

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

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

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## HIGH VOLUME OF FCPA ENFORCEMENT CASES WILL CONTINUE, FEDS SAY

After what they are calling a “banner year” for enforcement of the Foreign Corrupt Practices Act (FCPA), federal regulators at Justice and the Securities and Exchange Commission (SEC) say they expect the high pace of cases to continue into 2008. They say they also expect foreign governments to step up their prosecutions of the bribery of foreign officials as well. So far in 2007, Justice and SEC have settled 14 FCPA enforcement cases and imposed over \$135 million in penalties. The most recent case was a \$30 million settlement Nov. 14 with Chevron for FCPA and fraud violations related to the Oil-for-Food Program in Iraq.

The SEC has a large inventory of pending cases, and “the upcoming year will continue to be a very active year,” predicted Fredric Firestone, associate director of the SEC enforcement division. He said the SEC will continue to focus on cases against individuals involved in bribery. “It’s the most effective deterrent the commission has,” he told an American Conference Institute program Nov. 12.

Mark Mendelsohn, deputy chief of Justice’s fraud section, told the conference he foresees more prosecutions in countries that belong to the Organization for Economic Cooperation and Development (OECD), which is marking the tenth anniversary of its Antibribery Convention. “We are poised for significant developments” overseas, he said, noting recent penalties imposed on Siemens in Germany. He said many investigations are underway in France, Germany and Switzerland. Some of these are linked to the Oil-for-Food program. An OECD meeting in Rome the week of Nov. 19 is expected to seek increased enforcement of antibribery laws.

Assistant Attorney General Alice Fisher said her department is stepping up its focus on FCPA enforcement with more lawyers and investigators assigned to foreign corruption cases and more training being given to local U.S. Attorneys. She also urged companies to make voluntary self-disclosures of FCPA violations. “Those companies that come forward will get a real and tangible benefit from the department,” she promised. Fisher noted an Oct. 24 ruling in the Fifth U.S. Court of Appeals in *USA v. Kay*, which upheld the government’s ability to apply the FCPA in cases where bribery is intended to retain existing business or to compete with other companies that are bribing. “We take this very seriously,” she said.

## DEVELOPING COUNTRIES UNITE TO KEEP AGRICULTURE TOP DOHA PRIORITY

A meeting of developing-country ministers in Geneva Nov. 15 reiterate their call for keeping agriculture as the top priority for the Doha Round, as expectations pointed toward a new timetable for completing the World Trade Organization (WTO) negotiations. Some diplomats in

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Geneva now say the new deadline for completing the round may be next June or July, with the goal of having Congress consider the deal – perhaps in a lame duck session – after the 2008 presidential elections and before President Bush leaves office in January.

Just a handful of ministers of the 28 countries in the Group of 20 (G-20) showed up for the meeting called by Brazilian Foreign Affairs Minister Celso Amorim (see **WTTL**, Nov. 5, page 2). Nonetheless, they produced a joint paper on agriculture on behalf of the G-20, G-33, Nama 11, ACP group, African Group, small and vulnerable economies, and the Cotton-4. “Any attempt to change the central fact that agriculture is the locomotive of the round, of course, is bound to failure,” Amorim said after the meeting. “That is our main point,” he said.

“We must have a roadmap” from the U.S., Indian Trade Minister Kamel Nath told **WTTL**. The aim of the roadmap would be to reduce uncertainty, Nath said. “We are willing to go along, we are willing to follow whatever pace this roadmap has,” he said earlier at a press conference. “The faster the pace, the better it is,” he added. Nath also warned that “without a resolution on cotton, there can not be a resolution.” He also reacted to developed-country demands in services negotiations. “Now we are waiting to hear what they are willing to give on services,” he stated. Indian sources privately say India may be willing to go further on non-agriculture market access (NAMA) than some of the rhetoric coming from other developing countries.

Setting a new deadline for completing the round next summer may be merely a recognition of the reality of the state of the talks. “People who think they can engineer precise dates and moments in light of the U.S. political process are much wiser than me,” Agriculture Negotiating Committee Chairman Crawford Falconer told **WTTL**. Falconer, who is New Zealand’s WTO ambassador, has recently circulated new working documents on export credits, food aid, export subsidies and state trading enterprises. His original mid-November goal for issuing a revised draft modalities text on agriculture is unlikely “given that they’ve taken so long to get together on sensitive products and we’re already past the middle of November,” he told **WTTL**.

## **PANEL URGES MORE ENFORCEMENT OF EXPORT CONTROLS ON CHINA**

Among its far-ranging findings and recommendations on U.S.-China relations, a federal panel Nov. 15 urged Congress to increase funds for enforcing U.S. export controls. “In order to slow or stop the outflow of protected U.S. technologies and manufacturing expertise to China, the Commission recommends that Congress assess the adequacy of and, if needed, provide additional funding for U.S. export control enforcement and counterintelligence efforts, specifically those tasked with detecting and preventing illicit technology transfers to China and Chinese state-sponsored industrial espionage operations,” recommended the congressionally created U.S.-China Economic and Security Review Commission in its 2007 annual report.

The commission said China’s defense industry is supplementing its own commercial transfers and direct production partnerships with “an aggressive and large-scale industrial espionage campaign.” It said: “Chinese espionage activities in the United States are so extensive that they comprise the single greatest risk to the security of American technologies.”

The commission, which has regularly raised warnings about China’s military and industrial expansion in its past reports, said the U.S. intelligence community has often been taken by surprise by Chinese technological advances. “China’s defense industry is producing new generations of weapon platforms with impressive speed and quality, and these advancements are due in part to the highly effective manner in which Chinese defense companies are integrating commercial technologies into military systems,” the commission contended. This technology often comes from U.S. partners, it suggested. “Additionally, industrial espionage provides Chinese companies an added source of new technology without the necessity of investing time or money to perform research,” it added. The Pentagon’s growing reliance on commercial goods and technology poses an additional national security threat because many of these items

are now being produced in China. Defense needs to better assess just how reliant it is on foreign suppliers, it suggested. “The Commission recommends that Congress require the Department of Defense to prepare a complete list of the country of origin of each component in every U.S. weapon system to the bottom tier,” it advised.

The report also warned about Chinese plans to target several industries for commercial development. The commission said China is consolidating its state-owned enterprises (SOEs) under a new policy announced in December 2006. Beijing has identified seven strategic industries in which it must maintain “absolute control through state-owned enterprises” and five heavyweight industries in which it will remain heavily involved. The strategic industries are armaments, power generation and distribution, oil and petrochemicals, telecommunications, coal, civil aviation, and shipping. The heavyweights are machinery; automobiles; information technology; construction; and iron, steel, and non-ferrous metals.

### **BROAD DECONTROLS SOUGHT AS PART OF CCL REVIEW**

The Bureau of Industry and Security (BIS) may have bitten off more than it can chew with its request for industry and technical advisory committee (TAC) recommendations for updating the Commerce Control List (CCL). It has received 25 comments with 362 pages of recommendations and is still awaiting the recommendations from the TACs. The Transportation Equipment TAC, for example, is looking at changes in dozens of Export Control Classification Numbers (ECCNs). While BIS officials originally said they were looking for technical corrections in the CCL, several comments have called for broad decontrol of many products and technologies.

It is likely the CCL review could stretch out for two years or more. Any potential changes would still need to get interagency approval and possibly require multilateral agreement from the Wassenaar Arrangement. As shown by recently published changes in the Export Administration Regulations (EAR), it took BIS 11 months to amend the regulation to implement Wassenaar changes that had gotten interagency and international agreement more than a year ago.

BIS Under Secretary Mario Mancuso has said the agency wants to “clean up” the CCL but also welcomes suggestions on how to restructure the list. “I would not say that this is, *ab initio*, a minimalist exercise or a perfunctory exercise,” he told reporters. “I think that would be exactly wrong. We asked the community to put in the time to give us comments, and the assurance that I would give industry is that we will read your comments with an open mind, we value constructive input, but at the end of the day our controls and what we do have to rest on a deliberative foundation,” he added.

Among the comments submitted, the Semiconductor Equipment Manufacturers Association (SEMI) called for a comprehensive review of controls on semiconductor manufacturing equipment and materials. It said current controls put U.S. firms at a disadvantage, especially in China, the fastest growing market for its members’ products. “The last comprehensive review of SEM controls occurred 17 years ago while the semiconductor industry creates a new technology generation approximately every 18 months,” SEMI said.

Boeing’s comments included a list of 49 ECCNs that need to be adjusted or removed. In many cases, these items have foreign availability. It said the U.S. should harmonize Missile Technology (MT) controls with the European Union’s (EU) Dual Use List. BIS should work with Congress “with the goal of removing licensing requirements on MT controlled items if they are not controlled under the EU list, as long as they are not also controlled for national security reasons pursuant to Wassenaar,” Boeing wrote.

Consultant William Root submitted 127 pages of detailed recommendations for revising the CCL and removing inconsistencies with other parts of the EAR. He also called on BIS to address the definition of “specially designed.” The Council on Government Relations, which

represents research universities, urged BIS to simplify the EAR to ensure understandability and compliance. It said the CCL should be examined to eliminate technologies that are being created and developed overseas. Cadence proposed revisions in Antiterrorism (AT) controls “that are superfluous for control purposes” when countries are subject to a trade embargo. “This unilateral U.S list should be eliminated,” it said. The American Electronics Association proposed reforms for encryption controls, including elimination of reporting and review requirements and controls on publicly available software and open cryptographic interfaces.

## **BIPARTISAN BILL PROPOSES REFORMS OF STATE EXPORT LICENSING**

As previously reported exclusively in WTTL, a bipartisan group of House lawmakers Nov. 16 introduced broad-ranging legislation (H.R. 4246) to speed up the licensing process for U.S. Munitions List (USML) goods and technology subject to approval by State’s Directorate of Defense Trade Controls (DDTC) (see **WTTL**, Oct. 1, page 2). Among its provisions, the measure would require DDTC to limit the backlog of pending cases to 2,000 at any time.

The bill, co-sponsored by Reps. Brad Sherman (D-Calif), Don Manzullo (R-Ill.), Joe Crowley (D-N.Y.) and Roy Blunt (R-Mo.), would authorize the State Department to use registration fees collected by DDTC for funding DDTC licensing and compliance staff and functions. It would direct the secretary of State to assure that DDTC had the staff and resources to carry out its mandate.

“Our current export control policy was designed for the Cold War and we must reform the system to address the national security priorities of the 21<sup>st</sup> Century,” Sherman said in a statement. “This legislation is designed to address the problems of our high-tech trade system which is underfunded and understaffed,” he said.

The legislation also contains a waiver of licensing requirements for exports of spare and replacement parts or components and related services to NATO members, Australia, Japan, and New Zealand. “The waiver is subject to certain national security requirements and does not apply to significant military equipment or items on the MTCR Annex,” a fact sheet on the bill notes. “Additionally, the president may choose not to apply this waiver to any country, if it is in the national interests of the United States to do so,” it added.

The measure includes guidelines for reviewing (1) licenses for exports to U.S. allies; (2) commodity jurisdiction requests; and (3) technical assistance agreements. It would also clarify “that, subject to certain requirements, certain civil aircraft products included in the type design of a type certificate for a civil aircraft issued by the FAA on or before the enactment of this bill, shall be subject to jurisdiction of the Department of Commerce.” The president, however, would have the authority to waive this provision for national security reasons.

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

17-C: BIS has scheduled meeting for Nov. 20 with FAA, DHS, State and Defense officials to have FAA explain its process for certifying civil aviation components. State has drafted proposal for dealing with dispute over EAA Section 17(c) requirement that gives BIS licensing jurisdiction over FAA-certified parts. BISers say they hope agreement can be reached by end of November (see **WTTL**, Oct. 1, page 3).

DOHA ROUND: House Ways and Means Committee Chairman Charles Rangel (D-N.Y.) and trade subcommittee chairman Sander Levin (D-Mich.) warned administration in Nov. 14 letter that Doha Round deal on rules must restore U.S. ability to use “zeroing” in dumping cases. “It is hard to imagine Congress approving any final package that fails to include this essential clarification,” they wrote. They also said agreement had to address privatization of subsidized industries, use of dumping duties in ways such as Byrd Amendment, and use of adverse information in dumping cases.

INVESTMENT: Commerce Nov. 14 released White Paper on visas and foreign direct investment. Paper suggests ways to improve efficiency, timeliness and “user-friendliness” of visa process for business facilitation. Suggestions have to be coordinated with other agencies, however.

*The Export Practitioner and Washington Tariff & Trade Letter* Present

**A Live Webinar**

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

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## **Speakers**

### **Saul M. Pilchen**

Partner, Skadden, Arps, Slate, Meagher & Flom LLP

### **Gary DiBianco**

Partner, Skadden, Arps, Slate, Meagher & Flom LLP

### **Neil Lombardo**

Senior Associate, Skadden, Arps, Slate, Meagher & Flom LLP

### **Stephanie Fleischman Cherny**

Associate, Skadden, Arps, Slate, Meagher & Flom LLP

### **Elizabeth C. Billhimer**

Associate, Skadden, Arps, Slate, Meagher & Flom LLP

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## About Our Speakers

### Saul M. Pilchen

Saul Pilchen is a partner in the Skadden, Arps, Slate, Meagher & Flom LLP Litigation and Government Enforcement Group in Washington, D.C. A former federal prosecutor, he defends corporations, officers, directors and employees in a wide variety of administrative enforcement and criminal matters, including cases related to export control and the FCPA, as well as in civil and class action litigation. Mr. Pilchen also advises clients on the design and implementation of legal compliance programs and assists them in conducting sensitive internal investigations. He has been named one of Washington, D.C.'s "go-to" white collar criminal defense counsel in *Best Lawyers in America*, a peer-review compilation. Mr. Pilchen has been published widely in journals such as *The Export Practitioner* and *American Criminal Law Review*.

### Gary DiBianco

Gary DiBianco is a partner in Skadden's Washington, D.C. Litigation and Government Enforcement Group where he specializes in white collar criminal defense, securities and consumer fraud class action cases. He represents U.S. and foreign companies, financial institutions, accounting firms and individuals in civil and criminal government investigations and complex civil litigation in matters involving federal and state securities laws and the FCPA. He has advised and represented audit committees, boards and special litigation committees in connection with government investigations and shareholder litigation. Mr. DiBianco has published numerous articles and lectures frequently on the FCPA. Prior to joining Skadden, Mr. DiBianco was a trial attorney in the Justice Department's Criminal Division and was detailed as a special assistant U.S. attorney to the U.S. Attorney's Office for the Eastern District of Virginia.

### Neil Lombardo

Neil Lombardo is a senior associate in the Litigation and Government Enforcement Group of Skadden's Washington, D.C. office. His practice focuses primarily on conducting internal corporate investigations and representing clients in complex securities and accounting fraud cases. Mr. Lombardo also defends clients in FCPA cases investigated by the SEC and the Justice Department. He has significant experience conducting global FCPA investigations in countries such as Egypt, Morocco, India, Vietnam, Thailand, Indonesia, Brazil, Argentina, Singapore and Mexico. Mr. Lombardo has performed internal FCPA investigations, due diligence, and training for clients in the oil and gas, beverage and automotive industries.

### Stephanie Fleischman Cherny

Stephanie Fleischman Cherny is an associate in Skadden's Washington, D.C. Litigation and Government Enforcement Group. She represents companies and individuals in a broad range of federal investigations conducted by the Justice Department, SEC, OFAC and the Commerce Department, including those involving export control and FCPA issues. She has assisted companies in conducting international internal investigations and in drafting compliance programs. In the August 2007 issue of *The Export Practitioner*, she co-authored with Mr. Pilchen an article entitled "Adding FCPA Compliance to Your Business Arsenal." Ms. Cherny also has extensive civil litigation experience in federal and state courts.

### Elizabeth C. Billhimer

Elizabeth Billhimer is an associate in Skadden's Washington, D.C. Litigation and Government Enforcement Group, where she has assisted in conducting internal investigations and in defending companies in government enforcement actions. Ms. Billhimer has significant experience assisting in the management of FCPA investigations for large corporate clients with worldwide operations, involving countries such as China, Iraq, Brazil, Indonesia, Mexico, Kazakhstan, and Nigeria. She also has assisted companies in enhancing their compliance programs to address FCPA requirements.

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