

Washington Tariff & Trade Letter®

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. 37

September 17, 2007

U.S. FORMALLY OBJECTS TO KAZAKHSTAN'S NEW IMPORT RULES

New Kazakhstan rules requiring importers to provide copies of their export declarations for items being imported into the country have drawn official objections from the U.S. Trade Representative's (USTR) office and Commerce's International Trade Administration (ITA) (see **WTTL**, Sept. 10, page 4). The Census Bureau and the U.S. Ambassador to Kazakhstan also have written to the Kazakhstan government protesting the new requirements, which ask for copies of Shipper's Export Declarations (SED) or Automated Export System (AES) filings.

"Our ambassador in Astana sent a letter to the Minister of Finance on the issue, and he has also raised it with the prime minister," said USTR Spokesman Sean Spicer. The government of Kazakhstan "is aware of the issue, and we are working with them to resolve the problem as soon as possible," he added. An ITA spokesman said his agency "takes this issue very seriously."

The chief of Census' Foreign Trade Division, William Bostic Jr., wrote to the head of Kazakhstan Customs to explain the SED regulations and ask that the information not be required as a condition for import. "Companies exporting from the United States have recently brought to our attention that their shipments of merchandise are unable to clear Kazakhstan Customs because of a new law requiring U.S. exporters to provide copies of their Shipper's Export Declarations," Bostic wrote. Under Census regulations this information is confidential "and as such cannot be released to anyone without a national interest determination being made by the Secretary of Commerce or his designee, the Director, U.S. Customs Bureau," he explained.

"By requesting copies of SEDs, Kazakhstan Customs is requesting that U.S. companies violate U.S. law," Bostic asserted. "The U.S. Customs Bureau is committed to maintaining the confidentiality of the SED information reported to the U.S. government. We urge you to ensure that U.S. companies are treated fairly and that their goods are cleared promptly," he wrote.

BIS SEEKS TO REASSERT JURISDICTION FOR FAA-CERTIFIED AVIATION ITEMS

The Bureau of Industry and Security (BIS) is turning to industry to get help in reasserting its jurisdiction over aviation products that have been certified by the Federal Aviation Administration (FAA). BIS has had a long-running battle with State's Directorate of Defense Trade Controls (DDTC) over export licensing jurisdiction for aviation products, with the dispute hitting its peak over licensing requirements for the QRS-11 standby sensors in commercial aircraft (see **WTTL**, June 25, page 4). Section 17(c) of the Export Administration Act (EAA) places jurisdiction for FAA-certified equipment under Commerce, but this has not prevented

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

DDTC from claiming that its “see through” rule makes a final aviation product subject to the International Traffic in Arms Regulations (ITAR) if any component is on the U.S. Munitions List (USML). BIS has provided its views on Section 17(c) in Interpretation 9 in Part 770.2 of the Export Administration Regulations (EAR).

BIS Assistant Secretary Matthew Borman Sept. 12 asked the BIS Transportation Technical Advisory Committee (TransTAC) for help in producing an annotated version of Interpretation 9 that the agency could use in its discussions with DDTC on the issue. The annotated supplement would not be for publication but only for use in interagency discussions, Borman explained.

He said BIS wants to have a list that is linked to the FAA website so State “would not have to take our word for it” that items are FAA certified. The FAA list would “show this is an objective standard,” he noted. Borman said BIS would like two or three examples for FAA certified items for each of the product categories identified in Interpretation 9.

BIS is also reviewing a proposal for revising Interpretation 9 submitted by an Aerospace Industry Association (AIA) working group. Interpretation 9 has not been updated in about 20 years. Borman acknowledged that some aviation parts may have been designed originally for military use and that some models of the same product may be built for the military while other models are for civilian use. Even if a part is military, if it is in an FAA certified system, “you should not need an ITAR license,” Borman asserted.

There is also growing congressional interest in the 17(c) issue. In a Sept. 13 letter to President Bush, 34 House members urged the president to resolve the dispute between BIS and DDTC and to confirm BIS jurisdiction over FAA-certified aviation items. “In the absence of the application of 17(c), U.S. civil aviation manufacturers must play a guessing game with the U.S. export control system over how a government regulator might classify their products,” said a statement from Rep. Don Manzullo (R-Ill.), who along with Rep. Joe Crowley (D-N.Y.), organized the letter. “By offering clarification and restoring the application of 17(c), we will help this industry and its workforce remain strong,” said Crowley.

SCHWAB SAYS APEC STATEMENT ON DOHA IS DIFFERENT

USTR Susan Schwab contends a declaration issued Sept. 9 by leaders at the Asia-Pacific Economic Cooperation Forum (APEC) on the Doha Round is different from the dozens of other declarations issued by world leaders in the last five years in support of the World Trade Organization (WTO) talks (see **WTTL**, Sept. 10, page 3). The final APEC declaration underlined the importance of bringing the talks to “an early and successful conclusion.”

Schwab said the key statement in the declaration endorses negotiations based on draft texts released in July by the Doha Agriculture Committee Chairman Crawford Falconer and Non-Agriculture Market Access (NAMA) Committee Chairman Don Stephenson. “We will instruct our ministers and officials to resume negotiations on the basis of the draft texts tabled by the chairs of the negotiating groups on agriculture and non-agriculture market access,” the APEC leaders declared.

“This statement is different,” Schwab asserted. “First of all, it is important that leaders of major trading countries embrace [Doha] and they did as their top trade priority,” she told reporters Sept. 10. “Second, if you look at the text of the declaration, the signal that it sends to the rest of our trading partners about negotiations on the basis of these texts,” she added. “There have been quit frankly some obstructionist members of the WTO who don’t want the talks to succeed and don’t want to negotiate on the basis of these texts,” Schwab said.

A third point in the APEC declaration is “that everyone of us needs to show the flexibility and political will to get this done, not just the developed countries,” she noted. “There is a role to play by the developing countries, in particular the advanced developing countries, to make a

positive contribution,” she said. “All of this is nuance, but it was a very very important message and we’ll see if it resonates. You don’t know if it resonates until the negotiations move forward,” she conceded. Schwab noted that talks in Geneva have just restarted and it may be a couple of weeks before the U.S. will learn “whether our trading partners are negotiating in good faith on the basis of these texts or whether this notion that somehow they –quote – ‘have to be revised’ is a euphemism for being trashed.”

CENSUS ISSUES “BEST PRACTICES” ADVICE FOR AES COMPLIANCE

Some exporters with the “Best Practices” for complying with Automated Export System (AES) requirements have added their own software to the Census Bureau filing software to add screening elements to ensure AES compliance. “Several companies have added software to add more edits on top of AES edits to catch errors going into AES,” William Bostic Jr., chief of Census’ Foreign Trade Division told the BIS Regulations and Procedures Technical Advisory Committee (RAPTAC) Sept. 11. Based on visits to firms with high AES compliance rates, Census has developed AES Best Practices guidance and posted it on its website.

The Best Practices guidance advises exporters to set up training and mentoring program and to develop their own “frequently asked questions” to provide “explanations and examples designed to clarify complex situations or common misunderstandings specific to your company.” It also suggests creation of an “Export Checklist” that identifies “what the staff must do prior to submitting a shipment transaction via the AES.” It also recommends that the software firms develop or purchase for AES filing “should contain certain edits that will flag/reject invalid export information before it is submitted.”

Bostic said Census has completed visits to 42 exporters that had unacceptable AES compliance rates (see **WTTL**, June 18, page 2). About one-third of the firms have already made corrections to their practices to bring them up to the 95% compliance rate the agency considers acceptable. The firms that were visited were given 90 days to get into compliance. “We have had conversations with BIS about any companies that fail to come into compliance within 90 days,” he noted. For companies subject to BIS regulations, Census “will refer these companies to BIS so they can take a look at these companies as it relates to their regulations,” he said.

DEAC TOLD DEEMED EXPORT RULES LACK LEGAL BASIS

At their sixth and final public meeting in Washington Sep. 10, members of the Deemed Export Advisory Committee (DEAC) heard testimony claiming that BIS has no legal authority to impose licensing requirements under its “deemed export” regulation. DEAC members also heard Commerce Secretary Carlos Gutierrez urged them to apply a “sense of practicality” to their recommendations. In his statement at the start of the meeting, Gutierrez appeared to be separating himself from proposals to tighten the deemed export rules, while acknowledging the importance of foreign scientists and mathematicians to industry and academia. The DEAC expects to submit its report to Gutierrez by the end of November (see **WTTL**, Aug. 6, page 1).

Trade Consultant William Root told the DEAC that Section 16(5)(C) of the Export Administration Act (EAA) defines an export as the transfer within or outside the U.S. “with knowledge or intent that the goods or technology will be shipped, transferred or transmitted to an unauthorized recipient.” EAA provisions remain in effect under an executive order invoking the International Emergency Economic Powers Act (IEEPA).

“The ‘outside the United States’ wording in Section 202(a) of the International Emergency Economic Powers Act, which is the current authority for the Department of Commerce to control exports, arguably means that Commerce now has no authority to control domestic transfer to a foreign national within the United States for which there was no reason to believe

that an actual export to that person's home country would follow," Root testified. He suggested that the Export Administration Regulations be amended to make Section 16(5)(C) explicit and require intent to export as a condition for requiring a license.

Gutierrez attended the start of the meeting and BIS Under Secretary Mario Mancuso sat through the entire session. Gutierrez said he recognized the dual requirements for attracting skilled foreign scientists and mathematicians to the U.S. and maintaining national security. "The challenge here, of course, will be recognizing that the world has changed. When we did these rules in the past we had a different world, perhaps a simpler world," he said.

"We need to think of ways where we can be flexible and able to adapt to a world that is changing," Gutierrez declared. He told the DEAC that one thing he would encourage "is a sense of practicality" in its recommendations. "We know that sometimes many of these rules are over designed. They sound great in a room or they sound great on paper, but when it comes down to implementing them, people ultimately end up getting confused, it becomes complex, and because of that reduces the effectiveness of the policy," Gutierrez said.

Testifying for the American Association of Exporters and Importers (AAEI), Melvin Schwechter of LeBoeuf, Lamb, Greene & MacRea, told the DEAC that deemed export rules make it difficult for U.S. companies to share controlled data freely among their U.S. and foreign employees. "AAEI believes there should be a license exception for the export and reexport of controlled data to foreign national employees of foreign affiliates of U.S. companies and foreign national employees of U.S. companies," he testified. AAEI also said firms need to be able to share certain technology with international standards-setting bodies. When these standards are published, they should be considered public domain and not subject to deemed export rules.

* * * BRIEFS * * *

VEU: BIS reportedly is ready to publish at least five Verified End User (VEU) authorizations for customers in China under its new China rule. Among first firms to get VEU will be Applied Materials.

EXPORT REFORMS: Based on roundtable discussion of former U.S. export control officials and industry executives in December 2006, Hudson Institute Sept. 11 issued report called, "Turning Obstacles into Opportunities." Report identifies 26 "Opportunities" for improving ITAR export controls.

PERU: Senate Finance Committee Sept. 11 held hearing on pending U.S.-Peru FTA with industry and public sector witnesses. Senate appears likely to move accord before House.

PANAMA: ITC report Sept. 11 on economic impact of U.S.-Panama FTA said primary impact of deal would be to increase U.S. exports to Panama. "Nevertheless, the overall impact of the U.S.-Panama TPA on the U.S. economy would likely be small because of the small size of the Panamanian market relative to total U.S. trade and production," it concluded.

ANTIBOYCOTT: Horner Xpress Worldwide, Inc. of Fort Lauderdale, FL, has agreed to pay \$8,600 civil fine to settle four BIS charges that it violated antiboycott rules by providing boycott-related information to customer in Qatar and failing to report requests to BIS.

AUSTRALIA GROUP: BIS in Sept. 12 Federal Register amended EAR to implement changes adopted by Australia Group in June 2007 to list of chemicals, pathogens and biologics subject to multilateral controls. It also adds Croatia to list of AG members. Rule identifies Barbados as State Party to Chemical Weapons Convention (CWC) and, for CWC purposes, clarifies that "China" also includes Macau and Hong Kong.

LEMON JUICE: ITA has reached proposed suspension agreement with exporters of lemon juice from Mexico and Argentina to suspend antidumping case and impose minimum selling prices.

TRUCKS: Senate Sept. 11, by 75-23 voted, adopted amendment to pending transportation bill to bar use of any funds to implement pilot program to allow Mexican trucks into U.S. (see WTTL, Sept. 10, page 4).

SUGAR: ITC Sept. 7 released its report on impact of lifting restrictions on imports of sugar from Mexico under terms of NAFTA. Most of text, including findings and recommendations, was expunged from report.