

# 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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Vol. 24, No. 37

September 20, 2004

## **BIS SET TO PROPOSE “SAFE HARBOR” RULES FOR EXPORTERS**

The Bureau of Industry and Security (BIS) intends to publish a proposal in the next few weeks to establish a process through which exporters could get the agency’s formal confirmation that they have adequately resolved any “red flag” concerns about a potential customer and won’t be subject to any enforcement action, if the export later is found to have been diverted to a prohibited end user or end use. The proposal would create a “safe harbor” from legal liability under the Enhanced Proliferation Control Initiative (EPCI) rules which require exporters to ensure that a perspective customer or end use doesn’t trigger a licensing requirement because it raises one of the red flags identified in the regulation (see **WTTL**, April 19, page 1).

“All agencies have now cleared off on this proposed rule, emphasizing that it is a proposed rule,” BIS Assistant Secretary Peter Lichtenbaum told the agency’s Regulations and Procedures Technical Advisory Committee. BIS hopes to publish the proposal before its annual Update 2004 conference planned for Oct. 4-5.

A key element of the proposal will be a revision to the “knowledge” standard in the regulation. The change would make clear that “we consider the knowledge standard to be met when a reasonable person in that situation would conclude, whatever the test is, that it is met,” Lichtenbaum stated. The proposal would establish a process for obtaining a safe-harbor certification that the agency agrees with the exporter’s assessment that a license is not needed. “We thought it best to provide a clear 45-day timed route to getting a safe harbor from any administrative penalties for any knowledge-based violations,” he said.

## **BIS CLOSER TO NEW COMPUTER CONTROLS TO REPLACE MTOPS**

BIS is moving toward an agreement with industry and Defense on a plan to replace the current metric for controlling computer exports with a simpler calculation based on the speed of the microprocessors in each computer. After years of internal government debate and discussions with industry, BIS officials say they are nearing consensus on a technical concept that would replace the current CTP measurement of million theoretical operations per second (MTOPS) with what they call “weighted teraflops” (WT) or trillion floating operations per second.

“This has been among the more pleasant surprises,” Bernie Kritzer, director of the BIS Office of National Security and Technology Transfer Controls, told the Regulations and Procedures Technical Advisory Committee (RAPTAC) Sept. 14. “After many, many years of trying, we are very close to an agreement on a computer metric to hopefully replace MTOPS,” he declared. BIS technical staff has been working with the agency’s Information Systems Technical Advisory

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**Published weekly 50 times a year except last week in August and December. Subscription in printed or electronic form is \$597 a year in U.S., Canada & Mexico; \$627 Overseas. Additional copies with full price subscription are \$75 each.  
Circulation Manager: Elayne F. Gilston**

Committee (ISTAC) on the details of the WT formula and also have been talking with computer industry executives. Industry sources are more cautious about the status of these technical talks. "This is nothing more than a draft of a technical idea that has a lot of work ahead of it," one industry source told WTTL. "We're at the beginning of something, not at the end," he added. After the RAPTAC meeting, Kritzer told WTTL he agreed with that assessment. An agreement on the metric and how to revised the regulations are "a way off," he said.

While the technical work on the new metric has moved forward, there is still uncertainty about how BIS will handle the political and international questions that surround the MTOPS formula. Current law requires BIS to conduct post-shipment verifications on computers based on MTOPS. It is not clear yet whether BIS will seek a change in the statute before implementing any change to its rules.

In addition, BIS may need to seek international agreement from the Wassenaar Arrangement, which imposes multilateral controls based on MTOPS. One BIS source said it is "too early" to bring the WT idea either to Congress or Wassenaar.

While the details of the WT formula are still being worked out, industry sources have praised the idea. "We basically believe it would be an improvement over current MTOPs," one industry executive told WTTL. WT would be a lot easier to calculate than CTP and require fewer assumptions and extrapolations, he noted. The "weighted" portion of the formula would adopt some of the rules for aggregation that are now in the CTP formula to adjust microprocessor speeds to account for various computer architectures and lost performance when more than one chip is included in a unit. Industry sources say the methodology would be more transparent than the CTP calculation because the speeds at which microprocessor do numerical calculations are readily accessible in computer literature and specifications.

## **ITA WANTS TO STREAMLINE SEPARATE RATES FOR NONMARKET ECONOMIES**

The International Trade Administration (ITA) is making another stab at clarifying the procedures its uses to determine whether individual exporters in nonmarket economies (NME) should be given a separate antidumping duty rate. It also wants to prevent the diversion of exports to firms that aren't subject to the duties. The agency Sept. 15 posted a call for comments on three potential changes it might make in its regulations to address these issues.

This is the second attempt ITA has made to get public reaction to changes in the NME rules as part of a broader examination of the application of NME rules to China. An earlier concept paper drew mixed reactions from the trade bar, with comments depending on whether the law firms represented U.S. petitioners or Chinese respondents (see **WTTL**, June 7, page 3).

The latest notice asks for comments on a procedure to allow exporters to file applications at the beginning of any investigation to claim they are eligible for separate rates because they are both *de jure* and *de facto* independent of government control. If such a process is established, ITA would create a standard set of questions exporters would have to answer. Another change would revise the way ITA assigns duties to exporter-producer combinations. The third proposal would deal with resellers in third countries, such as Hong Kong, Taiwan and Malaysia, and would establish a "rebuttable presumption that NME producers shipping subject merchandise through third countries are aware that their goods are bound for the United States."

## **LATTICE AGREES TO PAY \$560,000 FINE FOR CHIP, DATA EXPORTS TO CHINA**

Firms operating in China need to be aware of how U.S. export controls can be violated not only by exports but also by the provision of technical data or training of Chinese nationals. Lattice Semiconductor of Hillsboro, Oregon, learned that lesson in the process of reaching a settlement agreement with BIS to resolve charges that it failed to get licenses for exports and deemed

exports to China. The firm agreed to pay a \$560,000 civil fine to settle the case. According to BIS, Lattice exported extended temperature range programmable logic devices to China without approved licenses on six occasions in 2000 and 2001. It also brought five Chinese nationals to the U.S. and provided them training on controlled technology without a deemed export license. On another occasion, it sent related technical data to China without a license.

Lattice has extensive sales in China and operates a design and sales center in Shanghai. It discovered the unlicensed exports and training through its own internal control mechanisms, a company spokesman told WTTL. After their discovery, the activities were voluntarily disclosed to BIS. "We have a process and procedures to catch these things, but clearly they were not foolproof," the spokesman added. "We made subsequent adjustments in the procedures so there will be no repeat of this," he said.

Because six of the alleged violations occurred while the Export Administration Act (EAA) had been temporarily renewed, they could have drawn fines of \$120,000 each. All together the potential fine on Lattice could have been \$789,000. Thus, BIS rewarded the firm with a 29% discount for its voluntary self-disclosure of its actions.

### **BIS WILL REVISE LIBYA, IRAQ RULES TO ADDRESS "INSTALLED BASE"**

BIS intends to issue regulations to establish a two-tier policy on export enforcement for items that may have been illegally exported to Iraq and Libya before the recent liberalization of controls on these countries. Exporters have questioned the agency about how it will treat the discovery of so-called "installed base" equipment and what legal requirements will be imposed on firms that find such goods and therefore have a "reason to know" about an illegal activity under Prohibition 10 of the Export Administration Regulations (EAR).

"Our proposed rule would offer some relief from the general application of Prohibition 10 in those situations without compromising our ability to prevent unlawful diversion of U.S. items and prosecute those who have been involved in those diversions," BIS Assistant Secretary for Export Administration Peter Lichtenbaum told the agency's Regulations and Procedures Technical Advisory Committee (RAPTAC) Sept. 14.

"What we are working on and have circulated to other agencies – so this is obviously at the early stages – is a two-tier system based on the sensitivity of the item," he explained. Items that are EAR99, AT-only or under National Security (NS) controls but not on the Wassenaar Sensitive Items List can be shipped as No License Required (NLR) or under a license exception, he said. "For that range of items, General Prohibition 10 activities could be performed but with an after-the-fact reporting requirement to simply let us know what U.S.-origin items folks are coming into contact with," Lichtenbaum stated.

"Activities with respect to other items that are more sensitive would continue to require a license in order to engage in General Prohibition 10 activities," he added. "That basically reflects the common-sense judgment that the stakes are higher with respect to certain items than others, as well as the likely burden on industry from the prior license requirement can be reduced if we can narrow the field to the more sensitive items," Lichtenbaum explained.

Additional changes in the Libya rules will correct a mistake which said BIS would apply a policy of denial to aircraft and oil well perforator exports. The correction will reflect guidance on the BIS website which says the policy is case-by-case review. BIS also will revise its treatment of vessels. "We think it is appropriate to allow for the revision of AVS License Exception to allow for the temporary sojourn of vessels," Lichtenbaum said. A technical change in the encryption rules would make software in Export Control Classification Number (ECCN) 5D992 eligible for license exception TMP as tools of trade. BIS is also talking with other export control agencies about potential changes in the Iraq regulations to revise the

current prohibition on the re-transfer within Iraq of items subject license exceptions. "We are talking with other agencies to see how we can best address that concern," he said.

## OFAC DEVOTES MORE STAFF TO CUBA THAN OTHER RISKY COUNTRIES

Treasury's Office of Foreign Assets Control (OFAC) devotes more personnel to enforcing sanctions on Cuba than to any other country or group, the department reported in response to a request for such information from Sen. Max Baucus (D-Mont.). OFAC assigns 21.43 full-time equivalent employees (FTEs) to work on Cuba programs, compared to 16.10 FTEs for Al Qaeda, 15.84 FTEs for the former Iraqi regime and 13.62 FTEs for Iran.

Baucus released the OFAC information Sept. 13 just as lawmakers in the House were preparing to propose an amendment to a pending appropriations bill to bar use of any appropriated funds to enforce the ban on travel to Cuba. The amendment's sponsor, Rep. Jeff Flake (R-Ariz.), decided to withdraw the amendment when it became apparent it would not pass. The renewed focus on OFAC came just as its director Richard Newcomb announced his retirement Sept. 13. He served in the OFAC post for 17 years.

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

MANDATORY AES: Harvey Monk, director of Census foreign trade division, said Sept. 14 that drafting of proposal to change federal trade statistics regulation to impose mandatory use of Automated Export System (AES) for all exports continues to face delays. He said he does not expect final rule to be published until first quarter of 2005 and mandatory AES won't be required until fall of 2005.

RICE: USTR's office in Sept. 10 Federal Register sought public comment on list of European Union (EU) exports that could face retaliatory tariffs if EU doesn't provide adequate compensation for lost trade U.S. rice exporters expect as result of adoption of EU rice import regime by 10 nations that joined EU in May. Hearing will be held Sept. 24.

LIBYA: President Bush Sept. 10 issued memorandum saying he has received "reliable assurances that Libya will not acquire or develop nuclear weapons or assist other nations in doing so." Hence, exports to Libya will be eligible for financing by Ex-Im Bank, he declared.

CUBA: BIS staffers say they are working on technical amendment to Cuba travel rules that were published in June to revise restrictions on personal baggage (BAG) so 40-pound weight limitation won't include personal clothing articles, wheelchairs or crutches. Cuban-Americans protested original wording.

IRAQ: Although Iraq has not been taken off official "terrorist" list, "its terrorist status is currently rendered inapplicable," BIS regulations writer Hillary Hess told RAPTAC Sept. 14. "I got that from the lawyers," she added. Under BIS regulations issued in July, Iraq was taken out of Country Group B, but still is in Country Group D:1.

TV SET TOP BOXES: Court of Appeals for Federal Circuit (03-1052) Sept. 16 reversed, vacated or remanded most of ITC's ruling in Section 337 case involving alleged infringement of patents on TV Set Top Boxes. While appellate panel upheld one part of ITC decision, it said ITC erred in finding Scientific-Atlantic did not infringe other patents held by Gemstar-TV Guide International and Starsight Telecast.

AIRBUS: U.S.-EU talks in Brussels Sept. 16 made no progress toward reaching new agreement to replace controversial aircraft subsidy accord that allows EU to provide some subsidies to Airbus. Talks apparently got bogged down in debate over what constitutes subsidy and whether Boeing gets subsidized aid (see **WTTL**, Aug. 23, page 2). Threats of cross complaints at WTO keep talks at stand-off.

CHINA: Four groups representing U.S. apparel importers and retailers wrote to Commerce Under Secretary Grant Aldonas Sept. 13 to protest his statements that department would accept safeguard petitions from textile industry for Chinese products that won't come off quota until January 2005 (see **WTTL**, Sept. 13, page 3). Groups note CITA ruling in August, which rejected safeguard petition on woven cotton gloves, because they were covered by quotas. "CITA will not take action under China textile safeguard on products that are subject to specific limits, as such imports are already limited," CITA declared.