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

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NEW OFAC CHIEF WERNER PROMISES MORE TRANSPARENCY

The new director of Treasury's Office of Foreign Assets Control (OFAC), Robert Werner, has embarked on a major makeover of the agency, reorganizing its staff, drafting new policy guidance, revisiting its enforcement guidelines, planning the consolidation of some rules, upgrading its information technology and working to improve the information it provides on specially designated nationals. "I am keenly aware and Treasury is keenly aware of the fact that our sanctions' program imposes a significant burden on the private sector," Werner conceded during a recent speech to a conference in Washington.

Werner said OFAC has been reorganized into three divisions: one covering licensing and enforcement, one for regulation writing and policy implementation and one for administration. It has also started to upgrade its information technology to install an enterprise content management system.

"We need to get out better guidance" on OFAC regulations and policies, Werner told the American Conference Institute. He noted, however, that "this is dangerous territory" for the agency. "Given the complexity of the OFAC programs and how fact-specific some of the issues are that we face, to answer a hypothetical creates the risk that someone can use that to either construct an evasion of the program or fit a very complex fact pattern within the law into the language of our general guidance," he said.

Werner also said OFAC intended to look at its enforcement guidelines. "At the end of the day there has to be a continuum in how we deal with violations of our programs," he said. OFAC enforcement measures would range from no action when a party voluntarily self-discloses a violation and has a "fantastic" compliance program in place, to a warning letter, to a fine, or to more serious action. "Of course, the most egregious action is where you don't self-disclose, we find the violation and you have no or a poor compliance program," Werner said. "In a case like that, we will take very aggressive compliance action," he warned.

JUDGE POSES TOUGH QUESTIONS ON CHINA TEXTILE SAFEGUARDS

Court of Appeals for the Federal Circuit Chief Judge Paul Michel grilled attorneys for both the government and U.S. retailers during oral arguments May 5 on the government's appeal of an injunction that had blocked Commerce's safeguard investigation of Chinese apparel imports based on the "threat" of market disruption. Although the CAFC had stayed the injunction issued by the Court of International Trade (CIT), its hearing was aimed at determining whether to vacate the injunction permanently (see **WTTL**, May 2, page 2). The CAFC order staying the

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CIT preliminary injunction strongly indicated that the government will prevail in its appeal against the suit brought by the U.S. Association of Importers of Textiles and Apparel (USA-ITA). While lawyers always caution against reading too much into questions judges ask during oral arguments, Michel's interrogations suggested that the court will vacate the preliminary injunction but remand the case back to the CIT for a ruling on the merits of the case.

Although Michel shared the bench with Judges Alan Lourie and Haldane Mayer, he did most of the questioning of Justice attorney Jeanne Davidson and Sidley and Austin attorney Brenda Jacobs, who represents USA-ITA. Michel repeatedly interrupted the two lawyers as they tried to make their statements. Michel said the suit before the court was "an unusual and difficult and exceptional case."

In her opening statement, Justice attorney Davidson called on the appellate court not only to vacate the injunction but also to dismiss the underlying USA-ITA suit. Michel questioned what basis the appellate court would have for ruling on the issues in the case when CIT Judge Richard Goldberg had not ruled on them. Michel complained that the government brief "wildly shot at 50 different areas" in seeking to vacate the CIT ruling. Davidson responded by saying the "silver bullet" in the case is the president's powers to conduct foreign policy and the CIT's lack of authority to interfere with those powers.

Jacobs got no gentler treatment from Michel, who challenged the USA-ITA assertion that procedures the Committee for Implementation of Textile Agreements (CITA) issued in May 2004 for handling safeguard petitions represented a policy that was subject to the Administrative Procedure Act. He questioned how the notice gave importers any private right of action to sue the government to block the safeguard cases. "I don't think you've shown that these procedures have the same effect as regulations," Michel said. "I'm having trouble understanding how you get a private right from publication of guidance," he said later in the hearing.

CENSUS TO DELEGATE ENFORCEMENT AUTHORITY TO OTHER AGENCIES

The Census Bureau has reached agreement with Bureau of Industry and Security (BIS), Customs and the Bureau of Immigrations and Customs Enforcement (ICE) to delegate to those agencies the authority to enforce proposed regulations mandating the use of the Automated Export System (AES) for filing export documentation for all exports. Census Director Charles Kincannon is expected to issue a directive shortly implementing the transfer of authority, which is needed because Census has no investigatory or law enforcement resources of its own.

Under the agreement, Census will refer violations of the mandatory AES requirements to BIS's Office of Export Enforcement (OEE) for investigation and prosecution. OEE also will enforce AES requirements as part of cases aimed at unlicensed exports. Customs and ICE will be able to launch investigations based on violations detected at U.S. ports or in documents presented to Customs.

With the comment period on the proposed mandatory AES regulations over, Census officials are aiming for publication of a final rule some time this fall, with the filing requirements going into effect during the first quarter of 2006. AES is already mandatory for exports subject to licensing under the Export Administration Regulations or International Traffic in Arms Regulations. The new requirements would cover all exports. Census officials say 94% of export documentation is already filed via AES, so the new rules would pick up the remaining 6%.

Census received 42 comments on its proposed rules, fewer than agency sources expected and with milder reactions than anticipated. Two main concerns were raised in the comments. The comments questioned how Census would determine liability for AES violations when filing requirements involved an exporter, freight forwarder and carrier or in routed transactions. They also said the language in several places in the regulation needed to be modified to reflect common usage in the trade community and to clarify several provisions. In its comments, the Customs and Border Protection Bureau (CBP) renewed a call for requiring mandatory AES

filing for all exports not just those subject now to filing a Shipper's Export Declaration (SED). "Without mandatory AES transmissions, shippers have the opportunity to use the SED exemption to circumvent export laws and shippers could possibly export items to unauthorized persons and destinations," Customs asserted. Census has rejected this idea in the past citing the large volume of low-value exports under \$2,500.

Several comments focused on proof of filing issues and the sharing of AES data. Shipper APL urged Census to amend the proposal to help make the AES Vessel Transportation Module (VTM) more efficient. "Without the electronic receipt of the proof of filing citation, both the automated efficiencies and prospective use or continued use of the AES VTM is seriously undermined," APL wrote.

INDICTMENT TARGETS EXPORT OF FORKLIFT TRUCK PARTS TO IRAN

The e-mail communications between two U.S. executives and an employee of an Iranian forklift truck manufacturer were included in evidence upon which a federal grand jury in Washington relied in an indictment April 28 of the three individuals on charges of violating the Iran trade embargo. Information from an unindicted co-conspirator who had already pled guilty to unrelated Iran embargo violations in 2004 also may have helped the government's case.

Indicted were Robert E. Quinn and Michael H. Holland, executives with Clark Material Handling Corp. (CMHC) of Lexington, Ky., and Mohammed Sharbaf, managing director of Sepahan Lifter Company of Esfahan, Iran. Sharbaf and Khalid Mahmood, the unindicted co-conspirator in the newest indictment, were indicted in 2004 on separate charges related to the export of engine radiators to Iran. Mahmood pled guilty to the 2004 charges and cooperated with the government in the new case, Justice said (see **WTTL**, Aug. 16, page 4).

The six-count indictment of Quinn, Holland and Sharbaf quotes extensively from e-mail the three sent each other during 2003 and 2004, detailing plans for Sharbaf to buy forklift truck parts from CMHC and have them shipped to Iran through Mahmood's firm, Sharp Line Trading, in the United Arab Emirates. The indictment includes one count of conspiracy and five counts of aiding, abetting and causing a violation of Title 18 of the U.S. criminal code. The e-mails note how some other executives of CMHC cautioned against doing business with Iran and may have tried to impede the sales.

MAY IN PARIS SUITS PORTMAN FOR FIRST TRADE FORAY

New U.S. Trade Representative (USTR) Rob Portman jumped head-first into the deep water during his first meeting with his international counterparts during and after the annual meeting of the Organization for Economic Cooperation and Development (OECD) in Paris May 2-3. In the OECD talks and during a mini-ministerial with more than two dozen other World Trade Organization (WTO) members, Portman helped negotiate a compromise agreement on a key technical issue in the Doha Round agriculture negotiations and got a strong endorsement from participants for making progress in talks on industrial tariffs and services.

The road to global trade agreements has been strewn with ministerial declarations that support progress in the negotiations but have had little impact on the final deals. The agreement on farm tariffs, which still awaits adoption by the full WTO agriculture negotiating committee, appears to clear a technical roadblock over how to translate non-ad-valorem duties, such as cents per pound, into ad valorem duties based on a percentage of value.

"Although a tough few days, at the end of the process, we have made gains not just in agriculture by being able to compare apples to apples, not apples to oranges...but we've also enabled the round to move forward with some enthusiasm and some energy," Portman told a press

conference in Paris. He recalled that during his confirmation hearing he had said he would try to “jumpstart” the round. “I hope that we’ve been able to do this as a group,” he said. The fact that countries may be able to compare these different types of tariffs during the coming request-and-offer phase of the negotiations does not mean they will agree on the formula for reducing any specific tariff. The European Union (EU) resisted a compromise on this issue up until the Paris meeting because it has many non-ad valorem tariffs that protect its farmers.

While in Paris, Portman had his first official meeting with EU Trade Commissioner Peter Mandelson. In addition to discussing the Doha Round, the two held a wide-ranging discussion of other transatlantic trade disputes, including the stalled talks over large aircraft subsidies. “On Airbus-Boeing, Mr. Mandelson and Mr. Portman agreed that a negotiated solution remained the most desirable option,” an EU statement said. “They agreed to continue their dialogue,” it added.

* * * BRIEFS * * *

EXPORT ENFORCEMENT: Two Chinese nationals, Jian Gua Qu and his wife Rua Ling Wang, pled guilty May 2 in Milwaukee, Wis., U.S. district court to one count each of conspiracy to export military radar and communications equipment to China without BIS approval. They had been arrested in September 2004 as part of government information that also charged Ning Wen and Wen Enterprises with violating U.S. export controls (see **WTTL**, Feb. 21, page 1). Wang agreed to pay \$1,500 criminal fine and was sentenced to time served (six and half months) since her arrest. Government will support \$2,000 fine and jail time for Qu, who will be sentenced in July. Trial of Wen and his wife, Hailin Lin is schedule for Sept. 14.

SOFTWOOD LUMBER: ITA in May 2 Federal Register issued final Section 129 determination amending its antidumping ruling on softwood lumber from Canada to meet directions of binational panel that found faults with original dumping margins. But final decision was not much different from preliminary ruling, with margins ranging from 16.35% for Weyer-haeuser to 3.92% for West Fraser and all-other rate of 11.54% (see **WTTL**, Feb. 7, page 4).

SAWBLADES: Diamond Sawblade Manufacturers’ Coalition filed antidumping petitions May 3 at ITC and ITA against imports of diamond sawblades from China and Korea.

CAFTA-DR: President Bush may finally be getting behind push for congressional approval of trade deal. He will meet in Washington May 12 with presidents of Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua. Separately, Commerce has now posted CAFTA-DR Gateway on its website, containing links to data on benefits of accord along with text of agreement.

AMORPHOUS SILICON: Pending any objections from members, Wassenaar Arrangement is expected to agree to working group proposal to extend new controls on amorphous silicon used in focal plane arrays for extra 30 months to December 2007. After two-year debate, regime in December adopted Validity Note imposing controls for just six months (see **WTTL**, Jan. 3, page 1). BIS regulation implementing new Wassenaar control has been delayed because State and Defense have objected to BIS draft which would decontrol thermal piles as part of rule changes. There is no U.S. production of these products, which are low-cost components of microwave ovens and made in China and Taiwan.

SUNSET REVIEWS: ITA in May 3 Federal Register said it was discontinuing policy of notifying parties by register mail of intent to initiate automatic sunset reviews. Starting in June, it will announce upcoming sunset reviews in monthly Federal Register notice.

BIS DENIAL ORDER: In May 6 Federal Register, BIS published order imposing three-year denial of export privileges on British firm, Petrochemical Commerce Co., Ltd., for its role in attempted export of gas compressor parts to Iran. PCC allegedly aided Chemical Industries Consolidated of Netherlands in attempting to obtain parts from Cooper Turbocompressor of Buffalo, N.Y. As part of separate settlement agreement with BIS, CIC agreed to five-denial of export privileges (see **WTTL**, March 7, page 4). Alerted to attempted export by Cooper’s export and anti-boycott coordinator, BIS set up undercover company, IMC Global, to offer sale of parts. Sting operation led to arrest and conviction of CIC representative. PCC is subsidiary of National Petrochemical Company, which, in turn, is owned by Iranian Petroleum Ministry.

STEEL: With dissenting opinion from Canadian member Serge Anissimoff, NAFTA Binational Panel April 29 sustained ITC remand determination finding U.S. industry injured by imports of dumped imports of corrosion-resistant carbon steel flat products from Canada.

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An Audio-Conference Briefing On New Changes to BIS Encryption Regulations

Featuring

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Why New BIS Encryption Regulations Matter

Changes the Bureau of Industry and Security made in December 2004 to its encryption regulations are already having a significant impact on exporters of encryption products and equipment with embedded encryption capabilities. For some companies and product, the revisions to the Export Administration Regulations (EAR) have eased their export authorization requirements, while for others, new licensing requirements apply. With increasing global competition in this important field, knowing what BIS requires, how to pass muster during one-time technical reviews and how to avoid licensing and product-review delays are crucial to your export plans. This important audio-conference will provide you with a direct briefing on the new regulations, how exporters are complying with them, how to demystify these complex rules, and where pitfalls and challenges still remain.

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