

# 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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## CENSUS ISSUES WARNINGS TO FIRMS STILL FILING PAPER SEDs

The Census Bureau and Customs and Border Protection (CBP) have sent over 1,000 joint letters of violation to U.S. exporters that have continued to file paper Shipper's Export Declarations (SED) for products on the Commerce Control List (CCL) and U.S. Munitions List (USML). New rules that went into effect in October require the submission of these SEDs electronically via the Automated Export System (AES). Some firms still may be filing paper SEDs because they are not aware of the new rules or because the paper SED may be a duplicate of the AES filing, one Census official conceded. No action is being taken against these firms for now.

Initially, about 800 letters were issued for violations for exports in November, but the number dropped to 200 in January, according to Gerard Horner, chief of Census' automated export system branch. Compliance with the mandatory AES rules "was not as smooth as we thought it would be," Horner admitted.

Some of the duplication of paper SEDs and AES filings may be caused by freight forwarders who are handling routed transactions or because Customs agents are asking for the paper SEDs. Census has set up a program to determine if the paper submissions are duplicates, Horner told the BIS Regulations and Procedures Technical Advisory Committee (RAPTAC) March 2.

The letter being sent to principal parties in interest and freight forwarders notes the submission of the paper SEDs. Filing paper SEDs for CCL or USML items "constitutes violation of the requirements of the Foreign Trade Statistic Regulations," it states. "The purpose of this letter is to ensure that your company is aware of the requirement to submit electronic export information via AES. Failure to comply with these regulations may result in a shipment being seized, delayed and/or penalties," it warns.

## NEW COSTA RICAN IMPORT REQUIREMENT COULD BLOCK U.S. EXPORTS

Exporters could face problems trying to ship goods to Costa Rica starting March 6 when new Costa Rican legislation goes into effect requiring importers to provide a copy of the export documentation that was filed for the products when they left their country of origin. Ahead of the deadline, officials at the U.S. embassy in Costa Rica were scrambling to forestall the implementation of the new requirements. "At present, application of this requirement on U.S. exporters has been suspended," Neena Moorjani, press secretary at the U.S. Trade Representative's (USTR) office, told WTTL at press time March 5. For U.S. exporters, the required documentation is the Shipper's Export Declaration (SED). But the Census Bureau has issued a memo to U.S. principal parties, freight forwarders and common carriers indicating that it has

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refused a request from Costa Rica to provide copies of SEDs, which Census considers confidential. The U.S. is not the only country protesting the new requirement. Representatives of the European Union (EU) and several Central American countries have also complained to Costa Rica about the new rules, a Costa Rican diplomat told WTTL.

Costa Rica enacted the new import law about the same time it was completing talks to participate in the Central American Free Trade Agreement (CAFTA). The law is intended to prevent false import valuations for tariff purposes. "Although we are very supportive of Costa Rica's efforts to combat corruption and decrease fraud, both parties wish to ensure that such objectives are met in ways that are consistent with the spirit and commitments in the CAFTA," Moorjani said.

Explaining its decision to reject the Costa Rican request for SED data, Census said it is required to treat the information as confidential. Under the provisions of the Foreign Trade Statistics Regulation "the information on the SED may not be disclosed to anyone except the U.S. principal party in interest or their agent and only when such a copy is needed to comply with United States official legal and regulatory export control requirements," wrote Census Foreign Trade Division Chief C. Harvey Monk Jr. in the memo.

"Therefore we are requesting that you do not provide the SED or Automated Export System record to the government of Costa Rica," Monk stated. "Providing this information to the government of Costa Rica would be contrary to the national interest as it would seriously impact further attempts to complete the mission of the Census Bureau," he added. Despite the request from Census, there apparently is nothing that would prevent an exporter from providing a copy of the information it submitted on the SED to Costa Rica without the exact copy of the SED form. Whether Costa Rica would accept such a copy is not yet known.

## **SENATE FINALLY APPROVES MISCELLANEOUS TRADE BILL**

The star-crossed miscellaneous tariff bill (S.671), which has been pending for two years, finally cleared the Senate March 4, but its fate is still uncertain. Some Senate Democrats reportedly are objecting to the appointment of representatives for a House-Senate Conference Committee to iron out differences with the House version (H.R. 1047) of the legislation because they are still upset about the way they were shut out of the conference on Medicare last year.

As with most miscellaneous tariff bills, S. 671 includes scores of noncontroversial duty suspensions or reductions for specific imports that don't have domestic competition or aren't opposed by domestic producers. The measure also includes new Generalized System of Preference benefits for hand-made rugs from Afghanistan and Pakistan, extends normal trade relations to Serbia and Montenegro, directs Customs to reliquidate some incorrectly liquidated entries, and corrects 2002 Andean Trade Preference Act provisions on certain luggage and work gloves.

## **COMMERCE DEFENDS OLD CVD POLICY ON PRIVATIZATION**

In a strange, but not unprecedented case, Commerce's International Trade Administration (ITA) is defending a policy it has already abandoned for applying its countervailing duty (CVD) regulation to the privatization of state-owned companies. In oral arguments before the Court of Appeals for the Federal Circuit March 3, Commerce Chief Counsel for Import Administration John McInerney noted that ITA has already revised its policy for prospective cases to comply with a World Trade Organization (WTO) ruling which found its previous policy inconsistent with global trade rules (see WTTL, June 30, 2003, page 3). The old policy, however, will continue to be applied to orders issued before the methodology was changed.

The appellate court is weighing a government appeal from two September 2002 decisions by Court of International Trade (CIT) Judge Judith Barzilay in cases involving the privatization of

French steelmaker Usinor (see **WTTL**, Oct. 7, 2002, page 4). Although Barzilay sustained the ITA remand rulings in *Allegheny Ludlum* and *GTS Industries*, the agency reached its decisions begrudgingly only after two earlier rulings were overturned. The government appealed the case because it still disagreed with the basis for the judge's opinion.

At issue is whether the French government's sale of Usinor to the public is different from the sale of a company's assets. ITA contends Usinor remains the same person which is subject to countervailing duties imposed on the firm prior to privatization. McInerney argued that if the mere sale of stock extinguished the subsidy given to Usinor, then the sale of a single share of stock on the stock market would cause such a change and that would be "an absurd result."

Appellate Judges Randall Rader and Paul Michel pressed McInerney hard on how the government's position squares with a previous Federal Circuit ruling in *Delverde III*. In that decision, the court said ITA must examine the facts and circumstances of the privatization transaction itself to determine whether previously bestowed subsidies pass through to new owners. McInerney argued that *Delverde III* differed because it dealt with the sale of assets. The cases before the court deal with the sale of the company, he said. Whether stock buyers paid a fair-market value for the new shares of Usinor was irrelevant, McInerney stated. The confusing difference between the sale of the company and the sale of assets led Judge Michel to extend McInerney's time for presenting his case. "We need more help," Michel said.

Judge Rader also asked how the 1804 Supreme Court ruling in *Charming Betsy* applied to ITA's treatment of the "same-person" rule. *Charming Betsy* calls for U.S. laws to be consistent with international laws whenever possible. In this case, argued Kathleen Cannon of Collier Shannon Scott, which represents Allegheny Ludlum, the specific U.S. statute takes precedence. The WTO agreement on subsidies didn't specifically address the same-person issue, she said. The issue was only an interpretation of WTO rules by a dispute-settlement panel.

## **MIDDLE EAST POLICY PROGRESSES WITH MOROCCO PACT, BAHRAIN TALKS**

The U.S. added another free trade agreement (FTA) to its trade scorecard March 2 with the conclusion of an agreement with Morocco. During the same week, it made progress in a second round of talks on an FTA with Bahrain. USTR Robert Zoellick said he hopes other countries in the Middle East will want to dock onto these agreements just as the Dominican Republic is expected to become part of the Central American Free Trade Agreement.

"The key thing is to get something started," he said. "A lot of people in the United States don't recognize how important it is to get things done, because then people in this region, who have heard a lot of words, can see practical reality. If by the end of the year we can point to having Jordan and Israel, Morocco in the Magrev, and Bahrain in the Gulf, that will show reality in the region," he said. The U.S. is expected seek talks with Egypt, Yemen and Kuwait.

In the talks with Bahrain, the U.S. has already agreed not to include an investor-state dispute settlement provision because it has an existing Bilateral Investment Treaty (BIT) with the Persian Gulf state. "For that reason, we have decided not to undertake new obligations per se in this free trade agreement," said Assistant USTR Catherine Novelli. "We don't need to reinvent the wheel," she added. In contrast, investment provisions are included the Morocco FTA, because its investment agreement with the U.S. was not up to current standards.

As U.S. negotiators complete more FTAs, there appears to be growing doubts that Congress will approve them this year. The chances for these pacts "is a little slim," Sen. Max Baucus told **WTTL** March 3. "People are not wild about trade agreements," he added. Even for a deal with America's strong ally Australia, "there are segments of the American economy that aren't hot about Australia too," Baucus said. While he would not say the accords are dead on arrival, he said "it's going to take some slogging to get through this."

**MANDATORY AES FOR ALL EXPORTS EXPECTED NEXT JANUARY**

The Census Bureau is aiming to require mandatory electronic filing for export information through its Automated Export System (AES) for all exports by Jan. 1, 2005. The statutory requirement for full AES follows the October 2003 application of AES requirements for items on the Commerce Control List (CCL) and U.S. Munitions List (USML). As part of its plans for publishing a proposal by the end of May to implement the requirement, Census will undertake a broad rewrite of the Foreign Trade Statistics Regulations (FTSR).

The coming rule will replace the Shipper's Export Declaration (SED) with a new filing called the Electronic Export Information (EEI). Census also plans to change the name of the FTSR to the Foreign Trade Regulations (FTR). After a 60-day comment period, the agency intends to publish the final revised rules by September and give exporters 90 days before it implements the requirements.

The rule will continue to allow firms to participate in the Option 4 system for post-departure filing of complete export documentation 10 days after departure of a shipment. The rules, however, will be revised so freight forwarders will no longer be permitted to file applications for Option 4 for exporters because Census thinks freight forwarders are abusing the system. Option 4 also will be limited to firms that export a minimum number of shipments annually. Census is working with State and BIS to get country group lists and proscribed country lists revised. Under current regulations, Option 4 is not available for certain proscribed countries, including China and the 15 former republics of the Soviet Union.

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

IRAQ: Rule moving CCL licensing requirements for exports to Iraq to BIS from OFAC is moving closer. "I am please to report that with the coordination and assistance from the State Department, we have consensus on what a regulation should look like," said BIS Assistant Secretary for Export Administration Peter Lichtenbaum. "There were some difficult issues, but we were able to work through them to make sure that the rule will comply with U.S. international obligations under the UN, while also insuring that the rules we apply don't interfere with the ability of companies to send items to Iraq," he told BIS RAPTAC meeting March 2. Before rule is published, President Bush is expected to issue executive order directing jurisdiction transfer. "Since the president originally instructed [Treasury] to apply the export controls to Iraq, there are two reason why the White House should say something," he explained. One is to delegate jurisdiction to Commerce and second is to provide clarity to exporters, Lichtenbaum noted.

SYRIA: Bush administration still plans to impose sanctions on Syria as required by legislation enacted last year. "We think we are getting very close on a recommendation to the president on how to implement [ban on dual-use and munitions exports to Syria] as well as provisions of the act requiring the president to chose two from a menu of six other sanctions, one of which is to cut all exports," said BIS Assistant Secretary Peter Lichtenbaum.

FSC/ETI: Senate began work March 2 on its version (S. 1637) of legislation to repeal FSC/ETI export tax law and replace it with new tax breaks for manufacturers and numerous other taxpayers. Most of three-day debate was taken up with amendment to bar government contractors from using offshore labor. Sponsored by Sen. Chris Dodd (D-Conn.), amendment passed by 70-26 vote. Senate will put aside measure week of March 8 and take it back up week of March 22 when it returns from short recess. Dozens of additional amendments are pending, but many of them may get wrapped up in manager's amendment, sources say.

LINE PIPE: Six U.S. steel firms March 3 filed antidumping complaints at ITA and ITC against imports of circular welded carbon quality line pipe from China, Mexico and South Korea.

MAGNESIUM: U.S. Magnesium Corp., United Steelworkers and Glass and Allied Industries Union filed antidumping petitions Feb. 27 at ITC and ITA against magnesium metals from China and Russia.

ADVANCE NOTICE: Customs in March 4 Federal Register extended dates for compliance with air cargo advance notice requirements, with new deadlines tied to location of airport.

CHINA: President Bush March 3 rejected advice from ITC to impose anti-surge safeguard sanctions on certain ductile iron waterworks fittings from China (see **WTTL**, Feb. 2, page 3).