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U.S. TO TIGHTEN RESTRICTION ON MEDICAL EXPORTS TO CUBA

The Bureau of Industry and Security (BIS) plans soon to issue new regulations to restrict exports of medicines and medical devices to Cuba to restrain "medical tourism", agency staffers told the BIS Update 2006 conference in Washington Oct. 16. The regulations, which are currently being drafted, come in response to recommendations made by the White House-sponsored Committee for Assistance for a Free Cuba. BIS participated in the committees deliberations.

> The committee's report in July 2006 recommended action to stop medical tourism in Cuba and to tighten the rules on the temporary sojourn of private aircraft and vessels to Cuba. It cited programs that bring foreign nationals, mostly Europeans, to Cuba for surgery with recuperation at Cuban hotels. The report also targeted a joint Cuban-Venezuelan project called the "Medical Miracle" under which Cuba sends doctors to Venezuela in return for low-cost or free oil from Venezuela.

The coming rules will impose "a policy of denial for medical equipment used to cater to tourists and foreign patients," said Joan Roberts, director of the BIS Foreign Policy Controls Division. They also will increase monitoring requirements for approved licenses to assure that equipment is going to appropriate uses, require more reports and for a longer period of time, and require the reports to come from non-Cuban nationals. "This will increase problems for medical sales into Cuba," Roberts said.

BIS has already post on its website new guidance for aircraft and vessels going to Cuba. The new policy requires case-by-case review of licenses. BIS will approve license only for aircraft and vessels carrying humanitarian goods and for only a limited period of time. The changes in BIS policies come as the Bush administration has launched a separate effort to crackdown on trade and travel to Cuba. The Justice Department Oct. 10 announced creation of a multi-agency federal Cuba Sanctions Enforcement Task Force that "will aggressively pursue criminal investigations and prosecutions" of violations of the existing travel and trade restrictions.

NEW EXPORT SANCTIONS ON N. KOREA TIED TO DEFINITION OF "LUXURY"

Before BIS can issue regulations to implement a United Nations resolution imposing new trade sanctions on North Korea for its testing of a nuclear bomb, it must first decide on the definition of "luxury goods," agency officials say. UN Security Counsel Resolution 1718, which was adopted on Oct. 14, requires members to impose restrictions on the export to North Korea of "luxury goods" along with military equipment and products and technology that can contribute to Pyongyang's development of weapons of mass destruction (WMD). The ban on luxury goods

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exports is aimed at North Korean leaders. The resolution also requires countries to take measures to prevent North Korean money-laundering and to freeze the assets of any entities identified as helping it develop WMDs. Office of Foreign Assets Controls (OFAC) officials say they will amend existing OFAC sanctions on North Korea to implement these requirements.

> UN Resolution 1718 doesn't define luxury goods. Although the U.S. lifted restrictions on exports of noncontrolled EAR99 items to North Korea in 2000, trade with the North – mostly involving agriculture products, textiles and medicines – has declined after an early surge.

So far in 2006, U.S. exports were below reportable levels. In the fiscal year ending Sept. 30, 2006, BIS reviewed nine licenses for exports to North Korea. It approved one; denied one and returned without action nine. The one approval and the seven RWAs were for items going to the Kaesong Industrial Complex in North Korea.

The definition of luxury goods is "still under discussion," said David Nelson of State's Office of Terrorism and Economic Sanctions. "We need to work out exactly how that will be defined both in the U.S. and internationally," he told the BIS Update Conference Oct. 17. "As a general principle, I think it's clear the concerns of the international community have to do with the activities of the regime leadership, and we recognize that the general population of North Korea is already suffering...and we are not looking to add to their suffering," Nelson said.

DON'T CALL CHINA RULE "CATCH-ALL," PADILLA PLEAS

The continuing use of the word "catch-all" by the exporting community and headline writers to describe BIS' proposed China licensing regulation is getting under the skin of agency officials. "There has been a great deal of misunderstanding about the scope of this proposed requirement," BIS Assistant Secretary for Export Administration Chris Padilla told the BIS Update Conference Oct. 16. "It is simply wrong to label it a 'catch-all.' It would apply only to a clearly defined set of products, under a clearly defined set of circumstances that have clear national security implications," he argued.

> Speaking to reporters later, Padilla said some people are criticizing the China proposal just because it is new. "I think it is important that people not criticize this concept because it is new," he said. "A lot of the criticism that I've seen and heard about this is less a criticism of the idea, than criticism that it is new, we don't like it," he added (see **WTTL**, Oct. 2, page 1).

Acting BIS Under Secretary Mark Foulon also objected to "misunderstandings" he has seen "in the press" about the proposal. The first misunderstanding is about the role of the Chinese government in approving proposed verified end users (VEU). The Chinese government won't have a role in approving VEUs, he asserted. The second misunderstanding is about the scope of the new licensing requirements and how they are limited to 47 Export Control Classification Numbers (ECCN) going to military end uses. "This is not what people were expecting," he told reporters. "Everyone was expecting a conventional catch-all. It's very narrowly targeted. It's not a conventional catch-all," he said. Foulon also emphasized the difference between the VEU process and the expansion of the requirement for Beijing to provide end-use certificates for exports of controlled items valued over $5,000.

BIS officials are trying to draw a sharp distinction between Beijing's role in conducting post-shipment verifications (PSVs) and its still undefined role in the audits that will be required for Chinese firms as a condition for a VEU. The Chinese insist on accompanying U.S. staffers in China on PSVs, which are covered by two bilateral agreements signed by both the Clinton and Bush administrations. Whether the Chinese will demand to be part of VEU audits is still not clear. "The details have to be worked out," Foulon conceded. The China catch-all proposal was one of the topics of discussion at a meeting of the U.S.-China High-Tech Working Group Sept. 27-29, Foulon reported. He said he was hesitant to characterize the Chinese reaction

to the proposal. "The Chinese are still trying to work it through," he said. Meanwhile, BIS issued a notice in Oct. 19 Federal Register extending the comment period on the China proposal to Dec. 4 from Nov. 3. It also has posted on the BIS website a set of questions and answers drawn from the public meetings it has held on the proposal.

JUSTICE SAYS DONATION TO CUSTOMS AGENCY WON'T VIOLATE FCPA

In the first advisory opinion it has issue in two years on the Foreign Corrupt Practices Act (FCPA), the Justice Department Oct. 16 said it would not consider a donation to an African nation's customs service to improve its anti-counterfeiting operations to violate the antibribery law. The request for the opinion came from an unnamed firm that has its headquarters in Switzerland but is registered as a Delaware corporation.

> The company told Justice that it wanted to provide the ministry of finance in the country $25,000 to use as incentives for customs agents to block trade in counterfeit copies of its products. Because the salaries of customs agents include a small percentage of the transit tax collected on the counterfeits, an incentive is needed to offset the lost income due to the blocked copies. The company said several safeguards would be established to ensure proper use of the money.

Based on the facts presented, Justice "does not presently intend to take any enforcement actions with respect to the proposed $25,000 payment," the opinion said. It added two caveats. One noted that it wasn't endorsing the program because it hadn't seen the full text of the agreement between the company and the ministry. It also said the advisory "does not apply to any monetary payments made by the requestor for purposes other than those expressed in the letter; nor does it apply to any individuals involved in authorizing or distributing the monetary awards."

Release of the advisory opinion coincided with an Oct. 16 speech by Assistant Attorney General Alice Fisher in which she urged companies to seek more advisory opinions from the department. "Over the years, the FCPA opinion procedure has generally been underutilized with only a handful of opinions being requested each year," she said in her prepared text. "As assistant attorney general, I want the FCPA opinion procedure to be something that is useful as a guide to business. It serves both of our interests to avoid FCPA violations before they occur, and the opinion procedure is one way to make that happen," she added. Fisher, however, cautioned that, "Just so we're clear, what we're talking about here is asking for advice before undertaking a transaction, not after you have discovered an FCPA violation."

STEEL AND AUTO INDUSTRIES BATTLE OVER WHO'S SICKER

Like two pensioners at an old-folks home arguing over who is sicker, the steel and auto industries came to the International Trade Commission (ITC) Oct. 16 arguing for and against the continuation of antidumping and countervailing duties on corrosion-resistant (CORE) steel because of their frail health. Despite the drama of two old-line U.S. industries battling over trade policy, the ITC's "sunset" review of antidumping and countervailing duty (CVD) cases on CORE imports from 16 countries is likely to go in favor of the steel industry.

In an unusual show of solidarity, six U.S. and foreign name-plate auto makers joined together to oppose the extension of sanctions. With U.S. producers swimming in red ink and laying off thousands of workers, the auto industry complained that the extra duties on steel have raised the cost of this product by 30%. They also argued that it is unfair to favor the steel industry, which employs under 200,000 workers over the auto industry, which employs 2.4 million. In addition, carmakers noted the consolidation and concentration of the steel industry and its improved economic condition. Steelmakers argued that they are not as healthy as they look and would be vulnerable if the duties were lifted. Foreign producers, particularly in China are expanding CORE capacity, they noted. The industry is "rapidly approaching inventory de-stocking and the downward pricing pressure that such de-stocking has historically imposed on

the industry," testified Roy Platz, Mittal Steel USA flat products marketing director. If the orders are revoked, "we are likely to see an even more dramatic decline in U.S. CORE prices."

AMENDMENTS EXTEND DEADLINE FOR PAYMENTS TO U.S. LUMBER INDUSTRY

The U.S. and Canada agreed to six pages of amendments to their bilateral Softwood Lumber Agreement (SLA), including one extending by two weeks the deadline by which Ottawa has to send $1 billion in payments to the U.S. industry and "meritorious initiatives" (see **WTTL**, Oct. 16, page 2). The amendments, made public Oct. 13, drop several preconditions on the settlement of litigation. They came as the Court of International Trade (CIT) issued another ruling requiring the refund of collected antidumping and countervailing duties (slip op. 06-152). In the week after the SLA went into effect, Customs issued its implementing regulations in the Oct. 18 Federal Register, and the U.S. and Canada withdrew their NAFTA and WTO cases.

JUSTICE PROMISES TO ENFORCE FCPA AGAINST FOREIGN FIRMS

After imposing criminal sanctions for the first time against a foreign firm, Norway's Statoil, for violation of the Foreign Corrupt Practices Act (FCPA), a senior Justice Department official said the department intends to apply the law to other foreign companies. "I want to send a clear message today that if a foreign company trades on U.S. exchanges and benefits from U.S. capital markets, it is subject to our law," declared Assistant Attorney General Alice Fisher in an Oct. 16 speech. "The department will not hesitate to enforce the FCPA against foreign-owned companies, just as it does against American companies," she said.

> As part of a deferred prosecution agreement stemming from a scheme to bribe an Iranian official to gain access to oil and gas contracts, Statoil agreed to pay a $10.5 million criminal fine, a $10.5 million disgorgement of profits, cease and desist from future violations, and hire an independent compliance consultant to review and report on its compliance. The agreement was made with Justice and the Securities and Exchange Commission (SEC).

In a second SEC settlement released Oct. 16, Oregon-based Schnitzer Steel Industries agreed to pay $7,725,201 in disgorgement of profits and interest and to hire an independent compliance consultant to resolve SEC charges related to bribes the firm paid to officials in South Korea and China to get business. The Schnitzer case "is an excellent example of how voluntary disclosure followed by extraordinary cooperation with the department results in real tangible benefits to the company," Fisher said. She also emphasized that the department doesn't always require firms to hire outside consultants as part of settlements. "I have given this issue some thought, and what I want you to know is that there is no presumption that a compliance consultant is required in every FCPA disposition," Fisher said.

* * * BRIEFS * * *

UNVERIFIED LIST: BIS in Oct. 19 Federal Register added 14 foreign entities to Unverified List.

RED FLAGS: BIS in Oct. 18 Federal Register withdrew 2004 proposal that would have changed definition of "knowledge" in EAR, added "safe harbor" mechanism, and expanded list of "red flags" that should trigger inquiry into reliability of potential customers. After reviewing mostly negative comments on proposal, BIS "concluded that utilizing this proposed rule as a basis for amending the EAR would neither clarify the public's responsibilities under the EAR nor make the regulations more effective," it said.

ANTIBOYCOTT: In settlement with BIS, Gates Europe NV of Erembodegem, Belgium, will pay $91,000 civil fine for 57 alleged violations of EAR antiboycott regulations. Firm, which is subsidiary of Colorado-based Gates Corp., self-disclosed that it had told Middle East customers that its goods weren't from Israel.

IRAN SANCTIONS: Two California men, Babak Maleki and Shahram Setudeh Nejad, were arrested and will be arraigned in D.C. U.S. District Court Nov. 2 on two-count indictment that charges them with attempting to export textile knitting equipment to Iran via UAE. They were caught in ICE sting operation.