

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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Vol. 26, No. 34

August 21, 2006

MCCORMICK'S DEPARTURE WON'T CHANGE BIS POLICIES

The move of Bureau of Industry and Security (BIS) Under Secretary David McCormick to the White House, announced Aug. 16, to become deputy assistant to the president for international economic affairs and deputy national security advisory won't change the current course of agency policies, industry sources predict. Deputy Under Secretary Mark Foulon, who will become acting under secretary, shares McCormick's views on key BIS policies, including its proposed China military catch-all regulation. More important, these policies have been dictated by senior officials in the Bush administration, so BIS has little power to amend them.

McCormick is taking the post of Fayar Shirzad, who left the administration at the beginning of August to join the investment banking firm of Goldman Sachs. The position has generally had more to do with international trade and economic issues than export controls, although McCormick's background may change the portfolio. The holder of this office usually serves as the U.S. "sherpa" who helps prepare the agenda and declarations for the annual G-8 economic summit.

It is not clear yet whether McCormick will have any oversight of BIS issues at the National Security Council. His farewell e-mail to BIS staffers sounded like he would not be dealing with export controls in his new post. "While I won't be directly involved, I will continue to follow and support your efforts in my new role," McCormick wrote. "I leave BIS confident that we have made enormous progress on crucial issues ranging from deemed export policy to high technology trade with India to a new China export control policy," he wrote.

McCormick's departure at this late point in President Bush's second term may make it difficult for the administration to bring in a new BIS chief from outside the government. In addition to the search for a successor, the security clearance process for someone not already in the government can take months. With nomination of Chris Padilla to be assistant secretary for export administration already submitted to the Senate, there is a possibility Padilla might be offered the quick step up to the under secretary post.

STATE MOVES UP IMPLEMENTATION OF BAN ON ML EXPORTS TO VENEZUELA

In a small notice in the Aug. 17 Federal Register and effective Aug. 17, State moved up the implementation of its policy of denying all licenses for exports of Munitions List (ML) items to Venezuela and revoked all outstanding licenses. The announcement also blocked the use of all license exemptions except for the temporary export of firearms and ammunition for personal use. In May, State announced that it had determined that Venezuela was not cooperating in the

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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

fight against terrorism and said it would stop approving ML licenses as of Oct. 1 (see **WTTL**, May 22, page 2). Even before then, State had begun to return without action licenses for Venezuela because of U.S. objections to the policies of Venezuelan President Hugo Chavez.

The decision to stop defense trade with Venezuela now was made separately from the decision on the terrorism issue, a State official told **WTTL**. The Bush administration has been concerned about other actions by Chavez, including the recent purchase of fighter jets and other military items from Russia. These purchases “are beyond the defense needs of the country,” the official said.

State’s new policy will also block the export of replacement parts under previously issued licenses and the continued fulfilment of any existing contracts. No contract sanctity policy applies to the new rules. “U.S. manufacturers and exporters, and any other affected parties (e.g., brokers) are hereby notified that the Department of State has revoked all licenses and approvals authorizing the export of or other transfers of defense articles or services to Venezuela,” State’s notice declared. “Revocation extends to the deletion of Venezuela from any manufacturing license or technical assistance agreement involving Venezuela, including any agreement that has Venezuela as a sales territory,” it said.

SEC SETTLES FCPA COMPLAINT AGAINST INVISION EXECUTIVE

The Securities and Exchange Commission (SEC) Aug. 15 reached an agreement with a former sales manager of InVision Technologies, Inc., on charges related to his personal role in violations of the Foreign Corrupt Practices Act (FCPA). David Pillor, the firm’s former senior vice president for sales and marketing, will pay a \$65,000 civil fine and be permanently enjoined from future FCPA violations. In February 2005, InVision, which was acquired by General Electric after the violations occurred, paid a \$1.1 million fine and disgorgement in a settlement with the SEC, and in December 2004, it paid an \$800,000 fine in a settlement with Justice.

Simultaneous with the settlement, the SEC filed suit against Pillor in the San Francisco U.S. District Court. The complaint, which was made moot by the settlement, charged him with causing the filing of false accounting records for payments to a distributor in the Philippines and with aiding and abetting InVision’s “failure to devise and maintain a system of internal controls.”

WTO APPELLATE BODY RULES AGAINST “ZEROING” IN LUMBER CASE

Canada’s growing record of legal victories against the U.S. antidumping and countervailing duty orders on softwood lumber is likely to stiffen the opposition of some Canadian lumber firms to the deal the U.S. and Canada struck in July to resolve the dispute (see **WTTL**, Aug. 14, page 2). But with Ottawa asking its industry and provinces to say whether or not they back the deal by Aug. 21, government assurances on areas of concern to industry may be more important than the World Trade Organization (WTO) victory. The new ruling, announced Aug. 15, strikes down a panel decision which said Commerce had sufficiently changed its policy on “zeroing” in dumping cases to bring the U.S. into compliance with an earlier WTO dispute-settlement panel’s opinion against the original zeroing methodology.

Even as Canada was winning this new ruling, however, British Columbia Aug. 16 announced that it would support the bilateral settlement. “We have received sufficient assurances that the province’s concerns with the softwood lumber agreement have been addressed,” said BC Premier Gordon Campbell. BC also said it was undertaking a review of its restrictions on log exports.

In the latest win, the WTO Appellate Body overturned a special Article 21.5 panel ruling which said the Commerce Department’s Section 129 determination and revised methodology for applying its “zeroing” policy had brought the U.S. into compliance with Article 2.4.2 of the

WTO Antidumping Agreement. The zeroing policy deletes from the calculation of a dumping margin any export transactions where there is no dumping or the export price is actually higher than the normal home market value. “We conclude that zeroing is not permitted under the transaction-to-transaction methodology” in Article 2.4.2, the Appellate Body ruled.

“The ‘margins of dumping’ established under this methodology are the results of the aggregation of the transaction-specific comparisons of export prices and normal value,” it said. “In aggregating these results, an investigating authority must consider the results of all of the comparisons and may not disregard the results of comparisons in which export prices are above normal value,” it said.

The Body also reversed the panel’s opinion that Commerce’ Section 129 decision produced a “fair comparison” between normal values and export sales. “In sum, the use of zeroing under the transaction-to-transaction comparison methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely,” the Body observed. “This way of calculating cannot be described as impartial, even-handed, or unbiased,” it ruled.

DEFENSE BOWS TO BIS AND STATE IN REVISED ACQUISITION PROPOSAL

The Defense (DoD) acquisition office Aug. 14 repropoed its controversial amendments to the Defense Acquisition Regulation Supplement (DFARS) to clarify requirements for government contractors to comply with U.S. export controls. In response to 145 mostly negative comments on the original September 2005 proposal, Defense said its new proposal makes it clear that the primary responsibility of contractors is to comply with the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR) when the research they are conducting involves controlled technology (see **WTTL**, Aug. 14, page 4).

“DoD has coordinated this second proposed rule with the Department of Commerce and the Department of State, and has revised the language to eliminate potential conflicts with the ITAR and the EAR,” the Federal Register notice said. “This second proposed rule recognizes contractor responsibilities to comply with existing Department of Commerce and Department of State regulations, and the mutual responsibility of both the government and the contractor to identify export-controlled information or technology,” it said.

The new proposal tries to give specific reactions to all the comments submitted on the first proposal, and, in most cases, agrees with the criticism. In addition to recognizing the regulatory jurisdiction of Commerce and State, it drops some proposals that would have added specific export-control requirements under DFARS. “The more expansive regulatory requirements (including the prescriptive requirements of badging, training, and segregated work areas) contained in the first proposed rule are not included in this second proposed rule,” it stated.

“DoD concurs that the guidance in the proposed rule was incomplete and conflicted with existing regulations,” it noted. “The rule has been changed to eliminate separate DoD requirements regarding export control compliance programs. Contractors that work with export-controlled information or technology should refer to the ITAR and the EAR when creating compliance programs,” the Defense agency explained.

JAIL AND MILLION DOLLAR FINES IMPOSED FOR ITAR VIOLATION

In a series of recent cases, individuals who have pleaded guilty to violating the International Traffic in Arms Regulations (ITAR) have had million-dollar fines imposed on them along with jail sentences. Kal Nelson Aviation, Inc., of Sun Valley, Calif., paid a \$1 million criminal fine in the L.A. U.S. District Court Aug. 9 for the attempted export of aviation equipment to Thailand without approved licenses from State. Firm was caught in undercover sting operation

run by Immigration and Customs Enforcement (ICE) and Defense Criminal Investigation Service (DCIS). In second case, a federal judge in Miami July 24, sentenced Ko-Suen Moo to 78 months in jail, followed by three years of supervised release, and also fined him \$1 million plus the forfeit of his share of \$350,000 that was seized during the investigation of the case. Moo, a Taiwanese citizen, pleaded guilty in May to numerous charges related to his attempted acquisition and export of parts for engines used in F-16 fighter jets and Blackhawk helicopters and cruise missiles (see **WTTL**, Feb. 13, page 4).

In a third case, George Charles Budenz II, a former U.S. Navy commander, was sentenced to one year in prison, fined \$10,000, and ordered to spend an additional six months in a halfway house for his role in the attempted export of various aircraft parts, some of which eventually were intended for Iran. The leader of the scheme, Arif Ali Durrani, a Pakistani weapons trader, was sentenced to 12 and a half years in prison a month earlier.

* * * BRIEFS * * *

DOHA ROUND: No August vacation for USTR Susan Schwab. She is headed to Singapore Aug. 22-23 and then to Kuala Lumpur, Malaysia Aug. 23-26 to attend ASEAN economic ministers' meeting. She will make first visit to China as USTR Aug. 27-29. "During the meeting, Ambassador Schwab also will discuss with ASEAN ministers, as well as her counterparts from Australia, New Zealand, India, Korea, and Japan, ways to get the World Trade Organization's Doha Round negotiations back on track," USTR's office said. In Malaysia, she will review progress on U.S.-Malaysia FTA talks, which have third round planned for week of Sept. 18. Schwab will seek help from Chinese to get Doha talks restarted and also will press Chinese on several trade issues, particularly IPR enforcement and market access.

LEBANON: To implement U.N. arms embargo on Lebanon (UNSCR 1701), State has issued notice that as of Aug. 11, 2006, it will not approve any licenses for defense items or services for Lebanon. "Any existing license or authorization for the export to Lebanon of ITAR-controlled defense articles or services is hereby suspended unless the end-user is the Government of Lebanon or UNIFIL," it said.

EXPORT ENFORCEMENT: Lawrence Scibetta of Port Lucie, Fla., has reached settlement agreement with BIS to pay \$30,000 civil fine to settle agency complaint that he exported two Raytheon thermal imaging cameras to United Arab Emirates without licenses. Scibetta, who was co-owner of Dyna Marine at time of exports, will pay fine in six bimonthly payments of \$5,000 each. He neither admitted nor denied charges.

RUSSIA: U.S. has reacted quickly to threat from Russian Trade Minister German Gref to terminate bilateral agreement which opened Russian market to U.S. poultry and beef, if Washington continues to block Moscow's accession to WTO. "The United States is negotiating in good faith with Russia to complete our bilateral WTO accession agreement solely on commercial terms in the next couple of months," said USTR spokesman Sean Spicer. "U.S. imports of certain beef, pork and poultry are currently subject to measures agreed by both sides after Russia took a unilateral action to limit imports of these products in 2003," he said. "If Russia chooses not to honor this negotiated agreement, it will create a serious problem that will complicate our efforts to conclude the negotiation of our bilateral WTO agreement," Spicer added.

SILICOMANGANESE: ITC voted 6-0 in "sunset" review on Aug. 14 that revoking antidumping orders on silicomanganese from Brazil, China and Ukraine would likely lead to renewed injury to U.S. industry.

TRADE PEOPLE: Jennifer Mulveny, who was deputy assistant USTR for congressional affairs, has returned to law firm of Sandler, Travis & Rosenberg in D.C. as director of trade and legislative affairs.

NAFTA: Binational panel Aug. 11 remanded back to ITA administrative review ruling on imports of oil country tubular goods from Mexico for Hylsa, S.A. "It is our conclusion that the Department acted in an arbitrary and capricious fashion when it failed to adequately justify its determination that Hylsa did not ship the subject goods in commercial quantities during the period of review," panel declared.

EDITOR'S NOTE: Effective Jan. 1, 2007, annual subscription price for *Washington Tariff & Trade Letter* will be \$647 for either print or electronic edition. Additional copies of print edition mailed in same envelope will be \$100 each. Rate for combination print and electronic subscription will be \$747. Site licenses for multiple recipients are available at significant discount and can be tailored to individual needs.

ANOTHER EDITOR'S NOTE: In keeping with our regular publication schedule, there will be no issue of *Washington Tariff & Trade Letter* on Aug. 28, 2006. Our next issue will be Sept. 4.