ISSN 0276-8275

WTTLonline.com

A Weekly Report for Business Executives on U.S. Trade Policies, Negotiations, Legislation, Trade Laws and Export Controls

Washington Tariff & Trade Letter®

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Vol. 28, No. 45 November 17, 2008

Cabela's Fined $680,000 for Unlicensed Exports of Rifle Scopes

Cabela's, an outdoor equipment outfitter and gun chain based in Sidney, Neb., has agreed to pay a civil penalty of $680,000 to settle 152 Bureau of Industry and Security (BIS) charges that it violated the Export Administration Regulations (EAR) by exporting optical sighting devices without approved licenses and without filing required Shipper's Export Declarations (SEDs). This new settlement comes just a little less than four years after an earlier agreement with BIS under which Cabela paid a $265,000 fine for allegedly exporting gun sighting devices and shotgun parts on 685 occasions without licenses (see **WTTL,** Feb. 14, 2005, page 1).

> In addition to the fine, which Cabela's will pay in two installments of $340,000 each by Nov. 30 and Jan. 31, BIS has required the firm to conduct an internal audit. "Cabela's shall perform an audit of its internal compliance program within 12 months," the settlement agreement states. "The audit shall be in substantial compliance with the Export Management System audit module. A copy of said audit report shall be transmitted to the Office of Export Enforcement, no later than 13 months from the date of entry of the Order," it adds.

The BIS Charging Letter to the company accused it of exporting 76 optical sighting devices classified under Export Control Classification Number (ECCN) 0A987 for firearms in 2004 and 2005 to Argentina, Brazil, Canada, Chile, Finland, Ireland, Malaysia, Malta, Mexico, Pakistan, the Philippines, South Africa, Sweden, and Taiwan. Each of the shipments was made without an SED, the agency charged. "Compliance programs must be routinely reviewed and updated so that they keep pace with ever-changing business practices," said BIS Assistant Secretary for Export Enforcement Darryl W. Jackson in a press release announcing the settlement. "Failing to do so can result in numerous violations occurring over time, which undermines our foreign policy objectives," he added.

$25 Billion Shortfall in Export Financing Seen Globally

Finance and trade experts at a Nov. 12 meeting at the World Trade Organization (WTO) estimated that there is a shortfall of some $25 billion in funds needed to finance world trade. Traders and emerging markets are most affected, they said. The meeting called by WTO Director General Pascal Lamy drew about 30 representatives from 19 international and regional financial institutions, private banks, credit insurance agencies and the WTO. Participants said there is little liquidity available to finance trade (see **WTTL**, Oct. 13, page 1). Discussions at the meeting were aimed at finding a possible role for the WTO in the current global financial

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Published weekly 50 times a year except last week in August and December. Subscription in print or by e-mail $647 a year. Combo subscription of print and e-mail is $747. Additional print copies mailed with full-price subscription are $100 each.

crisis. The World Bank's International Finance Corporation (IFC) is considering tripling available trade finance guarantees to $3 billion, the meeting was told. Plans by governments to increase their export credit agencies' activities also were reported. Possible longer term solutions that were discussed include increasing the ability of commercial banks to co-share risks and financing with international financial institutions and export credit agencies. Better information sharing, risk assessment and data collection also are being considered. A meeting of the Organization for Economic Cooperation and Development (OECD) in Paris the week of Nov. 17 also will look at trade credit issues.

> An example of the export financing problems in emerging markets is seen in Brazil. Because of the higher risk element now added to interest charges, Brazilian exporters have had to pay the London Interbank Offered Rate (LIBOR) plus a spread that now results in trade finance at about 15% per year, a Brazilian trade source told WTTL. Although LIBOR has fallen to 3.5-4%, the spread has gone up from one to 10, producing the 15% rate, he explained. The commodities market won't bear financing at 13% to 15%, he said. The situation is worse for average or medium size companies that may have to pay 20%, the Brazilian said. For smaller companies, there is no money at any price, he added.

While the WTO is attempting to address the trade financing issue, the U.S. Export-Import Bank has also been looking at ways to expand its programs to help U.S. exporters find needed financing. One proposal now under consideration is a two-prong expansion of Ex-Im's current working capital loan guarantee program. Bank staff are considering a plan to increase the percentage of each guarantee package that can be used to fund in-direct exports that go to manufacturers of final exports and to open the program to non-exporters who would use working capital loans to fund production of parts, components and materials sold for inclusion in exported products.

Business representatives in Washington have also started to weigh the impact of the trade finance problem and held a meeting on the issue Nov. 12 also. The meeting focused on developing proposals for the incoming Obama administration on how to strengthen the roles of Ex-Im, the Overseas Private Investment Corporation (OPIC) and the Trade and Development Administration (TDA) in trade financing. Limited anecdotal information indicates some companies are having difficulty getting export finance, said Frank Vargo, Vice President of International Economic Affairs at the National Association of Manufacturers (NAM).

Other companies have said their letters of credit have been hung up over concerns between banks, Vargo noted said. "Domestically, we have heard a lot of companies say they're having difficulty in rolling over their lines of credit and being able to get the credit they need," Vargo said. Patricia Mears, NAM's Director of International Commercial Affairs, said the question is whether it's the beginning of a real clampdown in international financial credit. She said NAM is reaching out to the WTO and Ex-Im. One option being discussed is an increase in Ex-Im direct lending for exports, something it has does very little of in recent years as it has shifted its focus to export loan guarantees. "That would require a huge ramp up in their personnel and their capabilities," Mears said.

Rep. Frank Urges Administration to Delay Online Gambling Rules

House Financial Services Committee Chairman Barney Frank (D-Mass.) urged the Bush administration Nov. 10 not to issue regulations to implement legislation that tightened restrictions on Internet gambling. U.S. laws on online gambling were declared inconsistent with international trade rules by a WTO dispute-settlement panel hearing a complaint filed by Antigua and Barbuda and their continued enforcement has been the subject of friction between the U.S. and the European Union (EU) (see **WTTL,** Feb. 4, page 3). But Frank's letter to Treasury Secretary Henry Paulson came too late. Treasury has schedule publication of the final rule in the Nov. 18 Federal Register. Frank called for a delay in the issuance "deeply flawed regulations" to enforce the Unlawful Internet Gambling Enforcement Act (UIGEA) so the incoming Obama

administration can make its own determinations on online gambling. He noted that his committee on Sept. 16 had reported out a bill (H.R. 6870) that would "prohibit the implementation of these flawed rules and replace them with a formal rulemaking process that would define the term 'unlawful internet gambling,' something the proposed rules fail to do," Frank wrote.

> A Justice Department criminal investigation of EU firms that were involved in Internet gambling in the U.S. has prompted a complaint by the firms to the EU Commission. Commission legal staff are now undertaking an investigation of their own to determine if the potential prosecution of these firms by Justice would violate U.S. obligations under WTO rules to provide national treatment in the services sector. "We are still working on the final report on this case," Antonio Fernandez-Martos, a Commission attorney working on the investigation, told WTTL in an e-mail. "There are, therefore, no conclusions or recommendations yet. We expect to be able to publish it before the end of the year," Fernandez-Martos told WTTL.

Commission lawyers were in Washington in September to meet with U.S. officials and congressional staffers to collect information for their investigation. At the time of their visit, Clive Hawkswood, Chief Executive of the EU's Remote Gambling Association(RGA) told WTTL, that the "DoJ chooses to pursue EU businesses while turning a blind eye to what is going on in its own backyard." Mark Mendel, counsel to Antigua and the Antigua Online Gaming Association, told WTTL that "the guiding force against remote gaming in America is the existing gaming industry, including state lotteries and monopolies." He said the "primary basis on which much remote gaming is prohibited in America is simply to avoid competition."

China Agrees to Open Financial Reporting Market

In what may be an emerging pattern, China once again has agreed to settle a complaint at the WTO before a dispute-settlement panel had a chance to reach a conclusion in the case. China signed a memorandum of understanding Nov. 13 with the U.S., Canada and the European Union (EU), promising to eliminate restrictions on doing business in China for financial reporting services such as Bloomberg, Dow Jones and Reuters. The complaint, which was launched with a request for consultations in March 2008, was aimed at requirements for foreign financial reporting firms to offer their services in China through a single agent that was designated by the Chinese government's news agency Xinhua. At the same time, Xinhua was starting its own financial news service (see **WTTL**, March 20, page 4).

> Under the MOU, China has agreed to: designate an independent regulator that will have no conflicts of interests with the companies it is regulating and will use a fair and transparent approach to licensing; eliminate the requirement that U.S. companies must use an agent to do business; limit the regulator to requesting only information that is relevant to the regulatory function; ensure the confidentiality of that information, and protect against its misuse; confirm the rights of U.S. companies to set up local operations in China; and treat U.S. companies at least as well as it treats Chinese companies.

Final CFIUS Regulations Try to Clarify Meaning of "Control"

Late on Nov. 14, Treasury released the final regulations to implement new statutory requirements for the Committee on Foreign Investment in the U.S. (CFIUS). The rules will be published in the Federal Register the week of Nov. 17. From the 25 written comments Treasury received on the proposed rules, there were 200 distinct points made, the department noted. "The final regulations issued today strengthen the CFIUS process in a manner that reaffirms America's longstanding policy of openness to investment, consistent with the protection of our national security," Treasury Secretary Henry Paulson said in a statement "These regulations reflect CFIUS's careful consideration of all comments submitted during the public comment

period," he said. The preamble to the final rule and the regulation attempt to clarify the meaning of foreign "control" that might trigger the need to submit a proposed foreign acquisition of a U.S. company to the committee for review. "The Final Rule maintains the long-standing approach of defining 'control' in functional terms as the ability to exercise certain powers over important matters affecting an entity," the department said.

> The regulation defines control as the "power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach, or cause decisions regarding the [matters listed in Section 800.204(a)], or any other similarly important matters affecting an entity."

The preamble stressed two points about the definition. "First, it eschews bright lines. Consistent with the existing regulations, control is not defined in terms of a specified percentage of shares or number of board seats," it said. "Second, echoing the congressional views expressed in the conference report accompanying the original legislation in 1988, the focus of the statute and therefore of these regulations is *control*. Even acknowledging the considerable flexibility necessarily inherent in a national security regulation, the statutory standard is not satisfied by anything less than control. Acquisition of influence falling short of the definition of control over a U.S. business is not sufficient to bring a transaction under section 721," it said.

The final rule also addressed comments concerned with what is a "critical infrastructure" which also is a criterion in deciding when to submit a notice. Treasury said it will continue to take a case-by-case approach to determining what that term covers. "Accordingly, the definition of critical infrastructure turns on the national security effects of any incapacity or destruction of the particular system or asset over which a foreign person would have control as a result of a covered transaction. Consistent with this approach, the Committee will not deem classes of systems or assets to be, or not to be, critical infrastructure," the department explained.

CIT Maintains Right to Judge Constitutionality of Tariffs

A three-judge panel of the Court of International Trade (CIT) Nov. 4 reasserted the courts jurisdiction to hear challenges to the Harmonized Tariff Schedule of the U.S. (HTSUS) on constitutional grounds of discrimination, but it denied cross-motions to review its previous ruling in a suit claiming the different tariff rates for men's gloves compared to other gloves was discrimination (Slip Op. 08-119). The court denied motions for rehearing of the case by the importer, Totes-Isotoner, and the government (see **WTTL,** July 14, page 6). In its earlier ruling, the court said the HTSUS could be challenged on constitutional grounds but that Totes had not shown that the classification had a discriminatory intent.

> The CIT panel said the case did not have to be remanded back to Customs, as the government requested, because Customs "has no authority to make any decision regarding HTSUS constitutionality and can only 'simply passively assess [the HTSUS] and collect' the required tariff," said the ruling written by Judge Donald Pogue. At the same time, "Totes has failed to demonstrate an impermissible classification, and thus cannot expect the court to waive the requirement of a demonstration of discriminatory intent," he stated.

"The HTSUS is not facially discriminatory; the HTSUS instead merely distinguishes between two similar products based upon the tariff provisions' descriptions of 'Men's' or 'other' gloves," Pogue wrote. "A product's mere classification based on the anticipated principal use of the good does not inherently mandate that the articles actually be so used, making the classification's effect on purchasers of different genders questionable at best. Notably, any importer of such good, whether male or female, pays the same tariff," he said.