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# Washington Tariff & Trade Letter®

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## OFAC to Issue New Enforcement Penalty Guidelines

New guidelines to apply the higher penalties of the International Emergency Economic Powers Act (IEEPA) to violations of U.S. trade sanctions are on the desk of Office of Foreign Assets Control (OFAC) Director Adam Szubin and will be published "very shortly," Szubin told WTTL June 17. Szubin said the new guidelines will not include any surprises and will continue to apply the agency's policy of considering mitigating and aggravating circumstances in deciding the amount of the fine to impose on violations (see **WTTL,** June 16, page 4).

> Although changes in IEEPA raised potential fines to $250,000 per violation, Szubin said he does not "expect to see multimillion dollar fines for small transactions." Earlier, in a talk to a business conference in Washington, he said the harshest penalties will be aimed at willful or grossly negligent violations. That "is conduct we want to deter and send a message," Szubin said. Even though the regulations that OFAC enforces have a strict liability standard, "we do not view it as a matter of strict liability enforcement," he said.

Szubin also tried to clarify a policy statement OFAC issued in February on the treatment of subsidiaries of entities that have been the subject of a blocking action. The notice applied only to situations where a U.S. person knows that a blocked party owns 50% or more of the subsidiary, in which cases its assets should be held, he noted. "The guidance did not speak to control; it spoke to ownership," he said (see **WTTL**, Feb. 25, page 4). "We do not have the expectation that the U.S. private sector is going to hire analysts to determine ownership," Szubin added. "The obligation to identify those subsidiaries is on our shoulders," he declared.

Szubin praised British Prime Minister Gordon Brown's June 16 announcement that the United Kingdom has frozen the assets of Iran's Bank Melli and will urge the European Union to follow suit. "That is something very significant and not a note we have heard from the Europeans in the past," he said. Szubin also said to expect new sanctions against Zimbabwe after its coming elections and also increased international sanctions against Burma. OFAC's decision June 16 to lift sanctions against 60 Colombians was based on Bogota's success in eliminating the influence of the Cali Cartel in several major firms. "It's a real success story," he said.

## DDTC User Fees Could Cost Some Firms $250,000-Plus

America's largest defense firms could face annual user fees in excess of $250,000 under new regulations State's Directorate of Defense Trade Controls (DDTC) will propose in the next few



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weeks to increase registration fees to self-finance about 75% of its operations. The draft rules, which were posted on DDTC's website, aim to raise about $13 million in additional funds for the agency, which already collects $9 million in registration fees (see **WTTL,** April 28, page 1). Although DDTC officials say no firm has more than 2,200 licenses a year, many larger corporations have subsidiaries that cumulatively file many more than that, sources say.

> Industry representatives attending the June 19 meeting of the Defense Trade Advisory Group (DTAG) had a fairly mild reaction to the proposal, raising concerns mainly about how equitable the fee structure would be and whether the money would really improve DDTC's licensing process. Concerns, however, were raised by non-profit exporters, such as universities, and small exporters, particularly exporters of sports guns and ammunition which often involve numerous small shipments that each require a license. Companies that apply for numerous license amendments following a merger or acquisition also expressed concerns.

Under the advanced draft of the proposed change to Section 122.3 of the International Traffic in Arms Regulations (ITAR), the agency intends to create a two-tier registration fee structure. Under Tier 1, a company that has filed an average of fewer than 10 license applications annually in the previous two years would pay a flat $2,500 registration fee, with registrations covering only one year compared to two years now covered. Under Tier 2, firms that averaged ten or more applications a year in the previous two calendar years would pay $2,500 plus an additional fee of $250 per license over 10.

"For those registrants where the registration fee is greater than 3% of the value of licenses submitted during the two previous years, the fee will be reduced to 3% of the total license value or $2,500, which ever is greater," the draft states. DDTC Managing Director Robert Kovac told DTAG that commodity jurisdiction requests, voluntary self-disclosures and directed disclosures won't be counted in calculating the number of licenses. He said DSP-119 forms for amending applications would be counted. DDTC looked at various methods of determining a fee structure, including basing fees on the sales of a company or the value of the exports. It even looked at how trade associations base dues on each member's size. It rejected those alternatives because it didn't want "to need a staff of statisticians to figure it out," Kovac said.

## Exclusions Will Reduce Benefits of Defense Treaties

The list of goods and technologies that Defense insisted on excluding from license-free treatment under the pending U.S. defense cooperation treaties with the United Kingdom and Australia, as well as restrictions on what is covered, could significantly reduce the benefits of the trade pacts, according to members of State's Defense Trade Advisory Group (DTAG). The list of excluded items and restrictions was included in a draft amendment to the International Traffic in Arms Regulations (ITAR) that DDTC has sent to the Senate Foreign Relations Committee to satisfy the committee's demand to see the ITAR implementing rules before it would vote on ratifying the two treaties (see **WTTL**, May 26, page 3). The draft covers the UK treaty, but a similar rule will be issued to implement the U.S.-Australia treaty as well.

> "Right now the way it is in the document, it is a major problem," said Sam Sevier, senior advisor with MK Technology Consulting. Sevier provided the DTAG with an analysis of several provisions in the draft regulations that are either confusing, ill-defined or restrict what could be exported under the treaty. DDTC will have to take another look at some provisions in the proposal "that are either incorrect or impossible to implement," Sevier said.

The broadest exclusion eliminates all goods and technology on the annex of the Missile Technology Control Regime (MTCR) from coverage under the treaties. DTAG members noted that the draft rule refers to the MTCR appendix published in the ITAR, which they say is out of date. Other provisions that raise concern deal with restrictions or limitations on anti-tamper equipment, low-observable features, sensor fusion, and software source code. In addition,

DTAG members complained about restriction on the export of hot-section engine parts. Since Foreign Relations has made publication of the ITAR changes a condition for the ratification of the treaties, questions were also raised on whether future secretaries of State will be restricted in their ability to amend these ITAR implementing provisions.

## U.S., China Agree to Launch BIT Talks

U.S. negotiators who are about to enter talks with China on a Bilateral Investment Treaty (BIT) admit they may have a difficult time getting Beijing to accept stricter rules on protecting foreign investment and market access than it has already accepted in investment pacts with other countries in Asia and Europe. Plans for starting the talks were announced June 18 at the end of the latest session of the Sino-U.S. Strategic Economic Dialogue in Washington. Preliminary work on a BIT has been underway for the last 17 months, but negotiation of the final deal is likely to a take a year or more, administration officials say.

> Although Chinese investment treaties with countries such as the Netherlands, Germany and Finland include many of the same rules as the model BIT the U.S. has used in other investment treaties, they don't contain non-discrimination protections in the pre-market access phase of an investment or provisions on transparency, the free flow of capital or performance requirements.

The U.S. and China have already agreed the BIT will allow either country to restrict investments that might affect "essential security." This would allow the U.S. to impose restrictions for export control reasons and to subject Chinese investments in the U.S. to the scrutiny of the Committee on Foreign Investment in the U.S. (CFIUS). Essential security exclusions will be self-designated by either country, an administration official said. If the Chinese invoke this clause, however, in situations where the U.S. disagrees "we will have a serious conversation about our view that what they are doing is not essential security," the official said.

Administration officials said they are aware of Congress' sensitivities about Chinese investment in the U.S. and have had discussions with the staff of the key committees with jurisdiction for treaties and trade. The BIT would go through the Senate Foreign Relations Committee and be subject to Senate ratification. "Those have not been particularly difficult discussions for us, so far," one official said. The positive reaction didn't stop House Ways and Means Committee Chairman Charles Rangel (D-N.Y.) and trade subcommittee chairman Sander Levin (D-Mich.) from saying they have concerns about a potential deal over which they have no jurisdiction.

## Justice Gives Halliburton Time to Comply with FCPA

Justice June 13 issued an advisory opinion to Halliburton, the oil and gas services company, saying it would not take legal action against the firm under the Foreign Corrupt Practices Act (FCPA) for a planned acquisition of a publicly trade British company that might have violated the statute. The apparent waiver of Halliburton's successor liability for FCPA violations was based on the firm's assertions that British law restricted its ability to do a complete due diligence review of the targeted company's FCPA practices before the closing of the acquisition and Halliburton's promise to complete an FCPA review, report any discovered violations and implement a remedial program, if needed, within 180 days after the acquisition is final.

"In light of the facts presented here and the particular restrictions in U.K. law regarding the bidding process, the Department does not presently intend to take any enforcement action with respect to any pre-acquisition conduct by Target disclosed to the Department during the 180-day period following the closing, provided Halliburton satisfactorily proceeds in accordance with the post-closing plan and remediation detailed above," Justice told the company. If Halliburton fulfils its promises, Justice said it "does not presently intend to take any enforcement action against Halliburton for: (1) the acquisition of Target in and of itself; (2) any pre-acquisition unlawful conduct by Target disclosed to the Department within 180 days of the

closing; and (3) any post-acquisition conduct by Target disclosed to the Department within 180 days of the closing, and which does not continue beyond the 180-day period or, if in the judgment of the Department the alleged conduct cannot be fully investigated within the 180-day period, which does not continue beyond such time as the conduct can reasonably be stopped." [**Editor's Note**: Copy of Justice opinion will be sent to subscribers on request.]

## * * * BRIEFS * * *

DROP-A-DIME DEPT.: Customs has added link on its website to eAllegations (www.cbp.gov/trade) which will allow public to report suspected trade law violations. "eAllegations is not intended for assertions of security issues such as terrorists or weapons of mass destruction," CBP said. "Violations that may be reported online through eAllegations include misclassification of merchandise, country of origin markings, health and safety violations, intellectual property rights violations, textile or other trade violations," it said.

VIETNAM: In June 20 Federal Register, USTR asked for comment on granting Vietnam GSP benefits.

MTCR: BIS amended EAR in June 16 Federal Register to implement changes in MTCR controls that regime adopted at its last plenary session in November 2007.

GREAT WALL: OFAC June 19 removed from SDN list China Great Wall Industry Corporation and G.W.. Aerospace, Inc., which have been on list since June 2006 for allegedly providing support to Iran's missile program. "A company that once supported Iran's missile program has implemented a rigorous and thorough compliance program to prevent future dealings with Iran," said OFAC Director Adam Szubin.

CHINA: In June 16 final CVD ruling on laminated woven sacks from China, ITA rejected Beijing's argument that application of CVD rules to Chinese imports can only start after November 2006 announcement of changed policy on applying CVD law to China. ITA is applying it back to December 2001 when China joined WTO. "Our decision to adopt this date is not based on whether the CVD law can or cannot be applied to non-WTO members. Rather, we have selected this date because of the reforms in the PRC's economy in the years leading up to its WTO accession and the linkage between those reforms and the PRC's WTO membership," ITA staff memo explained.

JUSTICE: President Bush June 19 sent Senate nomination of Patrick Rowan to be assistant U.S. Attorney General, role he has filled on acting basis since Ken Wainstein moved to White House.

ITC: As required by statute, President Bush June 17 rotated ITC chairmanship, naming Shara Aranoff chairman and Daniel Pierson vice chairman. Separately, Senate Finance Committee June 18 approved nomination of ITC member Deanne Okun to be deputy USTR pending Senate approval of waiver of Trade Act restriction barring any person who represented foreign government in past from holding USTR or deputy USTR posts.

LCDs: CIT Judge Judith Barzilay June 9 said Optrex America, Inc. must pay one and half times duties, taxes and fees owed for liquid crystal displays it imported because it "failed to exercise reasonable care in classifying" items at various ports of entry (slip op. 08-63). Unpaid duties were $959,635.

ANTIDUMPING: Court of Appeals for Federal Circuit June 17 upheld CIT ruling that Commerce has authority to conduct changed circumstances review of antidumping order on large newspaper printing presses imported from Japan by Tokyo Kikai Seisakusho, Ltd. (TKS). "We conclude that the trial court correctly determined that Commerce possesses inherent authority to reconsider the results of the yearly administrative reviews in light of TKS's fraud," CAFC stated.

EXPORT ENFORCEMENT: Xiaodong Sheldon Meng, 44 was sentenced to 24 months in jail in San Jose U.S. District Court June 19 and also ordered to serve three years of supervised release after prison; pay $10,000 fine, and forfeit computer equipment seized in case. He pleaded guilty last August to one count of violating Economic Espionage Act and one count of violating Arms Export Control Act by misappropriating trade secret of his former employer, Quantum3D Inc., to benefit China's Navy Research Center in Beijing. Conviction was first involving military source code under the Arms Export Control Act.

MORE EXPORT ENFORCEMENT: Parthasarathy Sudarshan, owner of Cirrus Electronic, was sentenced June 16 in D.C. U.S. District Court to 35 months in prison for conspiracy to export controlled electronic components to government entities in India that participate in development of ballistic missiles, space launch vehicles, and fighter jets. He pleaded guilty in March (see **WTTL**, March 17, page 4).

MORE EXPORT ENFORCEMENT: Humayun Jilani June 19 pleaded guilty in N.Y. U.S. District Court to three counts of conspiracy to export parts for F-14 jets and civilian aircraft parts to Malaysia and Iran.

EVEN MORE EXPORT ENFORCEMENT: Andes Chemical Corp. of Miami agreed to pay $60,000 civil fine after making voluntary self-disclosure in settlement with BIS. Charging Letter claimed firm exported sodium bifluoride to Jamaica without approved export licenses. Andes neither admitted nor denied charges.

FINAL EXPORT ENFORCEMENT: Brighton Equipment Corp. of Paramus, N.J. paid $17,500 civil fine to settle single BIS charge that it exported software for CNC machine tool system made by GE Fanuc to China without license. Firm neither admitted nor denied charge.