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## Export Enforcement Crackdown Nets 145 Defendants

U.S. Attorneys across the country have embraced export enforcement with a new gusto that has produced a sharp rise in criminal charges for violations of the International Traffic in Arms Regulations (ITAR), Export Administration Regulations (EAR) and other export laws and sanctions. Part of the spur to prosecution came from the Justice Department's launching of the National Export Enforcement Initiative in October 2007, but sources say prosecutors also were inspired by some envy for the publicity that U.S. Attorney John Brownlee garnered in winning a \$100 million settlement in the prosecution of ITT for ITAR violations in March 2007.

In the year since the initiative was launched, 145 defendants have been charged with export control violations, Justice reported Oct. 28. This compares to 110 the previous year. About 43% of these prosecutions involved exports to China or Iran. "In total, Iran ranked as the leading destination for illegal exports of restricted U.S. technology in the prosecutions brought in FY 2008, as well as those in FY 2007," the department noted. A significant number of cases in both years also involved illegal exports to Mexico of firearms and ammunition. A Justice fact sheet describes 100 prosecutions from October 2006 to October 2008.

One goal of the initiative was to create Counter-Proliferation Task Forces in various judicial districts around the country. There are now 15 nationwide. In addition, the initiative has provided enhanced training for more than 500 agents and prosecutors, Justice said. "The Department's National Security Division has also distributed a comprehensive tool kit of legal pleadings and related information on export control for field prosecutors and agents," it noted.

## BIS Identifies 200 Firms Likely to Benefit from ICT Exception

The Bureau of Industry and Security (BIS) has identified some 200 companies that might benefit from its proposed Intra-Company Transfer (ICT) License Exception, agency officials told a briefing for the exporting community Oct. 27. "This rule is not for everyone. We identified 200 companies the ICT might be useful for," Bernie Kritzer, director of the BIS office of exporter services, told the meeting. He said applying for the ICT will mean "more work" for those companies. Kritzer and other BIS officials admitted that many of the details of how the ICT will operate still need to be developed, and they stressed the agency's desire to get more advice and comments from industry (see **WTTL**, Oct. 6, page 1). "Quantitative data is valuable to the interagency process," said the BIS Regulatory Policy Division Director Hillary Hess. "Costs, the burden of hours, the difference in requirements, [are] very helpful. Tell us what

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you like. Tell us you do not operate on a level playing field versus your competitors. Tell us what other Wassenaar countries use to license exports,” Hess said. Steven Emme of the BIS regulatory policy division responded to concerns about the proposed audits that ICT holders would face under the proposed rule. “How to conduct the audit is still under discussion internally,” he said. Emme also said recordkeeping requirements on the transfer of technology to foreign nationals were included in the proposed rule because “foreign nationals could access technology repeatedly. We added language to limit only first type of transfer. If the ECCN changed, we need recordkeeping,” he explained.

The ICT is supposed to eliminate the need for users of the exception to obtain deemed export licenses for foreign nationals covered by approved ICTs. “Generally deemed exports run 900 to a 1000 a year, of which 1% to 2% are denied,” Kritzer noted. “There are probably a small number of companies that hold most of them. Some are approved, some are approved with provisos. What is the cost, loss of innovation, inability to use your best employees? Tell us. We’ve never in a decade gotten feedback,” Kritzer remarked.

Industry speakers at the meeting raised concerns about several provisions of the proposal. Benjamin Flowe Jr, of Berliner, Corcoran & Rowe commented on the “levels of requirements, even for trusted end users.” He said he didn’t want BIS “wasting time” and urged the agency to streamline the requirements needed to get an ICT. Intel’s Director of Import/Export Policy David Rose cautioned that “no one-size fits all audits.” He said “BIS should move towards recordkeeping rather than reports, particularly for foreign employees.”

Kathleen Palma, General Electric counsel for international trade regulation, questioned how BIS would handle the release of company information involving many Export Control Classification Numbers. “Many ECCNs may exist in a report, and it is difficult to document which foreign national saw which piece of paper in a report that has multiple ECCNs,” she noted. In those case, Emme replied, “foreign national deemed export site licenses” are required.

## **Schwab Threatens China to Help Dole Win Reelection**

In a last-ditch effort to help Sen. Elizabeth Dole (R-N.C.) in her hard-fought reelection campaign, U.S. Trade Representative (USTR) Susan Schwab has threatened to file a complaint against China at the World Trade Organization (WTO) for alleged subsidies of its textile industry. “I sent a letter to China’s Ministry of Commerce expressing concern about potential WTO-illegal subsidies and indicating that USTR has begun to prepare a potential WTO dispute settlement request to challenge such measures if China does not act promptly to eliminate them,” Schwab told Dole in a Oct. 23 letter.

Dole had written to President Bush complaining about the Chinese subsidies. “Thank you for calling this important issue to our attention,” Schwab wrote, suggesting she was unaware of it before Dole sounded the alarm. “Accordingly, on receiving your letter, I immediately directed my staff to intensify their analysis of whether such subsidies violate China’s WTO obligations,” she added.

## **Efforts Mount to Limit Impact of Lacey Act Amendments**

In the history of unintended consequences, amendments to the 100-year-old Lacey Act inserted in the 2008 Farm Bill may take the record for the most unexpected negative results. Late recognition of the wide impact of the legislation has prompted members of Congress to write to the U.S. Department of Agriculture (USDA) to urge the department to limit the scope of regulations implementing the law. Opponents of the measure say an effort is also underway to have Congress enact a “technical amendment” after it reconvenes in January to reduce the number of products that would be subject to its provisions. The technical amendment, however, won’t give importers “everything we want,” one source conceded. Slipped into the Farm Bill

with little fanfare, the amendment appeared to have the well-intended goal of limiting imports of products made from illegally logged wood or endangered species. Now those hit by the legislation say it stemmed from an alliance between environmentalists and the softwood lumber and paper industries whose aim was limiting imports and not protecting the environment.

Rather than requiring importers of just wood products to declare the country of origin and species of plant materials in their products, the legislation could require such declarations for thousands of products that have organic components, including rayon, cosmetics, paper labels, medicines and even autos that have wood trim on their dashboards.

While awaiting help from Congress, USDA will try to limit the impact of the legislation by phasing in the declaration requirements over two years and providing waivers for some products, according to the USDA coordinator of implementation of the law, Bill Thomas, associate executive director of the department's Planned Help Program (PHP) in its animal and plant inspection agency. Speaking at a Washington International Trade Association (WITA) program on October 28, Thomas admitted that "the more products we look at, the more we find and identify to exclude for two years: berries, apples, bananas, and cotton." Thomas said the fate was less clear "for items such as cellulose fiber, lipsticks and pharmaceuticals."

Thomas said "Congress and agencies have been working with us, and we are keeping environmental and business groups informed and involved." USDA proposed implementing rules for the new law in the Oct. 8 Federal Register. The upcoming "declaration will give you the impetus to discover where you really source your product from. This is going to help [protect] importers as well," he suggested. The regulations will clarify what information must be reported on import declarations. "What information you'll need to provide, genus species of the wood, and country of origin," he said.

USDA is working with Customs and Border Protection (CBP) to allow for electronic filing of the declarations rather than paper declarations. "We formed an interagency group to stop trade in the illegal logging," Thomas noted. He said Customs has suggested using an old Fish and Wildlife database as the mechanism for filing the declarations. "This database has not been tested yet," he said. The goal is to have an electronic system available by April 1, 2009.

In an Oct. 10 letter to USDA and Customs, six members of Congress said they supported the proposed phase-in of the declaration requirements but urged the agencies to "consider further limiting the products covered by the phase-in." The phase-in schedule "should be developed taking into consideration risk and an importer's ability to accurately identify a plant or plant product and the country of origin of the plant or plant product, as required by the declaration," wrote Ways and Means Committee Chairman Charles Rangel (D-N.Y.), Finance Committee Chairman Max Baucus (D-Mont.), Agriculture Committee Chairman Tom Harkin (D-Iowa), House Natural Resources Committee Chairman Nick Rahall (D-W.Va.), plus the two sponsors of the amendment, Rep. Earl Blumenauer (D-Ore.) and Sen. Ron Wyden (D-Ore.).

"Examples of the types of products that should be included in the first phase include logs and timber, sawn wood, lumber, and solid wood flooring. Examples of products that should be included in the second phase include bent wood furniture, cribs, wooden picture frames, plywood, engineered flooring and wood pulp. Examples of the types of products that should be included in subsequent phases include certain paper products, wooden blinds, billiard cues and musical instruments," the letter said.

## **ITC Launches Pilot Mediation Program for Section 337 Cases**

Buried by a continuing flood on unfair import petitions under Section 337 of the Trade Act, the International Trade Commission (ITC) Oct. 29 initiated a voluntary pilot mediation program aimed at resolving complaints against allegedly patent-infringing imports without a full adjudication at the commission. The ITC intends to establish a roster of mediators that parties can

select to hear cases. The decision of parties to go the mediation route will be voluntary, but commission administrative law judges and staff may recommend mediation in some cases. While there are no deadlines for mediation, once a 337 complaint is filed and mediation begins, there will be no tolling of the case, so parties should have the incentive to complete the process before 337 deadlines expire to be sure there is time left to go back to the normal review process if mediation fails, ITC sources explain.

“Although the Administrative Law Judge and the Commission have the power under the Administrative Procedure Act to require attendance at a settlement conference, including the use of alternative dispute resolution, the Commission has determined that parties’ participation in the pilot mediation program will be on a voluntary basis,” the ITC says in a notice to be published in the Nov. 4 Federal Register. “At the same time, the mediator will conduct the mediation only if he or she believes that the case would benefit from mediation and has settlement potential,” it adds.

ITCers expect mediation to be best for case involving only a few respondents and clear goals for settlement. If settlement is reached through mediation, the ALJ will dismiss the case. If no settlement is reached, the case would return to the normal 337 process. “The judges have asked for this for years,” one commission source noted. With the number of 337 cases continuing to grow, the ITC is about to add a sixth ALJ, and all the judges have a full workload. “This is a good faith effort to address the workload,” the source said.

## GAO Urges BIS to Suspend VEU Program for China

The Government Accountability Office (GAO) has recommended that BIS suspend its Verified End User (VEU) program for China until it has reached a new agreement with the Chinese on conducting on-site audits of VEU-approved firms in China. Although the VEU program has been dormant for months, BIS has rejected the GAO advice, claiming it already has authority to conduct such on-site visits under the terms of its 2004 End Use Visit Understanding (EUVA) with Beijing. Even with the EUVA, the agency is negotiating a new agreement with China, BIS Assistant Secretary for Export Administration Christopher Wall told GAO. “These negotiations with China’s Ministry of Commerce (MOFCOM) have been ongoing and are nearing completion,” he said in comments sent to GAO on its draft report.

“The introduction of the VEU program has yet to produce the advantages anticipated by Commerce, and challenges with program implementation may hinder Commerce’s ability to ensure that items are being used as intended,” said the report which was submitted to Congress on Sept. 25 but just released publicly Oct. 27. “In addition, problems with Commerce’s implementation of the VEU program limit its ability to ensure that semiconductor equipment and materials exported to China are used as intended,” it said.

“The fundamental premise of the report – that no adequate mechanism exists to provide oversight of exports of semiconductor equipment under the Validated End User Program – is incorrect,” Wall told the GAO. He said the report erroneously asserts that general procedures for selecting and conducting on-site reviews do not exist. “General procedures for end-use checks exist and will be used for on-site reviews as applicable,” he said. Specific guidance for individual on-site reviews must be developed on a case-by-case basis, Wall wrote.

### \* \* \* Briefs \* \* \*

CUBA: BIS in Oct. 29 Federal Register asked for public comments on effectiveness of its licensing process for agriculture exports to Cuba. Advice will be included in biennial report to be sent to Congress.

MATCHBOOKS: D. D. Bean & Sons Co., Oct. 29, filed antidumping and countervailing duty petitions at ITA and ITC against imports of commodity matchbooks from India.