntary self-disclosure and neither admitted nor denied BIS charges. Agency will allow company to pay \$50,000 of fine in 10 monthly payments of \$5,000 each and will suspend and then waive rest of \$400,000 fine, if FSI remains in compliance with export controls for next year.

MORE EXPORT ENFORCEMENT: Laura Wang-Woodford, former director of Monarch Aviation Pte, Ltd., in Singapore, was sentenced Nov. 5 in Brooklyn U.S. District Court to 46 months in jail for conspiring to export controlled aircraft components to Iran. She had pled guilty in March and agreed to forfeit \$500,000 (see **WTTL**, March 23, page 4).

USTR: Senate Finance Committee Nov. 4 held confirmation hearing on nomination of Michael Punke to be deputy USTR for Geneva and Islam Siddiqui to be chief USTR agriculture negotiator. Both said they want ambitious and balanced outcome from Doha Round and said U.S. needs to see more clarity on what other trading partners are willing to offer in talks.

DOHA ROUND: Joint statement issued by U.S. and EU leaders after Nov. 3 annual summit meeting added more weasel words to deadline for completing Doha Round. They said they agreed: "To make determined efforts to seek in 2010 the conclusion of a Doha Development Agenda agreement."

HONEY: Yong Xiang Yan, president of Chinese honey manufacturer, pleaded guilty Oct. 30 in Chicago U.S. District Court to conspiracy to avoid antidumping duties by illegally importing honey that was falsely identified as coming from Philippines.

FASTENERS: ITC Nov. 6 voted 6-0 in preliminary determination that U.S. industry is not being injured nor threatened with injury due to imports of allegedly dumped steel fasteners from China and Taiwan.

PHOSPHATE SALTS: In preliminary ruling Nov. 6, ITC found four domestic like products in investigation of allegedly dumped and subsidized phosphate salts from China and made four different determinations. For sodium tripolyphosphate, it found no injury; for dipotassium phosphate, it found possible threat of injury; for tetrapotassium pyrophosphate, it found possible threat of injury; and for monopotassium phosphate, it split 3-3 with three commissioners finding possible present injury and three finding threat.

COMMERCE: President Obama Oct. 29 nominated Suresh Kumar to be assistant secretary of Commerce and director general of the United States and Foreign Commercial Service in ITA. Kumar is president KaiZen Innovation and served as special advisor to the Clinton Foundation. Previously, he was on group operating committee at Johnson & Johnson and vice president of consumer products for Latin America at Warner Lambert/Pfizer. Kumar was also news anchor on national television in India.

CHINA: Consultations between U.S. and China at WTO over export restrictions Beijing imposes on certain raw materials have failed to resolve U.S. complaint, and USTR Nov. 4 formally asked WTO to establish dispute-settlement panel to hear dispute (see **WTTL**, June 29, page 1).

MEXICO: U.S. Nov. 5 asked for NAFTA consultations with Mexico to settle Mexico's complaint against U.S. "dolphin-safe" labeling requirements on tuna and tuna products. In March, Mexico filed complaint against rules at WTO, but U.S. invoked NAFTA provisions which give it right to choose whether to resolve dispute at WTO or through bilateral dispute-settlement. Mexico has refused to go NAFTA route. "In resuming its current proceedings in the WTO, Mexico continues to disregard its obligation to the United States to have recourse solely under the NAFTA for this dispute," said USTR spokesperson Debbie Mesloh.