

# Washington Tariff & Trade Letter®

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

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## REPORT SAYS DEFENSE NOT COMPLYING WITH EXPORT RULES

The Defense Department's (DoD) Inspector General says the Pentagon still hasn't taken steps to ensure that its laboratories and facilities comply with Commerce and State export control requirements for foreign nationals. The new report, the latest in an annual series required by law, also criticizes DoD for not providing adequate analysis and documentation to support its recommendations to the Bureau of Industry and Security (BIS) on license applications.

“Until our recommended actions are implemented, DoD continues to accept avoidable risks of inappropriately exporting sensitive goods, services and technology that could threaten our national security,” the IG claims. The report raises fundamental questions about whether Defense is subject to the Export Administration Regulations (EAR) and International Traffic in Arms Regulations (ITAR), especially EAR deemed export rules and their ITAR counterpart.

Although DoD has issued some guidance to various agencies regarding foreign national access to export-controlled technology, it has not issued an update of DoD Directive 2040.2 or other guidance to defense contractors, universities and federally funded laboratories and research facilities, the IG contends. The report notes that 11,000 foreign nationals visited six research facilities in a recent two-year period. “Until changes are made, DoD will be at increased risk of other nations' countering or reproducing our technology,” the report declares.

The report says the Defense Technology Security Administration (DTSA) is not applying EAR policies to its license reviews. A DoD management policy directive requires Pentagon agencies to comply with applicable laws and regulations in their activities. “The Export Administration Act is the law that establishes the requirements for processing export license applications and the Export Administration Regulations implement the management policies for processing those applications,” the IG notes. “DoD should consider those policies in making recommendations to the Department of Commerce on export license applications,” it declares.

## TRADE BAR IDENTIFIES CONCERNS ABOUT COMING CFIUS REGULATIONS

Legislation that imposed new requirements on the review of foreign investments by the Committee on Foreign Investment in the U.S. (CFIUS) left many of the details on how to implement the new rules to the Treasury Department, which is required to issue implementing regulations by April 21, 2008. At an Oct. 23 hearing at Treasury, trade lawyers identified numerous questions that were not clarified by the legislation and need to be addressed in the regulations. Treasury officials at the meeting said they encourage this advice and will give the public a

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chance to comment on the proposed regulations before they are issued in final form. "The way we look at it is CFIUS is about protecting national security on acquisitions here in the United States," said Treasury Assistant Secretary Clay Lowery. "That will always be our first and foremost responsibility," he added. "At the same time, I will reiterate the president's message on May 10 and that is we still want an open investment society. We welcome foreign investment. It is helpful to our country. It's helpful to our economy," Lowery said.

President Bush signed the Foreign Investment and National Security Act (FINSA) into law on July 26 and the statute became effective on Oct. 24. One provision that will be applied even before final regulations are issued is a requirement for those filing Exon-Florio pre-investment review notices with CFIUS to include a certification that information submitted is materially complete. Lowery said filers of already pending notices will be asked to submit certifications as well.

A primary concern for the trade bar is the lack of definitions in FINSA for several key phrases. These include the important threshold questions of what is "critical infrastructure" and "critical technology." They said the term "control" needs definition, as well as "covered transaction" and "foreign government control". This last issue has become complicated by new investment practices, including by private equity groups and sovereign wealth funds. Also of concern is the confidentiality for information submitted in an Exon-Florio notice, including personal information on foreign investors and the very existence of the notice if an acquisition deal falls through. Participants also asked Treasury to clarify how it will track withdrawn notices.

Several comments addressed the procedures for negotiating "mitigation agreements" that allow acquirers to take certain steps to alleviate national security concerns. Speakers said Treasury needs to give parties enough advance notice that a mitigation agreement will be required. They also said CFIUS should avoid requiring mitigation agreements that duplicate existing laws that protect national security. In particular, they noted that export control regulations already impose requirements to prevent unauthorized release of controlled goods and technologies.

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**EDITOR'S NOTE:** WTTL and our affiliate, *The Export Practitioner*, will sponsor an audio-conference briefing on the new FINSA and CFIUS policies and practices on Nov. 14 at 2:00 PM Eastern. Speakers will be Christopher Wall, an inter-national trade partner with Pillsbury Winthrop Shaw Pittman LLP, and Stephen J. Canner, vice president for international investment policy and financial services with the U.S. Council for International Business. For more details, contact Tami Gilston at 202-463-1250, Ext. 2.

## **WTO GAMBLING COMPENSATION MAY COST U.S. LESS THAN \$100 MILLION**

The U.S. may have to pay less than \$100 million in compensation to other members of the World Trade Organization (WTO) to withdraw gambling from its market-opening commitments under the General Agreement on Trade in Services (GATS), according to sources in Geneva and Washington. An Oct. 22 deadline for an agreement on the terms for removing the U.S. commitment was extended until Dec. 14 by agreement among the parties, the U.S. Trade Representative's (USTR) office said. The deadline was already extended from Sept. 22.

Australia and Canada are close to reaching a deal with the U.S., but the European Union (EU) and India could be sticking points, sources report. Resolution could come in late November or early December when a WTO arbitrator rules on how much compensation Antigua and Barbuda is due in the separate and original dispute over the U.S. refusal to allow remote Internet gambling based in the Caribbean nation (see **WTTL**, July 30, page 3).

The U.S. doesn't want to give the Europeans anything, a source familiar with the issues said. "The USTR considers Mandelson a free rider," he said, referring to EU Trade Commissioner Peter Mandelson. EU countries that claim they suffered damage could have brought a case, but

chose not to, the source explained. The EU is asking for greater market access for professional services, such as accountants and lawyers, in compensation for the withdrawal of gambling from the U.S. GATS list. The EU won't push very hard because its members are split, the source said. Germany reportedly doesn't want to open up competition for its national lottery, but British companies claim large losses from U.S. policies blocking Internet gambling. "I think the Europeans will go away fairly quietly....I don't think they're going to fall on their sword for Internet gaming," the source declared. The U.S. has won five WTO disputes against the EU that have not been complied with, the source said. "There is a very strong feeling at the highest level of the USTR that they will give the Europeans nothing," he said.

The U.S. may be able to "buy off" smaller countries seeking compensation under the GATS process, one source suggested. For these nations, a settlement would most likely be financial as opposed to new market access. "They have a strong argument that they should get development funds or debt relief," he said.

The U.S. proposal to remove gaming from its GATS commitments stems from its loss in the Antigua case. A WTO arbitrator decision on the amount of damages is expected after Thanksgiving, said Jim Jochum, a lawyer representing Antiguan interests. Antigua wants between \$1 billion and \$3.4 billion in the case. The U.S. said damages were \$500,000 to \$3 million.

### **SUBTLE ECONOMIC CHANGES EXPECTED WITH NEW CHINESE LEADERSHIP**

The retirement of several members of the Chinese Communist Party's Politburo and the naming of younger members at the party's 17<sup>th</sup> Congress, which ended Oct. 21, will produce only subtle changes in Chinese economic and trade policies, according to K.C. Kwok, the government economist of Hong Kong. Despite continuing U.S. pressure to allow the renminbi to appreciate faster, China is likely to raise the appreciation rate only to 7-8% from the current rate of 5-6%, Kwok told a seminar hosted by R&R Financial Group, a division of UBS Financial Services. The Chinese say "the renminbi is not our first problem; it is not our priority," Kwok said.

Kwok said the shift in Chinese economic policy was seen in statements by President Hu Jintao, who spoke about China growing in a "good and fast way." In the past, Hu said growth has to be "fast and good." The slight shift in emphasis from the speed of development to the quality of development reflects growing concern among China's leaders about inflation, sustainability, environmental damage and the increasing disparity in wealth in the country, Kwok explained.

While China won't make any big change in currency policy, it will adopt measures that will deal with its growing capital surplus, which is caused by its expanding trade surplus combined with an extremely high savings rate among the Chinese. To address this situation, Beijing will take measures to allow more outflow of capital, Kwok said. One of these steps will allow the Chinese to invest in mutual funds that buy stock in Hong Kong. Another will allow Chinese insurance companies to invest more of their assets overseas. A third would allow individuals to buy stock on the Hong Kong stock exchange, Kwok noted. He predicted this easing will eventually allow Chinese individuals to buy stock on exchanges in New York, London and Tokyo.

### **NEW TRADE SANCTIONS IMPOSED ON BURMA, IRAN**

New trade sanctions announced by the Bush administration the week of Oct. 22 on Burma will further reduce the already minimal trade with the trouble Southeast Asian nations, while new sanctions placed on Iran will pose added problems for U.S. banks and financial institutions. The new restrictions are consistent with previous administration policies on trade sanctions, trying to target specific individuals and organizations within the targeted country rather than using a broad brush of sanctions. For Burma, a presidential executive order imposed sanctions on several members of the Burmese military junta and their associates, freezing their assets in the U.S. and blocking financial transactions in which they are a party. Another part of the

order expanded U.S. export licensing requirements for exports to Burma. In the Oct. 24 Federal Register, BIS amended the EAR to impose “a license requirement for exports, reexports or transfers of items subject to the EAR to persons listed in or designated pursuant to Executive Orders 13310 or 13448, except for agricultural commodities, medicine, or medical devices classified as EAR99.” U.S. exports to Burma in 2006 amounted to only \$7.5 million. Of that, food products accounted for \$1.1 million and medical equipment \$1.15 million. Other sales involved drilling and oil equipment (\$752,000), electrical apparatus (\$425,000), industrial machinery (\$421,000) and pharmaceuticals (\$269,000).

Complicating the life of banks and financial institutions in the global market are new restrictions on Iran’s three largest banks: Bank Melli, Bank Mellat and Bank Saderat. “We call on responsible banks and companies around the world to terminate any business with Bank Melli, Bank Mellat, Bank Saderat, and all companies and entities” of the Islamic Revolutionary Guard Corps, Treasury Secretary Henry Paulson said in a statement.

\* \* \* BRIEFS \* \* \*

CORRECTION: IEEPA changes signed into law Oct. 16 increased maximum civil fine for each violation of EAR or trade sanction to greater of \$250,000 or twice amount of transaction. WTTL Oct. 22 incorrectly stated new fine (see WTTL, Oct. 22, page 4). Maximum criminal fine for willful violation is \$1 million or for natural person up to 20 years in prison.

ANTI-COUNTERFEITING: USTR Susan Schwab Oct. 23 announced launching of effort to negotiate Anti-Counterfeiting Trade Agreement among major industrial countries, including European Union, Japan, Canada, Korea, Mexico, New Zealand and Switzerland. Goal is formal arrangement for cooperation on law enforcement, border measures, training, and public awareness of importance of intellectual property rights, but no new penalties. Agreement apparently is being sought outside WTO where countries that have been charged with being lax on IPR protection would probably block new accord.

TAA: House Ways and Means Committee Oct. 24 – on 26-14 vote – reported out legislation (H.R. 3920) to renew Trade Adjustment Assistance program and expand benefits to service and public sector workers who lose their jobs due to trade. Bill also would increase training and health benefits for qualified workers and allow certification of workers on industry-wide basis rather than for individual companies. Labor Secretary Elaine Chao wrote to Ways and Means Chairman Charles Rangel (D-N.Y.) to express administration’s opposition to measure, saying program needs to be more flexible and increase in health credit to 85% from 65% would interject federal regulation into health insurance pricing.

EXPORT ENFORCEMENT: Buehler Limited of Lake Bluff, Ill., reached settlement with BIS to pay \$27,000 civil fine and its subsidiary, Buehler United Kingdom, agreed to pay \$29,000 fine for export of software for image analysis system to Iran without OFAC license.

SODIUM METAL: DuPont Oct. 23 filed antidumping petitions at ITA and ITC against imports of sodium metal from France.

ANTIBOYCOTT: Seattle-based Expeditors International of Washington agreed to pay \$2,250 fine to settle BIS charges that it certified vessel registration to customer in Beirut and failed to report request to BIS.

CHINA: ITA in Oct. 25 Federal Register called for public comment on potential for establishing test to determine whether company in China can qualify as Market-Oriented Enterprise (MOE) in antidumping cases and have market prices used in calculating dumping margin. “Market forces are not yet sufficiently developed in China to warrant market economy status,” notice said. “However, as noted in the Georgetown Steel Memorandum, China’s economy has evolved to the point where domestic prices of certain market-oriented firms might be useable in the dumping calculation,” it added

TARGETED DUMPING: ITA in Federal Register Oct. 25 asked for public comments and suggestions on what guidelines, thresholds, and tests it should use in determining whether targeted dumping is occurring. ITA has rarely made targeted dumping determination, but did in antidumping investigation of coated free sheet paper from Korea (see WTTL, Oct. 22, page 4)

ITC: Theodore Essex, formerly ALJ with Medicare appeals office in Cleveland, named ITC ALJ.

# CFIUS: New Rules for Foreign Investment in the U.S.

What You Need to Know About Changes in Exon-Florio Review Requirements

An Audio-Conference Briefing  
Sponsored by  
*The Export Practitioner*  
and  
*Washington Tariff & Trade Letter*

Featuring

**Christopher R. Wall**

Senior International Trade Partner  
Pillsbury Winthrop Shaw Pittman LLP

**Stephen J. Canner**

Vice President for International  
Investment Policy and Financial Services  
U.S. Council for International Business



## Why This Briefing Is Important to You

If you're involved in any merger or acquisition involving the takeover of a U.S. corporation by a foreign entity, you now face an increased likelihood that your transaction will require review and tougher scrutiny by the interagency Committee on Foreign Investment in the U.S. (CFIUS).

In the wake of the controversy over the attempted acquisition of U.S. port activities by Dubai Ports World, Congress enacted the Foreign Investment and National Security Act (FINSA). President Bush signed the legislation into law on July 26, 2007, and the law became effective on Oct. 24, 2007.

This timely audio-conference briefing will provide you with a detailed explanation and analysis of what this new law will mean to your international investments, the increased scrutiny your transactions will receive and how the new law could affect U.S. investments overseas. Our featured speakers are experts in U.S. laws on foreign investment and the CFIUS review process.

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November 14, 2007**

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## About Our Speakers

### Christopher R. Wall

Mr. Wall is the senior international trade partner at Pillsbury Winthrop Shaw Pittman LLP in Washington,DC. His practice focuses on export controls, foreign investment, international trade proceedings and policy. He advises clients on CFIUS reviews as well as commercial and military export licensing and enforcement; economic sanctions; anti-boycott compliance; the Foreign Corrupt Practices Act; antidumping, countervailing duty and other proceedings; Court of International Trade (CIT) appeals; Customs matters; bilateral investment treaties; and NAFTA and WTO dispute resolution. Mr. Wall is a member of the American Bar Association and has served as chair of the Special Advisory Committee on International Activities, vice chair of the Section of International Law and Practice, and Co-Chair of the International Litigation Committee. He received undergraduate degrees from Yale University and Oxford University and his J.D. from the University of Virginia Law School. He is a member of the bars of the District of Columbia and New York, the CIT and the Court of Appeals for the Federal Circuit.

### Stephen J. Canner

Mr. Canner is vice president for international investment policy and financial services at the U.S. Council for International Business (USCIB). The USCIB is the American affiliated with the International Chamber of Commerce. In his capacity, Mr. Canner advocates on behalf of Council members on numerous investment and investment-related issues, including investment negotiations and disputes before the World Trade Organization, the Organization for Economic Cooperation and Development's (OECD) Principles on Corporate Governance and OECD Guidelines for Multinational Enterprises, as well as globalization and financial services. Before joining USCIB, Mr. Canner served for 28 years at the U.S. Treasury Department. From 1987 to 1992, he was director of the office of International investment. In that role, he served as staff director of the Committee on Foreign Investment in the United States (CFIUS). In 1991, he received the President's Meritorious Executive Award in the Senior Executive Service. He holds a Ph.D. in economics from Clark University.

# **How Will Changes in Rules for Foreign Investment Impose New Requirements on Your Merger and Acquisition Plans?**

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- ✓ **Who Are Foreign Persons Triggering New Requirements**
- ✓ **When Do You Have to File Exon-Florio Notice**
- ✓ **Special Attention for Critical Infrastructure or Critical Technology**
- ✓ **How Rules Apply to Foreign Government-Controlled Acquisitions**
- ✓ **Key Considerations When Negotiating Mitigation Agreements**
- ✓ **Consequences of Failing to Comply with Mitigation Agreement**
- ✓ **How to Navigate the CFIUS Maze**
- ✓ **How Foreign Governments Are Reacting to U.S. Requirements**
- ✓ **Potential Impact on Your Foreign Investments Abroad**
- ✓ **What You Need to Do to Prepare for CFIUS Review**
- ✓ **Will New Rules Discourage Foreign Investment in U.S.**
- ✓ **What Personal Investor Information You May Need to Provide**
- ✓ **What Will Trigger a Full 45-Day CFIUS Review**
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- ✓ **Benefits of Pre-Notice Filing of Investment Plans**
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