

Vol. 31, No. 49

December 12, 2011

## Census Considers Barring EAR Items from Option 4

In an attempt to win Customs and Border Protection (CBP) agreement to keep the Option 4, Post-Departure reporting program available to old and new users, the Census Bureau may have to agree to exclude items subject to the Export Administration Regulations (EAR) from the program, Census officials told the Bureau of Industry and Security (BIS) Regulations and Procedures Technical Advisory Committee (RPTAC) Dec. 7. The possible exclusion of EAR items from Option 4 drew strong objections from committee members who use the program.

CBP has long opposed continuation of Option 4 except for some bulk materials and agriculture products. To overcome those objections, Census had drafted revisions to its Foreign Trade Regulations to create a “nots” list of items that would not be eligible for the program (see **WTTL**, Sept. 19, page 1).

“One of the recommendations we’re considering are items on the Commerce Control List that would not be allowed,” Omari Wooden, Census’ foreign trade ombudsman, told RPTAC. “Basically, an item that has an ECCN, we’re proposing that those types of products would not be exported” under Option 4, he said. “As we’re working with BIS, as we’re working with CBP, one of their things is clearly enforcement, and enforcement of controlled items that have dual-use purposes,” he explained. Census is trying to find something the trade community can live with “other than saying, we’re not going to allow anything to go post-departure at all,” he said.

## Court Throws Out FCPA Convictions for Prosecutor Misconduct

It was the first jury conviction of a company for violations of the Foreign Corrupt Practices Act (FCPA), but accusations of prosecutor misconduct and false testimony led Los Angeles U.S. District Court Judge Howard Matz Dec. 1 to overturn the convictions of Lindsey Manufacturing of Azusa, Calif., and two executives. Lindsey President Keith Lindsey and VP Steve Lee were found guilty in that court May 10 of a scheme to bribe Mexican government officials at the Comisión Federal de Electricidad, a state-owned utility company.

“It is with deep regret that this Court is compelled to find that the Government team allowed a key FBI agent to testify untruthfully before the grand jury, inserted material falsehoods into affidavits submitted to magistrate judges in support of applications for search warrants and seizure warrants, improperly reviewed e-mail communications between one Defendant and her lawyer, recklessly failed to comply with its discovery obligations, posed questions to certain witnesses in violation of the Court’s rulings, engaged in questionable behavior during closing



argument and even made misrepresentations to the Court,” Judge Matz said in his order to dismiss the convictions. The jury reached its verdict on Lindsey and Lee after one day of deliberations, following a five-week trial (see **WTTL**, May 16, page 4).

## **BIS Trying to Look Tough on Enforcement**

As the Obama administration’s export control reform (ECR) moves forward, BIS is trying to assure Congress that it’s up to the challenge of enforcing trade in military items transferred from the U.S. Munitions List (USML) to the CCL. “There seems to be this ongoing perception that Commerce is in bed with industry, and so you can’t have the fox guarding the chicken coop,” David Mills, BIS assistant secretary for export enforcement, told a meeting of BIS’ RPTAC Dec. 7. “That is undermining the ECR initiative, particularly on the Hill. So it’s something we have to counteract,” Mills said.

One way Mills plans to change that perception is by revising BIS’ common practice of “suspending” civil fines and denial orders as part of administrative settlements for specific periods when companies agree to stay in compliance with export controls during that period. “I like that practice, but I’m going to call it probation, not suspension. Suspension makes it look like we’re being soft, and that’s the perception on the Hill,” he stated.

## **USTR Unveils TPP Conservation Plan**

In an effort to win environmentalist support for Trans-Pacific Partnership (TPP) negotiations, the Obama administration unveiled Dec. 5 a “green paper” that seeks to add a “conservation framework” to the TPP talks. The framework would focus on three specific areas: wildlife species of particular concern, marine fisheries and illegal logging and associated trade. “Illegal environmental trade is clear and tragic,” Deputy U.S. Trade Representative (USTR) Demetrios Marantis said in a speech announcing the paper. Conservation initiatives to combat this trade “can be a starting point, not a sticking point,” Marantis said.

The pitch for conservation comes as the USTR’s office published three notices in the Federal Register Dec. 7 seeking comment on the prospects of Canada, Japan and Mexico entering the TPP talks (see **WTTL**, Nov. 21, page 1). USTR “is assessing Japan’s expression of interest in the TPP negotiations in light of the TPP’s high standards for liberalizing trade and specific issues of concern to the United States regarding Japanese barriers to agriculture, services, and manufacturing trade, including non-tariff measures,” the notice for Japan said.

The likelihood of Canada, Japan and Mexico joining the talks drew some skepticism from New Zealand Trade Minister Tim Groser in a Nov. 22 speech. Groser noted Japan’s protectionist policies for agriculture and Canada’s strong defense in other negotiations for its supply management system for farm products. “Truly I understand how sensitive this issue is for Japan,” he said. “Dairy will be very challenging for Canada,” he added; noting that supply management “is completely inconsistent with tariff elimination.” Groser also questioned how soon the three countries would be able to join the talks. “It is unlikely that these three economies will be joining the negotiation formally within, say, the next few months” or even July, he said.

## **Administration Putting Off Export Reform Legislation**

The White House has drafted legislation that would complete Phase III of its export control reforms but won’t submit it to Congress until it completes Phases I and II, reports Brian Nilsson, director of nonproliferation controls on the National Security Council. “We have a draft bill but no decision has been made on socializing that bill or introducing that bill,”

Nilsson told the Practicing Law Institute Dec. 6. “The reality is that we don’t need to deploy Phase III until we get Phases I and II done,” he said. Nilsson, who has been coordinating and leading the reform effort for the White House, said 85% of the changes needed can be accomplished by executive action. The bill would authorize creation of a single export licensing agency and a single export control list as well as all changes needed to implement the final reform steps. The White House might reconsider plans for delaying its bill if Congress moves ahead with any of the several bills that have been introduced to amend the Arms Export Control Act and the Export Administration Act, Nilsson acknowledged. If Congress began to move any of these measures, “it certainly would prompt us to go back up the chain for guidance,” he said.

## **Industry Use of STA License Exception Off to Slow Start**

Since publication of the final rules authorizing the use of the Strategic Trade Authorization License Exception (STA) in July, only 14 exporters have taken advantage of it for 74 shipments, according to Eileen Albanese, director of BIS’ office of national security and technology transfer controls. The agency expects that number to pick up as firms get more familiar with the use of STA. “I think with more education, with us doing more seminars, more people will use it,” she told the Practicing Law Institute’s annual export controls program Dec. 5.

Albanese stressed that STA is optional and exporters can still seek an individual export license. “You have to remember that if you choose not to use STA when STA is available and you submit a license application, there is no guarantee that that license application will be approved,” she said.

“Once that denial is received by the exporter, they can go ahead and, if they fulfill the obligations for STA, they can make that export,” Albanese stated. “BIS has not taken the position that a denial of an STA-eligible license is ‘informing’,” she noted. If BIS denies the license, it will tell the applicant, “Your application has been denied, however, this transaction is eligible for STA if you meet all requirements,” she explained. If there is a problem, there “will definitely be in the denial notice that you are hereby informed that this transaction cannot proceed and we will then put the entity on the Entity List, if that were the case,” she said.

## **Administration Plans to Harmonize Import Licensing Rules**

The Obama administration is drafting rules to harmonize temporary import licensing requirements administered by DDTC and permanent import requirements under the jurisdiction of Justice’s Bureau of Alcohol, Tobacco and Firearms (ATF). As part of that process, it will update the U.S. Munitions Import List (USMIL), which ATF uses to determine what imports need licenses, and align the list with expected transfers of item from the USML to the CCL, said Brian Nilsson, director of nonproliferation controls on the National Security Council at the White House. “The USMIL has not been updated for several decades,” Nilsson told a Practicing Law Institute program Dec. 6. ATF has already completed an initial review of the list and will publish a regulation to deploy those changes, he noted.

“ATF is the deciding agency for what needs to be protected for the purpose of domestic security. So we are going to recalibrate what is subject to temporary import controls to those defense articles that are on the USMIL. You will see that both in the ATF regulations and, in the near future, by State and Commerce,” he said.

## **State, BIS Propose Controls for Jet Engine “Hot Sections”**

Export control officials say they are aiming to have proposals published by the end of March 2012 for converting 20 categories on the U.S. Munitions List (USML) into positive lists and transferring large numbers of items to the Commerce Control List (CCL). In the steady move

toward that goal, the Directorate of Defense Trade Controls (DDTC) Dec. 6 proposed filling in previously reserved USML Category XIX to cover gas turbine engines and associated equipment and BIS proposed creating new 600-series Export Control Classification Numbers (ECCN) for items that will move from that category to the CCL. In parallel notices, DDTC and BIS also repropose revisions to Category VII (ground vehicles) to respond to public comments on their original proposals (see **WTTL**, Nov. 14, page 1).

The BIS proposal would create ECCNs 9A619, 9B619, 9C619, 9D619 and 9E619 for those military gas turbine engines and related articles that no longer warrant control on the USML. One of these new ECCNs would cover jet engine “hot” sections, long a controversial subject for the aviation industry.

ECCN 9A619 would control gas turbine engines “specially designed” for military use that would not be controlled under proposed USML Category XIX, as well as digital engine controls such as Full Authority Digital Engine Controls (FADEC) and Digital Electronic Engine Controls (DEEC) “specially designed” for gas turbine engines in ECCN 9A619. It also would control “hot section components and related cooled components “specially designed” for gas turbine engines in ECCN 9A619 and engine monitoring systems, the BIS notice said.

**\* \* \* Briefs \* \* \***

**BIS:** Agency has created new munitions control division in office of strategic industries and economic security to handle expected 20,000 to 40,000 additional licenses it expects to receive with transfer of items from USML to CCL, agency officials report. Todd Willis, who served as chief of DTSA’s dual-use licensing division, will return to BIS to head new division. Previously, he was assistant director of BIS office of enforcement analysis and also headed outreach efforts to universities and research organizations.

**RUSSIA:** U.S. will invoke “nonapplication” of MFN treatment for Russia when WTO approves Russia’s accession to WTO during its ministerial Dec. 15-17 because Congress has not yet agreed to lift Jackson-Vanik Act restrictions on Russia, USTR Ron Kirk said Nov. 30. He told reporters he didn’t expect nonapplication to affect trade because it will take time for Moscow to enact legislation to complete accession and by then Congress may have acted to grant Russia permanent-normal-trade relations status.

**MENTHOL CIGARETTES:** Twenty ex-HHS secretaries, CDC heads and surgeons general urged USTR Ron Kirk Dec. 8 to accept WTO ruling and ask FDA to ban menthol cigarettes (see **WTTL**, Sept. 12, page 3).

**BRAS:** CIT Judge Timothy Stanceu Dec. 5 rejected government’s motions to bar testimony of “bra fit model” in two cases brought by Victoria’s Secret and Lerner New York challenging Customs tariff classifications of bra tops (slip ops. 11-149, 11-150). Testimony of model who tries on bras for fit, feel, support and design doesn’t violate rules for use of expert witnesses, he ruled.

**AIRBUS:** After reviewing EU statement on measures it has taken to comply with WTO ruling on subsidies given to Airbus, USTR’s office said Dec. 9 that it has asked EU for consultations. “The United States has reviewed carefully the limited information in that notification. It appears to show that the EU has not withdrawn the subsidies in question and has, in fact, granted new subsidies to Airbus’ development and production of large civil aircraft,” USTR statement said (see **WTTL**, Dec. 5, page 3).

**CHINA:** Consultations with Beijing failed to resolve U.S. complaints about China’s antidumping and countervailing duties on imports of American chicken parts, USTR’s office said Dec. 8. As result, U.S. is asking WTO to establish dispute-settlement panel to hear case (see **WTTL**, Sept. 26, page 3).

**CANADA:** President Obama and Canadian Prime Minister Harper agreed Dec. 7 to launch two bilateral programs to enhance border security and regulatory cooperation. “Beyond the Border” and “Regulatory Cooperation” efforts will aim to facilitate trade, improve border infrastructure, strengthen security and revise regulations that hamper transportation and sale of goods and services across border.

**TRADE FIGURES:** U.S. merchandise exports in October rose 13.5% from year ago to \$127.8 billion, Commerce reported Dec. 9. Services exports increased 9.5% to \$51.4 billion from year ago. Goods imports went up 13% from October 2010 to \$186.6 billion, as services imports gained 6% to \$36 billion.

**PIPE:** In preliminary 5-0 vote Dec. 9, ITC found U.S. industry may be suffering injury from allegedly subsidized and dumped imports of circular welded carbon steel pipe from India, Oman, UAE and Vietnam.