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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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WYSONG CRITICIZES THOSE WHO RECOMMEND AGAINST FILING VSDs

Bureau of Industry and Security (BIS) Deputy Assistant Secretary Wendy Wysong has defended the agency's decision to seek civil penalties against EPMedSystems of West Berlin, N.J., for allegedly making false statements on a voluntary self-disclosure (VSDs) (see **WTTL**, Nov. 20, page 4). In an article in the December issue of *The Export Practitioner*, our affiliated publication, Wysong criticizes attorneys who cite the case as an example of why firms might want to consider not filing a VSD or at least delaying a submission until they have all the evidence.

The administrative settlement, which included charges related to the export of cardiac products to Iran, was the first BIS case ever to include charges for making false or misleading statements in a VSD. The firm agreed to pay a \$244,000 civil fine to settle the 23 charges, including five citing false or misleading statements, that BIS include in its Charging letter to the firm.

“Much of the recent discussion, including some Internet postings, is not fully informed and misses the larger point that experienced export control practitioners understand: companies that file accurate and thorough VSDs in accordance with the EAR receive great weight mitigation,” Wysong says in her article. “It is hard to believe that honest exporters would, as some seem to suggest, think that a company that files a materially incomplete, misleading, and/or false VSD with BIS should receive the same mitigation as a company acting in good faith that files a complete and accurate VSD,” she argues.

“Most harmful are the conclusions of some that companies should never file a VSD with BIS unless they are ‘almost certain’ that BIS will otherwise discover the export and that a company should not file a preliminary voluntary disclosure at all due to the risk of being charged with misrepresentations,” Wysong contends. “Neither a statistical analysis of VSD cases for the last three years nor the EPMedSystems case itself supports those conclusions,” she states [**Editor's Note:** A copy of *The Export Practitioner* with Wysong's article, which also provides statistics showing the benefits of VSDs, will be sent without charge to WTTL subscribers on request.]

CONGRESS SET TO PASS SHORT-TERM EXTENSION OF TRADE PROGRAMS

At press time on Dec. 8, as the 109th Congress was rushing to end its short lame-duck session and adjourn permanently, the House was about to pass with bipartisan support a massive tax and trade package that would extend current trade preference programs and offer new trade benefits to Haiti, Vietnam and Africa. While the trade part of the package (H.R. 6406), appeared likely to pass both houses, strong last-ditch opposition to the Haiti provisions was

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being waged by the U.S. textile industry and unions and their supporters in Congress. With a late vote by the House, the legislation wasn't expected to get a Senate vote until the weekend.

After three long days and late nights of negotiations, members and staffs of the House Ways and Means Committee and Senate Finance Committee, along with House and Senate leaders, cobbled together a comprehensive package of tax law extensions, Medicare rule changes, oil and gas exploration provisions and trade amendments. The final text of the bill was eked out slowly as lawmakers were beginning debate on the measure, so the exact details of its provisions weren't known as the House debated the bill.

Included in the trade package are: a two-year extension of the Generalized System of Preferences (GSP) with provisions that would allow the president to restrict benefits for super-competitive imports; a six-month extension of the Andean Trade Preference Act (ATPA), with provisions – clearly aimed at benefitting Colombia and Peru and putting pressure on Bolivia and Ecuador – that would allow further extension for countries that complete the legislative process to implement free trade agreements; an extension of the third-country fabric provisions of the Africa Growth and Opportunity Act until 2012, with further easing of restrictions on use of African-produced textiles; new trade benefits for apparel imports from Haiti, including a liberal value-added provision and trade preference level; permanent normal-trade-relations status for Vietnam; miscellaneous tariff suspensions and reductions; and an extended implementation period for the 2007 changes to the Harmonized Tariff Schedule of the U.S.

EU REVIEW TO CONSIDER IMPACT OF 'OUTSOURCING' ON TRADE LAWS

The European Union's (EU) Commission, its executive branch, Dec. 6 launched a wide-ranging three-year review of how it applies its trade laws with specific focus on whether its antidumping, countervailing duty and safeguard rules should be amended to address the growing outsourcing of production by European industry. The commission issued a "Green Paper" outlining the issues the review will examine. In addition to outsourcing, the paper calls for examining how to make the administration of EU trade laws more transparent and to reduce obstacles to small business participation in cases.

"Many EU companies now produce goods outside the EU for import into the EU; others have outsourced some steps in the production process or operate supply chains that stretch beyond the EU market," a commission statement said. "These changes challenge familiar understandings of what constitutes EU production," it said. The review will consider whether Europe needs "to take further account of the reality of outsourcing" and also the interests of consumers, importers and retailers, it noted.

TWO GAO REPORTS CALL FOR GREATER OUTREACH TO EXPORTERS

BIS and the Directorate of Defense Trade Controls (DDTC) have failed to assess adequately the access foreign nationals have to controlled technologies in universities and companies, the Government Accountability Office (GAO) claims in two reports issued Dec. 6. Rather than calling for tougher enforcement, the GAO recommends that the two agency conduct an assessment of "potential vulnerabilities" using export licensing data and also do more outreach to universities and companies to educate them on the importance of "deemed export" requirements and protecting controlled technology.

The two reports (GAO-07-70 and GAO-07-69) criticize the agencies for not basing the compliance programs on a systematic evaluation of potential risk, particularly related to cutting-edge technologies and targets of foreign espionage. "At present, both agencies' approaches to conducting compliance visits generally target specific industries and industry practices, but are not based on thorough knowledge of possible weaknesses and vulnerabilities in company pro-

tection of export-controlled information,” the GAO argues. “One third of companies GAO interviewed did not have internal control plans to protect export-controlled information, which set requirements for access to such material by foreign employees and visitors,” one report states. Commerce told GAO that in the fiscal year that ended Sept. 30, 2006, its Deemed Export Compliance Review Program completed 14 reviews of deemed-export license holders to determine compliance with license conditions. It also said it has made recommendations to the Department of Homeland Security to have visa application forms amended to provide more information on the technology that visiting students and researchers will be working on.

“Universities we visited indicated that government-provided training and guidance on export control regulations is limited in informing their efforts to manage and protect export-controlled information in the university environment,” the GAO said. Commerce’s response admitted “some universities and research institutions need to acquire a better understanding of deemed export control requirements.”

UNIVERSITIES OBJECT TO PROPOSED CHANGES IN DFARS

Nearly a dozen universities and academic associations have filed comments with the Pentagon’s acquisition office praising the changes the office made in a proposal to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to add new export control compliance requirements. But the academic community said it is still concerned that the proposal would infringe on the application of the “fundamental research” exception to export controls.

“We are concerned that the proposed rule may imply a fundamental misunderstanding of the applicability of export controls to fundamental research,” said comments from the Office of Research at the University of Missouri-Columbia. The proposal to report information that might trigger new export controls during a research project would “create a significant burden on both the contracting officer and contractors,” wrote the Johns Hopkins University Applied Physics Laboratory.

The Association of American Medical Colleges questioned “the ability of DOD contracting officers to make determinations about whether export-controlled information or technology will or will not be involved in a research and development contract.” It urged Defense to amend the proposal to require contracting officers to consult with State or Commerce before making a determination. The Council of Defense and Space Industry Associations called the revised proposal “fatally flawed.” It said the Pentagon already has sufficient enforcement tools to act against contractors who violate U.S. laws, including export controls. The council urged Defense to “withdraw the proposed rule in its entirety” (see **WTTL**, Aug. 21, page 3).

WASSENAAR ISSUES GUIDELINES ON CONTROLLING “INTANGIBLES”

The annual plenary meeting of the Wassenaar Arrangement Dec. 5-6 in Paris approved two “best practices” guidelines that support increased recordkeeping and surveillance of “intangible technology transfers” (ITT) and exports that are eligible for general licenses or license exceptions. The non-binding advice to members also recognize that export controls on ITT don’t apply to information that is in the public domain or considered basic scientific research.

The plenary marked the 10th anniversary of the multilateral regime for controlling the export of dual-use goods and technology and conventional arms. The group noted that 2007 will be an assessment year for reviewing current control lists as well as “the overall functioning” of the regime.

The ITT guidelines urge members to establish laws and regulation defining ITT and the oral and electronic means of transmitting them. They also support “the imposition of a requirement on industry, academia, and individuals to keep records, for an appropriate period of time, that clearly identify all controlled technology transferred, the dates between which it was trans-

ferred, and the identify of the end user of all intangible transfer of technology for which licenses have been issued that may be inspected by, or otherwise provided to, export control authorities upon request.” Best practices for licensing policies on “global/general license or license exceptions” also support requirements for exporters to maintain “documentary evidence, sufficient to enable export licensing and/or enforcement authorities in the participating state that issued the license, to satisfy itself that the terms and conditions of the license have been complied with.” The paper also says authorities may require exporters to apply for or register to use a general license exception. Furthermore, it suggests states can impose restrictions on license exceptions when exports “have been informed” that the items in question are intended for prohibited or military end use.

DDTC GIVES BAE SYSTEMS PASS FOR ITS FAILURE TO CLEAR STOCK SALE

The Directorate of Defense Trade Controls (DDTC) apparently has agreed to accept a *mea culpa* from BAE Systems and not take any enforcement action against the firm for its failure to get State approval for its sale of a majority interest in its stock to Finmeccanica SpA. In a Dec. 8 posting on its website, DDTC said it conducted an extensive review of the stock sale. “As a result of that review, DTCC has received written acknowledgment from BAE Systems that it did not request prior authorization from the Department of State for the sale of stock in SELEX to Finmeccanica,” the agency noted. “BAE understands that this authorization should have been obtained to address those Department of State licenses and agreements (active and expired) to which BAE Systems Avionics was a party,” DDTC said.

“BAE Systems has assured DTCC that it will obtain prior authorization for an intended resale, transfer or disposal affecting ITAR-controlled defense articles/services or seek guidance from the Department on legal and regulatory responsibilities,” it continued. BEA agreed to update its internal compliance policies and provided DDTC with evidence that it has proper safeguards in place to protect defense technology and technical data.

* * * BRIEFS * * *

EXPORT ENFORCEMENT: Juan Sevilla was sentenced Nov. 30 to six months home detention, five years probation, and \$10,000 fine for attempted export of steel tensile-strength testing equipment to Iran. He will also do 100 hours of community service. Former sales director of United Calibration Corp. in Huntington Beach, Calif., he pled guilty in September 2005 to one count of violating IEEPA.

CONGRESS: Democrats selected Rep. Tom Lantos (D-Calif.) to chair EAA-writing and export-controls oversight House International Relations Committee (see **WTTL**, Nov. 13, page 1).

STATE: DDTC notice Dec.6 chided exporters for growing number of low-quality ITAR license applications and gave examples of errors that occur. “These are examples of errors that demonstrate lack of basic understanding of export control standards and a potentially inadequate compliance program,” DDTC said.

KOREA: Despite breakdown in talks on application of trade remedy laws, fifth round of U.S.-Korea FTA talks held Dec. 4-8 in Big Sky, Mont., made “good progress” in several areas, reported chief U.S. negotiator, Assistant USTR Wendy Cutler. Progress was seen in market access for industrial goods, services, IPR, investment, financial services and environment and labor. U.S. was less pleased with progress on auto trade and failure of Seoul to make new offer, Cutler said. She also said U.S. “extremely disappointed” with Korea’s plans to go ahead with drug pricing plan that Washington opposes.

RUSSIA: U.S.-Russia Business Council will serve as secretariat for newly formed Coalition for U.S.-Russia Trade, which will lead business lobbying effort for Russia PNTR (see **WTTL**, Nov. 27, page 3). Council’s new vice president for policy and programs, Randi Levinas, will be Coalition’s point person.

STEEL BARS: In “sunset” review determination Dec. 4, ITC voted 6-0 that lifting antidumping orders on stainless steel bar from India and Japan would lead to renewed injury to U.S. industry; it voted 4-2 that lifting orders on Brazil and Spain would renew injury to industry.