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

Editor & Publisher: Samuel M. Gilston • P.O. Box 5325, Rockville, MD 20848-5325 • Phone: 301-570-4544 Fax 301-570-4545

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STATE SEEKING INFORMATION ON FOREIGN BROKERING ACTIVITIES

State's Directorate of Defense Trade Controls (DDTC) compliance office has begun sending out letters to registered U.S. defense exporters asking for detailed information on their relationships with foreign distributors, joint venture partners and other business entities to determine if any of those activities come under the brokering controls in the Arms Export Control Act (AECA) and International Traffic in Arms Regulations (ITAR). State officials say they are seeking this information because they don't always have sufficient information now to determine whether these foreign firms should be classified as arms brokers.

The questionnaires are part of an intensified, broader effort by DDTC to enforce the brokering rules. They also stem from an organizational shift of responsibility for brokering issues to DDTC's licensing staff. DDTC staffers now hold weekly meetings discuss brokering issue, one official reported.

Due to this new effort, DDTC staff looked at all the data they receive to determine whether they are getting adequate information on brokering activities. They reviewed Trade Assistance Agreements (TAA) and licenses to see how foreign firms, workers and partners were identified. "What drove this is that they went back and looked at a number of TAAs and licenses and found that people included in there could be viewed as being brokers -- they are engaging in brokering activities -- but they are not being registered as brokers," one official explained.

"It became clear that there was a lack of information to make informed decisions," the official continued. "So what they are trying to do is go and gather information, apply that information to the statute and regulations, and make a determination whether people are, in fact, engaging in brokering activities," he continued. "If they are, DDTC is going to notify them that they are going to have to come in and register as brokers and that any kind of brokering activity is subject to a brokering license," the official explained.

LONG, SLOW SQUEEZE STARTS AGAINST BYRD AMENDMENT

Coming Canadian and European Union (EU) retaliation against the Byrd Amendment underscores how foreign complaints against Washington's implementation of U.S. trade laws may be overblown and how inadequate World Trade Organization (WTO) permitted sanctions are in resolving some disputes. Based on a ruling from a WTO arbiter, Ottawa, starting May 1, will impose a 15% penalty tariff that is expected reduce selected U.S. exports to Canada by \$14 million. A similar 15% EU sanction on selected U.S. exports should reduce U.S. exports by \$28 million. While the American products targeted will feel real pain from these tariffs, the

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overall impact on U.S. trade with Canada and the EU will be infinitesimal, given the \$190 billion in U.S. exports to Canada and \$173 billion in exports to the EU in 2004. Nor did U.S. dumping and CVD duties keep Canada from exporting \$256 billion in goods to the U.S. last year or the EU from exporting \$283 billion. The level of retaliation is based on actual funds that the Bureau of Customs and Border Protection (CBP) has disbursed to U.S. firms that participated in and publically supported antidumping and countervailing duty cases against foreign imports. Those payments are only made after final liquidation of entries.

In addition to Canada and the EU, the WTO gave Brazil, Chile, India, Japan, Korea and Mexico authority to retaliate against U.S. exports because Washington failed to meet the December 2003 deadline to repeal the Byrd Amendment, which requires CBP to give collected dumping and CVD duties to qualifying U.S. firms. Japan reportedly has decided to defer retaliation, but the other countries could add to the global tax on U.S. goods. The WTO will allow countries that won the ruling against Byrd to adjust their retaliation annually based on CBP payments.

Canadians made no secret that they selected targets of retaliation based, in part, on the states where the goods originated and the support that lawmakers from those states have given to maintaining Byrd. Canadian duties will hit U.S. exports of live swine, cigarettes, oysters and such fish as monkfish and talapia. These initial sanctions are only a marker Ottawa is laying down as a potential threat against Washington distributing any of the \$4 billion collected so far on Canadian softwood lumber. The EU imposed its duties on several apparel products, writing pads, albums, paper products, frozen corn, eyeglass frames and crane lorries. It warned that its retaliation could jump to \$1.6 billion after October 2005, based on this year's Byrd payments.

SHARP REACTION TO BIS DEEMED EXPORT PROPOSAL

The business and academic communities reacted negatively to an notice of proposed ruling making that BIS issued in the March 28 Federal Register calling for comments on suggested tightening of deemed export rules. As expected, the notice seeks public views on recommendations the Commerce Inspector General made in a report last year urging stricter controls on the "use" of controlled technology, basing deemed exports rules on the place of birth of foreign nationals and tightening controls on university-based research (see **WTTL**, March 21, page 1).

When asked what BIS intends to do with the notice, one BIS official said: "We intend to look at all the comments and go on from there." Industry executives were quick to meet with BIS Acting Under Secretary Peter Lichtenbaum March 31 to discuss the IG report and industry's reactions to the report. Lichtenbaum reportedly deferred any discussion of the Federal Register notice.

Even as BIS is seeking comments on the IG's recommendations, other elements of the Bush administration's national security team are pushing for a tightening of deemed export controls, one source reported. Officials in the Defense Department, in particular, are examining proposals they want to see added to dual-use regulations, the source said.

The main target for all this activity is Chinese industrial and defense espionage, which has become a major concern for some national security officials who see these efforts as part of Beijing's attempt to leapfrog industrial and military development. BIS officials told industry representatives that they are unaware of such a push from other agencies.

In reaction to the BIS notice, several trade groups plan to join with university and research organizations to mount a coordinated attack on the IG recommendations and other proposals to tighten controls on academic research. "The university community has woken up to this issue," one source noted. Some exporters hope the academic community might bring extra support to the fight from lawmakers who aren't normally interested in export or national security issues. "We're stunned," said one university legal counsel. "This new notice caught us off guard because we don't know what risk they are trying to address," she said. "We're willing to

comply but the risk hasn't been explained," she added. "We don't relish having to classify every piece of equipment on campus and identifying every foreign student and professor who works on which equipment in which labs." Similar comments came from industry executives. "If these changes go into effect, I would expect a lot of companies and universities to go through a lot of hair-pulling and increased licensing requirements," one industry executive said. She said it could create "a compliance nightmare" and conflict with some foreign privacy laws.

GOVERNMENT OPPOSES NEW TRIAL ON "SPECIALLY DESIGNED"

The government is opposing an effort by Walter Lachman and his firm, Fiber Materials, Inc. (FMI) to get a new trial to reexamine BIS's interpretation of the term "specially designed" in the Export Administration Regulations (EAR). In a brief filed in the Boston U.S. District Court March 28, the U.S. Attorney's office in Boston argued that the request for a new trial has come beyond the deadline allowed by the courts and that Lachman's claim that there is new evidence to warrant a new trial is not supportable.

In October, the First Circuit Court of Appeals issued a sweeping ruling supporting the government's restrictive reading of "specially designed" in the regulations (see **WTTL**, Nov. 1, page 2). After the appellate court rejected Lachman's request for an en banc review of that ruling, he and FMI asked the district court to reopen the case based on the Circuit Court's remand instructions.

"Not only was all the so-called newly discovered evidence known or available to the defendants through the exercise of due diligence before trial, but the evidence itself would not even be admissible at a new trial," the brief declared. Lachman contends that some BIS officials had different views on specially designed than the government argued in his original trial, which led to his and FMI's conviction. "The defendants themselves have previously acknowledged in this case that, absent a direct tie to the defendants' state of mind, evidence of third party opinions is inadmissible in a case where the underlying law is clear," the government stated.

CONGRESS MAY HAVE TROUBLE WRITING CHINA EMBARGO BILL

Whether or not the EU lifts its embargo on arms sales to China, congressional and industry sources expect Congress to take up legislation that could lead to retaliation against European defense firms whose governments permit arms sales to Beijing. If Brussels puts off the lifting of the embargo, as some reports suggest it is considering, lawmakers may still propose legislation that would be conditional and would only be triggered if the sanctions were lifted.

An EU-targeted measure could be attached to broader legislation to revamp the Arms Export Control Act (AECA). The House International Relations Committee (HIRC) will begin a series of hearings on the statute April 7. Sources say congressional staffers are already considering potential amendments to the law, although HIRC Chairman Henry Hyde (R-Ill.) has not made a decision on whether to move a bill this year.

Along with an amendment tied to the arms embargo, a new AECA measure could become the vehicle for reenacting the long-expired Export Administration Act (EAA). Both House and Senate sources say there is no interest in doing a complete rewrite of the export law, as Sen. Mike Enzi (R-Wyo.) tried four years ago, but a modest measure renewing the statute, increasing fines and penalties, and addressing deemed export and terrorism issues could find support in Congress, sources say. Industry sources say they would still oppose any EAA legislation because they expect no good to come from a new law and potentially a lot of bad.

If Congress does take up a measure similar to one sponsored in 2004 by House Armed Services Committee Chairman Duncan Hunter to bar EU firms for U.S. defense contracts if the China embargo is lifted, the House and Senate could split over such a bill. Senators reportedly are

concerned that too broad a bill could hurt Pentagon procurement programs involving EU firms, EU companies with U.S. factories or American companies that rely on EU parts or technology. "We need to be careful what we do, but we need to do something," one Senate source said.

Meanwhile, the Bush administration appears to be taking a harder line with the EU on the China arms embargo. State Department officials believe Washington's pressure is succeeding in forcing Brussels to delay a decision on the sanctions. They say they don't want to consider EU proposals for imposing restrictions on sales after the embargo is lifted. "We refuse to negotiate conditions for lifting the embargo," said one State official speaking on background.

* * * BRIEFS * * *

FAST TRACK: President Bush March 30 asked Congress to renew fast-track negotiating authority, which administration calls trade promotion authority. Along with letter requesting renewal, he sent report explaining benefits of trade agreements reached under authority and new deals currently being negotiated. Under fast-track law, authority is extended automatically unless Congress passes resolution of disapproval by June 30. No one expects such a resolution to get out of either Finance or Ways and Means Committee.

C-TPAT: Customs March 25 posted on its website new security criteria for firms participating in Customs-Trade Partnership Against Terrorism (C-TPAT). New requirements will require participants to conduct comprehensive assessment of their international supply chains based on new Customs criteria. Current C-TPATers will be able to phase in any needed corrections to meet new criteria over 180 days; new participants will have meet requirements before getting certified as eligible.

EXPORT ENFORCEMENT: Another firm has agreed to conduct audit of its exports and provide results to BIS as part of settlement agreement with agency. Metric Equipment Sales of Hayward, Calif., will pay \$150,000 civil fine and conduct audit of its internal compliance program in deal to resolve 31 BIS charges that it exported oscilloscopes to Israel without BIS approved licenses and made false claims on its SEDs. BIS imposed and suspended five-year denial of export licensing privileges.

MORE EXPORT ENFORCEMENT: Carl Zeiss Optical of Chester, Va., will pay \$10,000 civil fine to settle BIS charges that it exported optical sighting devices to Canada on 10 occasions without BIS license.

EVEN MORE EXPORT ENFORCEMENT: BIS has reached settlement agreement with freight-forwarder Air Tiger Express, which has agreed to pay \$49,500 civil fine to resolve charges that it aided and abetted in export of controlled items to Indian organization on BIS Entity List

D-TRADE: DDTC put off planned March 29 release of new version of D-Trade DSP-5 v. 2 for beta test, saying "configuration incompatibility occurred" when it introduced version into production environment.

TRADE BARRIERS: USTR's office March 30 issued annual foreign trade barriers, identifying what U.S. considers to be unfair trade and investment practices in several dozen countries. Required under 1988 Trade Act, report has lost most of its punch, with both Republican and Democratic administrations reluctant to take trade actions based on its findings. House Democrats used latest report to complain about Bush administration enforcement of trade laws. In letter to President Bush March 31, Democrats called for White House to "move beyond cataloguing these barriers and to begin enforcing U.S. rights vigorously."

CHEMICAL EXPORTS: BIS in March 30 Federal Register amended EAR to add "catch-all" rules applying controls on chemical and biological weapons end uses to all countries.

TELECOMMUNICATIONS: Annual Section 1377 report released March 31 on foreign violations of U.S. rights under telecommunications agreements listed concerns about practices but took no action against them. USTR's cited problems in China and said it is watching Peru, Germany, Mexico and Japan.

ETHANOL: Senate Finance Committee Chairman Charles Grassley (R-Iowa) wrote to Customs March 29, asking it to issue ruling on whether ethanol produced by Angostura Holdings in Trinidad and Tobago is eligible for duty-free treatment under CBI. Grassley claims firm is building new plant to refine ethanol from Brazil. Members of Congress have raised concerns that foreign ethanol might undermine legislation to help U.S. ethanol producers by increasing required ethanol levels in gasoline.

OFAC: Treasury office revised Iranian Transactions Regulations in March 28 Federal Register to clarify application of rules to brokers and dealers in securities.