

# Washington Tariff & Trade Letter<sup>®</sup>

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

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## **BIS WEIGHING CHANGE IN PENALTY FORMULA FOR SELF-DISCLOSURES**

Bureau of Industry and Security (BIS) enforcement officials have started to hold meetings to discuss a possible change in the formula they use to discount civil fines in administrative settlements when an exporter makes a voluntary self-disclosure of a violation, agency sources told WTTL. The new look at penalties follows re-enactment of the USA Patriot Act with provisions increasing the potential fine for each violation of the International Emergency Economic Powers Act (IEEPA) to \$50,000 from \$11,000 (see **WTTL**, March 20, page 4).

Agency sources emphasize that no decision has been made on changing the formula but say officials recognize that the increased fine may alter industry's judgment on whether a self-disclosure is worthwhile. They note, however, that the new level of fines will apply only to violations that occur after March 9, 2006, when the change in the law became effective. Thus, it may be two or three years before they have cases that will be subject to the higher penalty.

BIS has cut potential fines in some cases more than 50% when an exporter has made a voluntary self-disclosure of a violation. Industry lawyers, however, complain the agency has diluted the benefit of that discount by adding additional charges, such as acting with knowledge, conspiracy, aiding and abetting, and filing false Shipper's Export Declarations (SED). As a result, the 50% discount from IEEPA's maximum \$11,000 fine frequently has been multiplied by the additional charges, producing fines of \$25,000 or more per shipment. With the new \$50,000 maximum, if BIS uses the same approach, potential fines, even with a discount, could range up to \$100,000 or more per export, trade lawyers say.

BIS officials contend the higher fines should give industry more incentive than before to come in with a voluntary disclosure because non-disclosure will risk significantly higher fines. Trade lawyers, however, say they may advise clients to wait and see what discounts BIS will offer under the new penalty levels before making a disclosure unless other legal liabilities are involved. The question may be: who wants to be the first exporter to test BIS policy?

## **U.S., UK DEFENSE ADVISORS SAY EAR IS "OBSOLETE"**

The "commercial electronics marketplace has made obsolete the U.S. Export Administration Regulations (EAR)" declares a just-released joint report by the U.S. Defense Science Board and the United Kingdom's Defense Scientific Advisory Council. "The issue of economic competitiveness is also relevant to ITAR" [International Traffic in Arms Regulations], the report adds. The product of a task force on Defense Critical Technologies, it also calls for a reexamination

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of Defense's reliance on commercial-off-the-shelf (COTS) components and technology. The report questions the Pentagon's growing reliance on COTS procurement, saying commercial suppliers can't be depended on to produce products the military needs to maintain its superiority. The U.S. and UK "need to prepare for dealing with the COTS-equipped adversary," the report states. It recommends more spending on defense-specific R&D and an increased effort to attract more science and engineering students to seek work in the defense industry.

The advisors say both EAR and ITAR need to be reevaluated in light of the wide availability of microelectronics, as well as sensors and high-performance computers. "New regulations should recognize modern market forces and allow the export of technology that is available in foreign markets," the report recommends. "Ideally, new regulations would allow the United States to export technology that is just a bit better than the foreign competition," it advises.

In the sensors sector, the reports says an "ominous" concern is "the availability of state-of-the-art sensors to our potential adversaries given that most of these products are produced in large quantities for the commercial market in overseas factories." The EAR attempts to control these items, "but often the global market place limits the effectiveness of the regulations and promotes the off-shore migration of the electronics industry," the joint report states.

## **EAGLE TO GET OFF ARMY, STATE DEBARMENT LISTS**

Eagle Global Logistics, a Houston, Texas, freight-forwarder, succeeded March 24 in reaching an agreement to get off the Department of the Army's procurement debarment list and expects to be taken off State's denied party list. "We just signed the agreement and it has been signed by the government," Eagle General Counsel Dana Carabin told WTTL. "The Army indicated someone is standing by to remove EGL from the suspension list," she added. The company was given an informal hearing before the Army's procurement staff on March 20 and afterward was informed that it would be taken off the suspension list once an agreement was reached. Eagle was told by State that it would come off State's list after deal with the Army was completed.

Eagle got caught in a double squeeze after a former employee pleaded guilty Feb. 16 to committing fraud against the U.S. government by adding unwarranted war-risk surcharges to air shipments the company made from Dubai to Baghdad as a subcontractor for Kellogg, Brown & Root. After Christopher Cahill pled guilty in the Rock Island, Ill., U.S. District Court, the Army on Feb. 27 automatically added Eagle to its debarment list. Then on March 10, State's Directorate for Defense Trade Controls (DDTC) posted a notice on its website saying Eagle was no longer eligible to be a party to a munitions export license.

Unbeknownst to the Army, Eagle was in separate talks with the U.S. Attorney for the Eastern District of Texas on an agreement to settle civil charges against the company for Cahill's actions. That settlement, which is still being negotiated, is expected to result in the firm being required to reimburse the Army for the over-charges and to pay a civil fine for filing false claims with the government. During the company's March 20 informal hearing with the Army, it explained that Justice has conducted an 18-month investigation of the company.

## **GRASSLEY "DISCOURAGED" BY BRAZIL'S VIEWS ON DOHA ROUND**

At the end of a visit to Brazil March 23, Senate Finance Committee Chairman Charles Grassley (R-Iowa) criticized Brazil's attempt to seek greater market openings from developed countries in Doha Round negotiations on agriculture and industrial goods, while not offering to open its own markets. He accused the Brazilians of "having their feet in both camps." "They have an advanced agriculture sector, but they act like a developing country when it's convenient for them," Grassley said in a statement (see WTTL, March 20, page 2). "I must admit that I'm disappointed in what I have heard this week," said Grassley, who held a series of meetings with Brazilian trade and agriculture officials and industry groups. "I have become increasingly

discouraged about the prospects of reaching an agreement on the Doha Round,” he added. Grassley complained that the Brazilians say the U.S. needs to offer more in the World Trade Organization (WTO) talks even though Washington has made a meaningful offer in agriculture. “I’ve come to the conclusion that this offer will never be enough for Brazil,” he said.

Grassley’s visit to Brazil came as Doha Round negotiators held another week of informal farm negotiations in Geneva. During those meetings, the European Union (EU) announced that it is willing to consider product-specific restrictions on subsidies in the “old” Blue Box of less-trade-distorting farm subsidies.

For “sensitive” products that would be exempt from normal market access commitments, the EU said it continues to oppose minimum market opening requirements based on the size of the market for the restricted food. It said it would consider adjustments that would open markets more for foods that are imported in small quantities.

Negotiators also reportedly had a favorable reaction to a proposal offered by several African and least-developed countries on disciplining food aid. The proposal would limit food donations to emergency situations that were declared an emergency by the UN, by the receiving government in coordination with an international organization or by an independent assessment of need. Additional disciplines would be imposed on non-emergency food aid.

There was a strong debate, however, over an Argentina paper that claimed market access demands being made in agriculture will produce less opening than demands for tariff cuts in industrial goods. Vigorous disagreements also broke out over a G-33 proposal on a special safeguard mechanism that would allow developing countries to restrict farm imports if they increased as little as 5%. At the end of the week, the chairman of the farm talks, New Zealand’s ambassador Crawford Falconer, said the negotiations have not “advanced materially.”

## **RUSSIA’S WTO ACCESSION TALKS GETTING BOGGED DOWN**

A significant high-level political push – perhaps at the upcoming G-8 meeting in St. Petersburg – will be needed, if Russia is to reach an accession agreement to join WTO by the end of 2006. The 30<sup>th</sup> meeting of the WTO working party on Moscow’s accession in Geneva March 23 made little progress on most key unresolved issues and also revealed continuing problems in bilateral talks with countries such as the U.S., Australia and Colombia. “There are many policy issues out there that need to be tackled, and we are far away,” said the chairman of the working party, Stefan Johannesson, Iceland’s WTO ambassador.

“It is quite clear that the Russians and the members have been making very good progress on the bilaterals,” he told reporters after the talks. Some 55 bilaterals have been completed. In the multilateral sessions “unfortunately, we have not been making the same good progress we would have liked,” he said. “The progress has actually been incremental,” he added, noting that the latest meeting got to discuss only three of 12 texts on the agenda.

For the U.S., the main area of disagreement has been over market access for foreign financial services in Russia. Washington’s growing complaints about copyright piracy in Russia didn’t get discussed in the latest working group, one source reported (see **WTTL**, Feb. 20, page 4). Colombia is pushing Moscow to liberalize import restrictions on sugar.

Russia’s chief negotiator in the accession talks, Maxim Medvedkov, said Moscow made an improved offer in financial services last fall. “In banking and insurance, we offer half of this big and tasty cake,” he said. The offer would allow foreign firms to hold 50% in overall capital of all banks and insurance companies in Russia. This compares to the current limit of 25% in insurance and 12% for banks. “In banking, subsidiaries of foreign banks will have national treatment provisions in terms of establishment and operation. In insurance, they have national treatment provision in non-life insurance,” Medvedkov explained. For life insurance, there would be a 5-to-7 year transition period for opening the market.

**CUSTOMS OFFICIALS SAY IMPORTERS CAN MAKE SETTLEMENT OFFERS**

Many importers fail to take advantage of a Customs process known as “offers and compromise,” which allows them to seek a reduction in penalties the agency has proposed in penalty notices or petitions for false import statements or classifications, according to Charles Ressin, chief of the penalty branch at Customs and Border Protection (CBP). An importer can cut off the whole legal process by making an offer and compromise, he told a conference in Washington March 22. “The problem is that it is not particularly known to business that they can do this.”

An offer and compromise request may be warranted when an importer thinks the level of penalty CBP wants is too high or when an alleged error has resulted from negligence rather than fraud. CBP may be open to these offers because “there are litigation risks to the government as well as to the importer,” Ressin said. “I urge you to take advantage of that in appropriate cases, and almost every case is appropriate, at least on the civil side,” he added.

A common mistake importers make in protesting penalty notices is to make “frivolous legal and policy arguments,” Ressin said. Importers also fail often to substantiate their claims. “You can’t just make allegations that are not supported.” The most common mistake is to claim that they can’t pay the proposed fine. To support such a claim, Ressin said firms need to show evidence, including tax statements and profit-and-loss statements to review.

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BIS: Agency has posted advisory opinion on its website explaining application of deemed export requirements to technology included in patent applications. BIS has given U.S. Patent and Trade Office authority to license export of technology in patents to foreign patent offices. If patent applicant is foreign national, deemed export license is not required for controlled data that goes to applicant, but license may be needed if data going to another foreign national, it explained.

CHINA: Rush to legislation to impose 27.5% tariff on Chinese imports may be cooling following visit to China by Sens. Charles Schumer (D-N.Y.) and Lindsay Graham (R-S.C.). In addition, Sens. Charles Grassley (R-Iowa) and Max Baucus (D-Mont.) plan to introduce their own China bill March 28. If they report out their measure before March 31, Schumer-Graham bill would not get automatically on Senate agenda. Coming April 11 meeting of U.S.-China Joint Committee on Commerce and Trade and April 20 visit of Chinese President Hu Jintao to Washington are seen as events that may be tempering congressional eagerness for legislation – for now

TEXTILES: U.S. is still reviewing Turkish proposal in Doha Round for sectorial negotiations on textiles, Deputy USTR Peter Allgeier said March 24, disputing reports that U.S. has come out in favor of idea. “We’ve received the proposal as has everybody else. We have sent it back to Washington. There is not an official U.S. position on that proposal,” he told reporters in Geneva..

EXPORT ENFORCEMENT: Three firms got deep discounts from BIS in settlement agreements because they made voluntary self-disclosures of alleged export violations. Nvidia of Santa Clara, Calif., agreed to pay \$4,500 civil fine for allegedly not having deemed export license for release of controlled technology to Iranian national. Bear Basin Outfitters, Pleasant Hills, Calif., had to pay only \$8,000 civil penalty after it reported exporting controlled optical sighting devices on 64 occasions without licenses. BIS imposed \$7,000 civil fine on Tech Pro of Cuyahoga Falls, Ohio, after it reported exporting without license controlled item to customer in India who was on BIS Entity List.

NME: ITA published request for comments in March 21 Federal Register on changing way it calculates normal values in nonmarket-economy cases where inputs come from both NME and market economies.

CANADA CORN: U.S. has asked Ottawa for WTO consultations on its dumping order on U.S. corn.

INDIGO: All six ITC commissioners agreed March 23 in sunset review case that U.S. industry would not be injured if antidumping order on indigo from China were revoked.

EXPORT LICENSING: While BIS still struggles with SNAP, Canada’s export control agency said it will be ready to receive all export licenses, including supporting documents, electronically starting March 31.