

# Washington Tariff & Trade Letter<sup>®</sup>

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

Editor & Publisher: Samuel M. Gilston • P.O. Box 5325, Rockville, MD 20848-5325 • Phone: 301-570-4544 Fax 301-570-4545

Vol. 27, No. 49

December 10, 2007

## BIS DRAFTING INTRA-COMPANY LICENSE EXCEPTION RULE

The Bureau of Industry and Security (BIS) has taken industry's advice and is preparing to amend the Export Administration Regulations (EAR) to establish a new license exception that will allow companies to transfer controlled goods and technology internally across borders and to foreign employees without an individual approved license or deemed export license. "We are finalizing a Commerce draft which will probably go the agencies in the next couple of weeks that's pretty consistent with the recommendation of the Coalition for Security and Competitiveness's package of recommendations," BIS Deputy Assistant Secretary Matt Borman told the agency's Regulations and Procedures Technical Advisory Committee (RAPTAC) Dec. 4.

The coalition's proposal called for allowing companies with strong compliance programs to make transfers to foreign affiliates and employees of items that are not subject to statutory licensing requirements. The final version of the BIS proposal could be revised to deal with recommendations that are expected to come shortly from the Deemed Export Advisory Committee (DEAC). Creation of an intra-company license exception was one of the ideas that was proposed to the committee by several witnesses during its cross country hearings.

The DEAC's recommendations could dovetail with the BIS proposal, Borman said. "You've got a coalescence of several things here. You've got the coalitions recommendations; you have the DEAC report coming out and the CSIS [Center for Strategic and International Studies] also has a report coming out pretty soon," he noted. "So you are going to have in a short period of time several major pieces of work all related to export controls," he added. Borman didn't say when BIS would propose the new rules. The interagency process can take months.

## REPORTS TEE-UP DOHA SERVICES TALKS FOR PROGRESS IN 2008

Doha Round talks on services appear ready to move into a more accelerated pace after the start of the new year following a Dec. 6 special session of the Council for Trade in Services. At the meeting, countries serving as "coordinators" of negotiations on 18 service sectors presented progress reports on the offers World Trade Organization (WTO) members have made to liberalize trade in those sectors. No deadline is imminent, however, on when new offers in those sectors should be submitted and opinions differ on the separate issue of how to draft a text of proposed changes to the General Agreement on Trade in Services (GATS).

The coordinators are managing the process of plurilateral market-opening requests submitted in February 2006 under the terms of Annex C of the December 2005 WTO Hong Kong Ministerial

**Copyright © 2007 Gilston-Kalin Communications, LLC. All rights reserved. Reproduction, copying, electronic retransmission or entry to database without written permission of the publisher is prohibited by law.**

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

declaration. Twenty-two collective requests in specific sectors were prepared by a group of “demandeurs” or requesters and submitted to another group of target countries. The coordinators presented progress reports on each of these sets of requests. The U.S. is coordinator for telecommunications services, and postal and courier services. Canada is coordinator for financial services, and architectural engineering and integrated engineering services.

Many countries have voiced strong support for the idea of a having a services text adopted at the same time as agreements on agriculture and non-agriculture market access (NAMA) for industrial goods. There is still disagreement, however, over how much the services text, which would revise the GATS, should influence the request-offer process for opening specific service sectors.

The chairman of the services talks, Fernando De Mateo, the Mexican Ambassador to the WTO, is consulting with countries on a possible services text. The controversy over proposed elements in the text focus on the level of ambition in services, the assessment of the request-offer negotiations, and guidance on market access. Most of the text would not be a problem to produce, one trade official said. He said the text would need to reaffirm the goals set at the Hong Kong Ministerial in 2005, point to a high level of ambition in the services negotiations, define a new date for revised offers, provide details on the obligations of less developed country and provide something on domestic regulations and GATS rules. Market access “is where we run into trouble,” the official said.

## **DOHA FARM TALKS MAKING PROGRESS, DESPITE DELAY IN TEXT**

A new modalities text in the Doha Round agriculture negotiations isn’t likely to appear until late January or February, but the delay isn’t due to a lack of progress in the farm talks. New Zealand Ambassador Crawford Falconer was originally aiming to have a new text ready in November. He told WTO members Dec. 3 that he is “one step away from finalizing” texts on export competition. He later told reporters that “quite a lot of things we’re moving on.”

Talks will stop in Geneva for the holidays, but Falconer plans a new set of meetings starting Jan. 3, he reported. After a short break in the middle of January, he plans to start revising his draft modalities text around Jan. 21 and circulate it to members sometime after that.

Falconer reportedly plans a new tact for his next paper, aiming to suggest revisions to existing WTO agreements rather than starting from scratch with a new text. Many of the unresolved issues in the farm talks are highly technical, while others require political-level decisions.

Despite the progress Falconer reported, some WTO observers are warning that time is running out for reaching an agreement that President Bush could sign before he leaves office. If a deal on all the texts in agriculture, industrial tariffs and services isn’t reached by April or May, there won’t be enough time left to allow Bush to sign the agreement by Jan. 20, 2009, when he leaves office, one source argued. This timeline is based on the expectation that it will take three or four additional months for countries to complete the line-by-line evaluation of concessions and offers plus the 90-days advance notice the president must give Congress before signing the deal, if lawmakers were to renew fast-track negotiating authority, he estimated.

## **DDTC TO ISSUE GUIDANCE ON JURISDICTION FOR CIVIL AVIATION PRODUCTS**

State’s Directorate of Defense Trade Controls (DDTC) plans to issue guidance by the end of the year or early in 2008 to industry clarifying which civil aviation products that are certified by the Federal Aviation Administration (FAA) come under the jurisdiction of the International Traffic in Arms Regulations (ITAR) and which are subject to Bureau of Industry and Security (BIS) controls under the Export Administration Regulations (EAR). The clarification of commodity jurisdiction follows an interagency meeting Nov. 20 at which the FAA explained

how it selects products for certification (see **WTTL**, Nov. 19, page 4). BIS and DDTC have been under pressure from Congress to end their dispute over the Commodity Jurisdiction (CJ) for civil aviation products subject to FAA certification. Bipartisan legislation (H.R. 4246) introduced in November to reform ITAR licensing procedures includes provisions reaffirming BIS jurisdiction for most of these products.

Along with the DDTC notice, BIS will also issue a change in the EAR to make sure its interpretation matches State's, BIS Deputy Assistant Secretary Matt Borman told **WTTL**. The two notices "will take the FAA language and make sure it is clear to companies what they can rely on when they are deciding to come in for a commodity jurisdiction ruling," Borman said. The aim is to save companies from coming in for a CJ for common civil aviation products. The ITAR and EAR revisions are intended "so that in the vast majority of cases companies can look at it and say, 'Ah ha, I can clearly see my item doesn't need a CJ or very clearly it does based on the clarification,'" he explained.

### **REPORT WARNS ABOUT PENTAGON'S PURCHASE OF FOREIGN SOFTWARE**

Defense Department computer systems could be vulnerable to penetration or malicious "bugs" implanted by adversaries because of the department's growing reliance on foreign software and its inability to detect illicit functions in source code, according to the Defense Science Board (DSB). While the Pentagon can continue to use commercial off-the-shelf (COTS) software for many of its missions, it should require "critical system components to be developed only by cleared U.S. citizens," the board recommends in recently released report dated September 2007.

The globalization of the software industry and the increasing use of foreign computer software programmers offshore "seem to point to an intractable problem" for the Pentagon, the DSB concludes. "The current systems designs, assurance methodologies, acquisition procedures, and knowledge of adversarial capabilities and intentions are inadequate to the magnitude of the threat," it states.

The use of U.S. programmers for certain critical software is one step that can be taken, it recommends. "If the attacker cannot be deterred and its malware cannot be found, what is to be done to provide assurance that DoD software will perform in mission-critical situations?" it asks. "Although there never will be an absolute guarantee, software assurance is really not about absolute guarantees but rather intelligent risk management," it advises. "The risk of vulnerable software can be managed through a suite of processes and mitigation strategies," the board says. "The risk can be weighed against the attractive economics and enhanced capabilities of mass-produced, international software," it states.

### **MANDATORY AES FINALLY ON HORIZON AFTER AGENCIES REACH DEAL**

The Census Bureau and Customs and Border Protection have resolved a nearly three-year-long dispute over the sharing of U.S. export data with foreign governments, clearing the way for publication of a new Foreign Trade Regulations (FTR) and the mandatory use of the electronic Automated Export System (AES) for the filing of exporting documentation for all exports. With publication of the final rules, which probably won't occur until several months after the new year, fines for violation of Census rules will go up to \$10,000 per violation from \$1,000 and BIS will get authority to enforce the Census regulations (see **WTTL**, June 18, page 2).

Although Census officials decline to provide details on the agreement they reached with Customs, they expect the interagency review of the stalled FTR to resume. "You can expect to have a new Foreign Trade Regulation in a realistic time frame," Census Ombudsman Jerry Greenwell told the BIS RAPTAC Dec. 4. He said the final rule has been sent out for interagency review and comment. The final rule is going to look a lot like the notice of proposed rulemaking that was published on Feb. 17, 2005, he reported. Once the rule is published, it

will become effective 30 days after publication, but exporters will have an additional 90 days to implement the regulations, particularly the shift to AES filing. Most exports are reporting their exports through AES now. AES use is required for all exports subject to EAR or ITAR export licensing requirements. Only about 30,000 paper Shipper's Export Declarations (SEDs) are still filed monthly, Greenwell noted. In addition to the sharing of AES information with foreign governments, Census and Customs disagreed over the continued use of Option 4 for post-shipment filing of export documentation by trustworthy exporters. Census wanted to maintain the option, while Customs wanted to terminate the program.

## **CCL REVISION WILL BE 'ROLLING' MULTI-YEAR EXERCISE, BORMAN SAYS**

The BIS response to industry recommendations for reviewing and updating the Commerce Control List (CCL) may take several years and will be done in increments instead of one big massive revision, BIS Deputy Assistant Secretary Matthew Borman told the agency Regulations and Procedures Technical Advisory Committee (RAPTAC) Dec. 4. The agency has appointed an internal ad hoc group to look at all the comments and to devise a plan for dealing with all the recommendations, including changes in specific Export Control Classification Numbers (ECCN), revisions of technology controls and broad shifts in principles, such as use of Anti-Terrorism controls. The group will also continue to manage the process (see **WTTL**, Nov. 19, page 3).

"My goal is to have that plan regularized so every year we will do some aspect of it," Borman said. He said he would like to act on some technical and administrative changes that won't need interagency review "sooner rather than later," while the full revision plan proceeds over the next few years.

### \* \* \* BRIEFS \* \* \*

**BIS:** Office of Export Enforcement (OEE) Director Kevin DelliColli has been promoted to deputy assistant secretary for export enforcement, post he has been holding on acting basis since Wendy Wysong left government. OEE Deputy Director Tom Madigan will remain as acting OEE director.

**U.S.-PERU FTA:** Senate Dec. 4 gave approval to U.S.-Peru trade pact by bipartisan 77-18 vote. Major presidential candidates, Biden, Clinton, Dodd, McCain and Obama, were absent for vote. Ironically, China and Peru have launched bilateral FTA talks. First round is to be held in Lima Jan. 21-24, 2008.

**AUSTRALIA:** President Bush Dec. 4 sent Senate U.S.-Australia Defense Trade Cooperation Treaty for ratification (see **WTTL**, Sept. 10, page 2). "My Administration is prepared to provide to the Senate for its information other relevant documents, including proposed implementing arrangements to be concluded pursuant to the Treaty, relevant correspondence with the Government of Australia, and proposed amendments to the International Traffic in Arms Regulations," president said in accompanying statement.

**EXPORT ENFORCEMENT:** Proclad International Pipelines, Ltd., of Fife, Scotland, will pay \$100,000 civil fine to settle BIS charges that it aided and abetted and conspired to export nickel alloy pipes from U.S. through U.K. and UAE to Iran without approved license. BIS also imposed seven-year denial of export licensing privileges on firm but suspended order for seven years and said it would waive order if firm remained in compliance with U.S. export controls.

**KAZAKHSTAN:** President of Kazakhstan Nov. 27 signed new law revising requirement for importers to provide copy of their export declarations or face maximum tariffs. New rules exempt exporters if their national law prohibits disclosure of such documentation, Dale Kelly, director of Census's Trade Regulations Branch told RAPTAC Dec. 4 (see **WTTL**, Nov. 5, page 4). New rules are to go into effect mid-December. Census officials say they know of U.S. firms that violated U.S. trade regulations and provided information to Kazakhstan authorities but they won't prosecute them because fines are so low.

**BEDROOM FURNITURE:** Court of Appeals for Federal Circuit Nov. 30 (case no. 2007-1216) reversed and remanded CIT ruling in *American Signature, Inc. v. U.S.*, saying CIT had jurisdiction to review Commerce liquidation instructions to Customs, based on ministerial error and importer didn't have to wait until administrative review to get duty refunds.

**BRICs:** President's Export Council Dec. 4 approved letter to President Bush urging U.S. to negotiate bilateral investment treaties with Brazil, Russia, India and China.

**REGISTER TODAY**

## **Common Ground: Leveraging FCPA Compliance From Your Company's Export Control Program.**

**Tuesday, December 11, 2007 ♦ 2:00-3:30 P.M. (Eastern)**

**SUBSCRIBERS SAVE 15% ON PRICE OF AUDIO-CONFERENCE**

(Non-Subscribers, call today to subscribe at special discount rate.)

### **3 EASY WAYS TO SIGN UP**

- ① **FAX: 301-570-4545**
- ② **CALL: 202-463-1250 Extension 2**
- ③ **MAIL: Gilston-Kalin Communications, P.O. Box 5325, Rockville MD 20848-5325**

**☛ Please Print, Complete and Return this Information to Register:**

Yes, Please register me for the December 11, 2007, 90-Minute Webinar Briefing on "Common Ground: Leveraging FCPA Compliance From Your Company's Export Control Program" for \$197.

I'm a subscriber to *The Export Practitioner* or *Washington Tariff & Trade Letter*, please sign me up at 15% discount price of \$167.

Check Enclosed (Payable to Gilston-Kalin Communications, LLC)

Charge My Credit Card: VISA  MasterCard  American Express

Card No. \_\_\_\_\_ Exp. \_\_\_\_\_ / \_\_\_\_\_

Signature \_\_\_\_\_

E-Mail \_\_\_\_\_

Name \_\_\_\_\_

Title \_\_\_\_\_

Company \_\_\_\_\_

Address \_\_\_\_\_

City/State \_\_\_\_\_ Zip \_\_\_\_\_

Phone Number \_\_\_\_\_

Fax Number \_\_\_\_\_

Please send me information about future audio-conferences, webinars and compliance materials on U.S. export controls.

WT-4