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Export Compliance Manager Fined in BIS Settlement

Export compliance managers and trade consultants got reminded of the importance of their roles in export controls in Bureau of Industry and Security (BIS) settlements Aug. 10 with RF Micro Devices, Inc. (RFMD) of Greensboro, N.C., and its former export compliance manager. The case points up the caution employees need to take when being interviewed by BIS investigators and why companies should demand clear advice from export consultants. Carol Wilkins, the former manager, agreed to pay a $15,000 civil fine in the agreement with BIS. RFMD reached a separate settlement and agreed to pay a $190,000 civil fine. In their settlements, Wilkins and RFMD neither admitted nor denied the BIS charges.

> BIS had charged Wilkins with making a false or misleading statement to a BIS investigator in 2004. According to the BIS Charging Letter, she told the investigator that she had been advised by an outside consultant that the RFMD products being exported were classified as EAR99 and did not need a license from BIS.

"Wilkins had not been so advised by the consultant or his consulting firm," BIS claimed. "In fact, in January 2002, the consulting firm had informed Wilkins, in a memorandum authored by the consultant and others at the firm, that there was some indication that certain RFMD products may be classified under specific Commerce Control List Export Control Classification Numbers that carried licensing requirements," BIS stated. In particular, licenses may be needed for exports to China, the memo said. The Charging Letter makes no assertion that Wilkins was responsible for the exports that drew charges against RFMD.

BIS charged RFMD with 41 alleged violations of the Export Administration Regulations, including 14 charges for exporting modems classified under ECCN 5A001 to China without licenses, 14 for exporting with knowledge that a violation would occur, and 13 for filing false statements on Shipper's Export Declarations (SED). On the SEDs, the company said the exported items qualified for License Exception NLR (no license required). The knowledge charges were based on the same memo from the outside consultant that tripped up Wilkins.

Talks Resume on Review Plan for Anti-Corruption Convention

With an international survey showing raising concerns among trade experts that the current global recession will lead to more corruption and bribery of government officials, signatories of United Nations Convention against Corruption will resume talks the week of Aug. 24 in Vienna on a review mechanism to measure whether countries are implementing the convention. Top

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executives of major international corporations have given their endorsement to the creation of a formal system for reviewing enforcement of the agreement, but progress on a mechanism has been blocked for several years by a handful of countries. The review mechanism would affect 136 countries that signed and ratified the convention, including the U.S. Countries agreed in 2006 on the need to determine compliance with the accord, but no real progress was made at the convention in 2008. A small number of countries are "absolutely holding this whole thing up," one executive told WTTL, referring to Egypt, Iran, Pakistan, China and Cuba. Those countries are against open reviews, he said. They want to keep reporting limited to governments and the U.N. secretariat without outside assessment, he said.

> An International Chamber of Commerce (ICC) survey released Aug. 19 found some countries concerned that the recession is heightening corruptive pressures. A substantial proportion of experts in countries such as Argentina, Turkey, South Korea, Romania and Portugal, said they expect businesses to relax their anti-corruption measures in response to the global recession. But experts in Vietnam, the United Arab Emirates, South Africa, Pakistan, Canada and Spain had the opposite view, the ICC survey showed. In the U.S. 25% of experts surveyed said business will relax compliance, while 19% expected businesses to reinforce their efforts and 56% said they foresee minimal impact on compliance.

"Political will and determined action by governments" are needed for implementing effective prevention and enforcement measures, two dozen chief executives of major international corporations said in a May 1 letter to U.N. Secretary-General Ban Ki-Moon. U.S. companies such as Fluor, General Electric and Newmont Mining are part of the coalition. Governments will have to decide how to organize the review mechanism, the companies said. A draft review mechanism has been circulated with many options that will be the subject of the coming talks. The goal is to have a proposal ready for a Nov. 9-13 meeting of the convention.

Differing approaches to implementing the convention can keep the global playing field unfairly balanced, said Christiaan Poortman, director of global programs at Transparency International. "Unless you have a review mechanism, the application of the legislation is always going to be a question mark," Poortman said. The review process shouldn't be just between governments and a U.N. secretariat, Poortman added. An open, public process could increase political pressure to bring practices in line, he said. The draft review mechanism suggests different options on how to release the results of the reviews to the public.

"Countries are afraid as to how intrusive the mechanism would be and how the outcome of the reviews could be used to satisfy perhaps extraneous agendas, things that have nothing to do with corruption," said Dimitri Vlassis, an anti-corruption expert with the U.N. secretariat that administers the convention. The spirit of the convention and the entire exercise is to develop a mechanism to support countries, Vlassis said.

ITA Can't Use Workload as Excuse to Deny Reviews

The International Trade Administration (ITA) can't use its heavy workload and lack of resources as an excuse to deny a respondent in an antidumping case an individual review in an administrative review unless the workload is due to that specific case, Court of International Trade (CIT) Chief Judge Jane Restani ruled Aug. 19 (slip op. 09-87). In *Zhejiang Native Products v. U.S.*, she remanded back to ITA an administrative review decision on imports of honey from China to calculate an individual dumping margin for Zhejiang's exports.

Although there were just four exporters subject to the administrative review, ITA selected only two for individual reviews, claiming a "significant workload" in other antidumping proceedings. When one of those two firms withdrew from the review, the agency still refused to accept Zhejiang as a mandatory or voluntary respondent, and in its preliminary determination assigned it a separate dumping rate of 45.46%. The statute "grants Commerce authority to limit the number

of mandatory respondents only where a large number of exporters or producers are involved in the review," Restani noted. In this case, ITA determined that four was a large number of respondents because of "the various administrative circumstances" it was confronting during the review and that individual examination of all four exporters and producers was not practicable because of its significant workload from other antidumping reviews and investigations.

> "The court rejects Commerce's conclusion. The statute focuses solely on the practicability of determining individual dumping margins based on the large number of exporters or producers involved in the review at hand," she wrote. "Accordingly, Commerce may not rely upon its workload caused by other anti-dumping proceedings in assessing whether the number of exporters or producers is 'large,' and thus deciding that individual determinations are impracticable. Commerce cannot rewrite the statute based on its staffing issues," Restani ruled.

Cooper Opposes Section 421 Tariffs against Chinese Tires

At least one major U.S. tire manufacturer, Cooper Tires, has now come out on record opposed to the International Trade Commission's (ITC) recommendation to impose tariffs on tire imports from China under the pending Section 421 safeguard case. "In the Company's opinion, the proposed remedy by the ITC is not appropriate or acceptable, and could have significant negative impacts causing considerable market disruption," Cooper said in a statement. "As recommended, the remedy could also have negative impacts on U.S. consumers while not addressing the issues as intended," it added (see **WTTL,** Aug. 10, page 1).

> Cooper executives were invited to a meeting with the U.S. Trade Representative (USTR) officials in early August to discuss the 421 case and its potential impact. The company produces about 20% of its tires in China through two joint ventures, a company spokesman told WTTL. Those tires are exported globally, including to the U.S. Those coming to the U.S. would be hit by the proposed tariffs, he said.

"Cooper is currently evaluating what the potential impact could be if the recommendation made is adopted by President Obama," the company's statement said. "The company has developed plans to address various scenarios that could develop into final recommendations," it added.

U.S. Loses Another WTO Ruling on "Zeroing"

The U.S. cannot apply World Trade Organization (WTO) dispute-settlement ruling only to imports entered after the end of the "reasonable period of time" allowed for coming into compliance with a panel ruling, the WTO Appellate Body (AB) ruled Aug. 18. In upholding a panel ruling that the U.S. still has not come into compliance with a 2007 WTO determination that its zeroing practices are inconsistent with WTO rules, the AB rejected Washington's argument that panel rulings should be applied only prospectively after the reasonable time has expired (see **WTTL**, May 4, page 4).

> The decision is the latest WTO ruling to find Washington's use of zeroing in antidumping investigations and reviews to be inconsistent with the Antidumping Agreement in the General Agreement on Tariffs & Trade (GATT). This case involved a complaint brought by Japan against U.S. dumping orders on several steel products. The ruling could open the way for Japan to retaliate against the U.S. for its failure to come into compliance. Tokyo had requested a review of U.S. compliance with the original panel ruling that was in Japan's favor.

"Irrespective of the date on which the imports entered the territory of the implementing Member, the WTO-inconsistencies must cease by the end of the reasonable period of time," the AB declared. "There will not be full compliance where the implementing Member fails to take action to rectify the WTO-inconsistent aspects of a measure that remains in force after the end

of the reasonable period of time. Likewise, actions taken by the implementing Member after the end of the reasonable period of time must be WTO-consistent, even if those actions are in respect of imports that entered the Member's territory before the end of the reasonable period of time," it stated. "Where a WTO Member has been found to have violated the Antidumping Agreement and the GATT 1994 by using zeroing in a periodic review, it fails to comply with the DSB's recommendations and rulings if it collects, subsequent to the expiration of the reasonable period of time, antidumping duties based on rates that were determined in the periodic review using zeroing," the AB ruled.

> The AB also rejected the U.S. contention that the panel's ruling puts countries that have retrospective antidumping systems, such as the U.S., at a disadvantage for basing dumping duties on administrative reviews of past imports. "The United States' argument is difficult to reconcile with the text of Article 9.3.2 of the Antidumping Agreement, which requires that WTO Members with prospective antidumping systems provide a mechanism allowing importers to request refunds of any duty paid in excess of the margin of dumping," the AB said.

In its arguments, the U.S. said some of the imports covered by the WTO case were also the subject of litigation in U.S. courts, which had imposed stays on Commerce action pending final adjudication of those suits. The AB said the GATT required WTO members to amend their administrative and judicial procedures to provide for implementation of DSB decisions. "The fact that collection of antidumping duties is delayed as a result of domestic judicial proceedings does not provide a valid justification for the failure to comply with the DSB's recommendations and rulings by the end of the reasonable period of time," the AB wrote.

FMC Pays $610,000 Fine for Unlicensed Exports of Valves

FMC Technologies, Inc., of Houston, Texas, a manufacturer of a wide variety of material-handling equipment, including valves, agreed to pay a $610,000 civil fine in a settlement with BIS to resolve charges that it had committed 78 violations of the Export Administration Regulations (EAR) with exports and reexports of valves to numerous countries without approved licenses. The company had made a voluntary self-disclosure, which earned it a 97% reduction in the potential fine it could have faced. The exported butterfly and check valves were subject to Export Control Classification Number (ECCN) 2B350, BIS charged.

> "An effective compliance program is only as good as its last revision," said Kevin Delli-Colli, BIS acting assistant secretary for export enforcement in a statement., "Not staying up to date with regulatory changes can lead to violations of the export regulations," he cautioned.

In its Charging Letter, BIS accused FMC of exporting the valves without required licenses on six occasions to China, Mexico, Tunisia, and Venezuela from 2005 to 2007. The company also exported the valves to warehouses in Singapore, the United Arab Emirates and the United Kingdom and reexported them without licenses to 18 countries, the agency claimed.

* * * Briefs * * *

RACKS: In final antidumping determinations Aug. 18, ITC found two different domestic industries making shelving and racks – one producing refrigerator racks and one making oven racks. It voted 5-0 that dumped imports of refrigeration shelving are injuring domestic U.S. industry. On vote of 4-1, it found threat of injury to domestic firms making oven racks.

EXPORT ENFORCEMENT: Southwall Technologies, Inc., of Palo Alto, Calif., has agreed to pay $16,000 civil fine to settle two BIS charges of exporting sputter disposition roll to roll coaters to China without approved licenses and misstating classification on SED.

EDITOR's NOTE: In keeping with our regular schedule, there will be no issue of ***Washington Tariff & Trade Letter*** on Aug. 31. Our next issue will be dated Sept. 7.