

Vol. 34, No. 24

June 16, 2014

BIS, DDTC Have Not Agreed on Common Enforcement Policies

Officials in the Bureau of Industry and Security (BIS) and State's Directorate of Defense Trade Controls (DDTC) still have not come to a common philosophy and approach to export enforcement as export control reforms move forward, conceded Sue Gainor, the director of DDTC's defense trade controls compliance office. There is still a difference of opinion over whether it is better to impose many administrative fines for export violations as BIS does or just a few very large fines as DDTC does, she told the American Conference Institute's annual global trade compliance conference June 12.

Gainor said she has the phone number of Doug Hassebrock, the director of BIS' office of export enforcement (OEE) on speed dial. "Doug Hassebrock and I have had many conversations about the theology behind lots of fines by people with badges versus a few large consent agreements that tell industry a story about what we are looking for," she said. "It is a theological debate that we have not yet resolved," she said.

Gainor also said there has been a lot of discussion about how export enforcement will be conducted for products that are being transferred from the U.S. Munitions List (USML) to the Commerce Control List (CCL). "There is a lot of uncertainty in government," she admitted. "Yes, there is confusion between Commerce and State," she conceded.

"We have very different approaches. We have different staffs," she said. Gainor noted that BIS has a badged, uniformed force that carries guns, while DDTC compliance staff has fewer than 40 civilians and contractors. "We have not reconciled how our agencies are going to work in this brave new world," she said. For now, all DDTC investigations are still focused on violations that occurred before final transition regulations went into effect. She acknowledged, however, that questions are coming from Customs and Border Protection about products that are going through transfer from the USML to the CCL, and that has increased the load of commodity jurisdiction requests DDTC is handling.

Cantor's Loss Hurts Chance of Ex-Im Reauthorization This Year

The stunning primary loss of House Majority Leader Eric Cantor (R-Va.) June 10 and his announced decision to step down from the Republican leadership post will have a wide-ranging impact on many legislative initiatives, not least of which is reauthorization of

the Export-Import Bank. Ex-Im supporters were hoping Cantor would come to the bank's rescue as he did two years ago and negotiate a compromise to get its charter renewed this year. Now, congressional sources say, the strategy has shifted to getting a short-term extension for the bank as part of the appropriations process.

With Ex-Im unlikely to get the five-year extension the Obama administration has requested, the first goal will be to get its charter extended through the end of 2014 as part of a "continuing resolution" that will extend the budgets of several federal agencies that have not had their appropriations bills enacted by the time the new fiscal year starts Oct. 1, 2014, congressional sources explain. After that, the aim would be to have the bank's charter extended for one year as part of second continuing resolution that is expected to be enacted during a lame-duck session of Congress in December to keep the government operating into 2015 (see **WTTL**, May 12, page 3).

As supporters move toward the appropriations route to keep Ex-Im operating for another year, some backers are saying it would be better for the bank to have a "cooling off" period and to get the White House and the business community more involved in defending it next year. The strong tea party opposition to the bank was underscored by a June 9 Wall Street Journal editorial against its reauthorization.

"Industry has not been up on the Hill" supporting the bank's reauthorization, one congressional source said. "The administration has to spend some effort lobbying, which it hasn't. It has left it up to Ex-Im," the source added. "There will have to be a much more concentrated effort. They will have to press much harder next year if they want a multi-year extension," he added.

Meanwhile, Ex-Im is getting support from House Appropriations Committee members because its balance sheet shows a contribution of more than \$1 billion to the U.S. Treasury. Appropriators like to have that offsetting income when working on the budget. "They are not going to throw that over the side," one source said.

DDTC Allows "Tokenization" for Data Exports to Cloud

Companies hoping to use "tokenization," a method of data security, to put on the cloud technical data that are controlled under the International Traffic in Arms Regulations (ITAR) got a qualified green light from State's Directorate of Defense Trade Controls (DDTC) May 27. In an advisory opinion addressed to Toronto-based software provider Perspecsys, DDTC opened the door to using this security technique without a DDTC license under certain conditions.

"In accordance with [ITAR] Section 125.4(b)(9), tokenization may be used to process controlled technical data using cloud computing applications without a license even if the cloud computing provider moved tokenized data to servers located outside the U.S., provided sufficient means are taken to ensure the technical data may only be received and used by U.S. persons who are employees of the U.S. government or are directly employed by a U.S. corporation and not by a foreign subsidiary throughout all phases of the transfer, including but not limited to transmission, storage, and receipt," the DDTC opinion said. After Perspecsys issued a press release touting the approval, DDTC issued another statement June 11, clarifying its position. "The advisory opinion is not intended

to imply that ‘sufficient means’ to accomplish the requisite assurance levels exists today technologically, nor does it suggest that tokenization by itself could achieve that end,” it said. DDTC asked Perspecsys to post the clarification on its website, which it did. The company also will revise the original press release to add the ITAR restrictions.

Industry sources say the clarification raises more questions, such as “what are sufficient means? And who decides what is sufficient?” Nonetheless, even with the “sufficient means” of assurance condition, they say this opinion is an important development in the cloud computing and security sector because lots of defense companies would like to put their data on the cloud.

Industry has long been asking export control agencies to address the new challenges of cloud computing. Last year, State’s Defense Trade Advisory Group (DTAG) urged the department to amend the ITAR to exclude from the definition of controlled technical data information that goes into the cloud encrypted with no unauthorized party access (see **WTTL**, May 13, 2013, page 1).

DDTC apparently was concerned that the Perspecsys press release led customers to believe that only its proprietary tokenization had been approved and not the method in general. A source familiar with the company said that was unintentional. Its original press release simply said, “In its groundbreaking decision, DDTC reinterpreted the ITAR to authorize the use of Perspecsys tokenization to process ITAR technical data in the cloud without a license, even where the tokenized technical data may be transferred to servers located outside the United States.” The release did not mention the protections needed to ensure the data were only sent from and received by U.S. persons at U.S. companies, even located outside the U.S. borders.

Tokenization itself is not a new phenomenon, having been used since 2005 to process credit card and other payments, as well as storing customer data on network servers. According to payment management company Cybersource, tokenization is defined as “the replacement of sensitive data with a unique identifier that cannot be mathematically reversed.” What is new is sending this ITAR-controlled data through the cloud to locations in other countries.

Applications Needed to Get Interpretation of Russia Sanctions

Exporters who are uncertain about how the Bureau of Industry and Security (BIS) is interpreting the restrictions placed on exports to Russia will have to apply for a license to find out the agency’s policies, according to BIS Assistant Secretary Kevin Wolf. “The only way in which you are going to know what those are is to apply for a license and see what the outcome is, because we are still working through it through the interagency process,” he told the BIS Regulations and Procedures Technical Advisory Committee (RAPTAC) June 10.

When the U.S. and its allies imposed sanctions in April on Russia for its actions in Ukraine, BIS issued a notice saying it would deny pending licenses and revoke existing licenses for “any high technology item subject to the EAR to Russia or occupied Crimea that contribute to Russia’s military capabilities.” Since then, it has issued no clarification of what it means by high technology or military capability (see **WTTL**, May 19,

page 3). “If you are exporting something to Russia that requires a license, submit the application,” Wolf advised. “It might get denied; it might get approved,” he said. “To the extent that it doesn’t need a license, it doesn’t require a license,” he continued. “We never said we were imposing licensing requirements on things that didn’t require a license under the existing regs, but a lot of people assumed that we were; and I had to say no we are not,” he told RAPTAC. New licensing requirements, however, were imposed for exports to Russian and Ukrainian persons and organizations added to the Entity List, he cautioned.

BIS is still reviewing existing licenses to see if any would need to be revoked. “To the extent that there are existing licenses that have not been used up, we will be going through the process of reviewing those,” Wolf said. “Unless you hear from us and get a notice from us about something, then the status quo remains,” he advised.

Separately, the United Kingdom’s Export Control Organization (ECO) issued a notice June 11 to add new restrictions on the use of Open General Export Licenses (OGELs) for Russia. It added Russia to the list of prohibited destinations for the use of OGELs for returning military goods to Russia after exhibition or demonstration. “This change comes into effect immediately. In the future a Standard Individual Export Licence (SIEL) will be required to return military exhibits to Russia, including any military items exhibited at Farnborough International Airshow. Applications for SIELs will be assessed against the terms of the licensing suspension announced on the 18 March 2014 and the Consolidated EU and National Export Licensing Criteria,” it explained.

Trans-Pacific Partnership: Just Delayed or Really Dead?

As hard as U.S. trade officials try to put a positive spin on negotiations toward a Trans-Pacific Partnership (TPP), especially their parallel market-opening talks with Japan, there are growing rumblings in the trade community that TPP is not just delayed but actually dead. At a minimum there is less hope for concluding a deal this year.

At an event in Washington June 10, Acting Deputy U.S. Trade Representative (USTR) Wendy Cutler claimed there has been progress in ongoing parallel talks with Japan on agriculture and autos. Her latest round of talks with Japanese negotiators on autos was held June 9-10.

Cutler credited President Obama’s trip to Tokyo in April, which widely had been seen as a bust with no deal, with moving the ball forward on progress on those two fronts. After that trip, “we were able to really enter a new stage in our negotiations when we achieved a path forward on both autos and agriculture,” she said (see **WTTL**, April 28, page 2).

Cutler joked she had left the ongoing auto talks on her lunch break to give the speech. “We are making some progress, but we still have a lot of work to do,” she said. “We’re starting to discuss some of the more difficult issues in the negotiations, including standards, dispute settlement and financial incentives,” Cutler added.

Chief TPP negotiators are to meet again in July, she said. On the larger TPP talks, “we’re continuing to make progress, resolving issues and we’re getting closer to concluding an ambitious TPP agreement,” she asserted. However, with growing critics both

in Congress and the public sector, the agreement will face a hard time getting passed, especially without trade promotion authority that is stalled (see related story below).

Lawmakers Insist on Elimination of Farm Tariffs in TPP Deal

Japan must eliminate its tariffs on agriculture imports, not just lower them as part of any Trans-Pacific Partnership (TPP) deal, members of the House Ways and Means Committee insisted at a trade subcommittee hearing June 11. Some statements by USTR Michael Froman have hinted the U.S. might accept something less than full elimination of tariffs. In his opening statement, subcommittee chairman Rep. Devin Nunes (R-Calif.) criticized Japan's effort to protect so-called "sacred" agriculture sectors TPP talks. "Tariffs must be eliminated without exclusion," he declared (see **WTTL**, June 2, page 4).

"In some cases a long timeframe may be warranted, but there has to be a path to zero. If any countries insist on retaining tariffs, then we must complete the negotiations without them and allow them to rejoin when they can commit to full tariff elimination" he said. "To gain support in Congress, these agreements must result in complete market access," Nunes added.

As talks with Japan remain bogged down, witnesses at the hearing on the agricultural trade agenda renewed complaints that have dogged trade talks for years: sanitary and phyto-sanitary (SPS) protections, country-of-origin labeling, market access and tariffs on U.S. agricultural exports. Beef and dairy industry representatives also addressed the list of products Japan wants to protect.

"For many months, our negotiators were making progress, but unfortunately Japan has been unwilling to abide by the same principles of free trade as all of the other TPP countries and they are digging in and are refusing to negotiate on products they deem politically 'sensitive.' This is discouraging and ultimately detrimental to the entire process," testified Bob McCan, president of the National Cattlemen's Beef Association.

The hearing also touched on ongoing talks with the European Union (EU) toward a Transatlantic Trade and Investment Partnership (TTIP). A representative of almond exporters said that the "most consistent SPS issue that we deal with is in Europe."

The EU submitted a letter June 9 to Nunes for the record. The letter said the EU has "engaged with the United States to negotiate an effective bilateral framework for SPS rules that facilitate trade while fully respecting food safety legislation on both sides." It agreed science should form the basis for sanitary measures. "Accordingly we base our decisions in this area on scientific results provided by EU scientific agencies, and implement our measures transparently, in line with the EU legal processes," the EU added.

Nunes also repeated his push to pass "fast track" trade promotion authority (TPA), which was introduced in January. "What we still have here is a bipartisan agreement, that was made with the prior Senate Finance chairman, who then left. We have a new Senate Finance chairman, who is ... trying to get his feet on the ground, but the clock is ticking, in terms of time that we have left to even put something together before the end of the year," he told reporters after the hearing. "Any urgency by the administration to try to close TPP will kill TPP without TPA passed," he added. Nunes dismissed concerns that

House Majority Leader Eric Cantor's (R-Va.) primary loss would affect TPA. "I think it has absolutely nothing to do with it," he said.

Europe Seeks "De-escalation" of Crisis with Russia

While U.S. and European officials have warned that tougher sanctions, including sectoral sanctions, could be imposed on Russia if it continues to interfere in Ukraine, some European Union (EU) officials are calling for a de-escalation of the conflict. Michel Barnier, the EU commissioner for internal market and services, told reporters in Washington June 12 that the election of Petro Poroshenko as Ukraine's new president and his recognition as the legitimate head of the country offer an opportunity for diplomacy to resolve the crisis without having to impose more sanctions against Moscow.

Barnier noted the efforts of Secretary of State John Kerry and EU High Representative Catherine Ashton to reach a deal with Russia in April to reduce the conflict. The goal should be "de-escalation, not to be obliged to go to higher levels of additional sanction, even if there is tooing and froing and hot and cold, particularly on the Russian side," he said through a translator. "I think we will progress towards that sort of de-escalation," he added.

Barnier said it's too early to tell the impact the existing sanctions have had on European financial institutions. "We know sanctions involve a price," he said. He noted that half of Moscow's revenue comes from energy exports. "Russia cannot afford to be isolated in economic terms, financial terms or diplomatic terms," he said. "The work of European diplomacy under Cathy Ashton and American diplomacy has to move forward," he added.

In addition to pressing for de-escalation of the crisis with Russia, other EU diplomats have been working behind the scenes with U.S. officials to make sure any new sanctions against Russia carefully carve out business arrangements that might hurt EU companies and banks. The large investment of European companies in Russia and Europe's dependence on Russian energy supplies have made it difficult for the U.S. and EU to agree on new sanctions that won't hurt the EU as much as Russia (see **WTTL**, May 19, page 3).

Exporters Remain Reluctant to Use STA, Wolf Reports

U.S. and foreign companies still don't understand that the requirements for using License Exception Strategic Trade Authorization (STA) are no greater than they were for obtaining a license before from State or Commerce and in many cases are less, BIS Assistant Secretary Kevin Wolf told RAPTAC June 10. Wolf said he continued to find misunderstanding of the rules on recent trips to Japan and Australia. "It's more a function of education," he said. "It's a function of getting people to read the reg," he added.

The most common complaint he heard was about the need for foreign customers to sign a document identifying end-users and end-uses and agreeing not to reexport the STA item to parties outside of the 36 countries permitted under the regulation. Items that were formerly subject to ITAR before being transferred to the 600 series on the Commerce Control List would have needed a retransfer authorization from State, he noted. "That's more paperwork and more burden and more time than exchanging documents between the

parties involved and putting them on notice that you can't retransfer outside of the group of 36," Wolf argued. "All of these things would have required a license before and would require a license if you don't use STA," Wolf said. "For U.S. companies to prepare a license for State in the old days or for Commerce now, you had to tell your U.S. party what the end-use and end-user was," he said.

"We are not asking you for anything in the STA that otherwise wouldn't have been required as part of a license application," he added. "Every time I heard a complaint and every complaint I heard over the course of two weeks, they were complaining about something that was already required the old way," he said. The BIS official also said he heard complaints from governments that they were being asked to sign STA certifications. "We never asked that," he said. "Our regulations don't require the government to certify," he added.

Separately, in response to numerous requests from industry, BIS has posted on its STA frequently asked question (FAQ) site a "*600 SERIES*" *SAMPLE CONSIGNEE STATEMENT (per EAR section 740.20)*." The form includes statements confirming restrictions on reexports outside of authorized countries, permitted end-users and end-uses and that U.S. government "has otherwise authorized the ultimate end use, the license or other authorization is in effect, and the consignee verifies in writing that such authorization exists and has provided the license or other approval identifier to the exporter, reexporter or transferor (as applicable)." It also says the consignee "Agrees to permit a U.S. Government end-use check with respect to the items (Note: only required if the consignee is not the government of a country listed in Country Group A:5)."

EU, U.S. Still Far Apart on Including Financial Services in TTIP

In an effort to overcome U.S. opposition to including financial services in a Transatlantic Trade and Investment Partnership (TTIP) deal, European Union (EU) officials are promising that nothing in the agreement will do anything to lower standards for financial regulation or interfere with the enforcement of the Dodd-Frank Act, which was enacted to tighten financial oversight after the 2008 financial crisis. After meeting with U.S. trade and finance officials in Washington June 12 and apparently getting a negative reaction, EU Internal Market Commissioner Michel Barnier told reporters, "We still don't agree with the Americans."

Barnier stressed the EU's adoption of its own regulatory reforms and the enactment of 41 regulations to strengthen its regulation of financial services to show that the EU system is now as stringent as U.S. rules. As a result, the EU now has a stake in maintaining its high level of regulation, he said.

"Under no circumstances would we accept" the undermining of EU standards, he declared. The financial services provisions of a TTIP deal would not provide for common rules but would recognize each partner's regulations and help open market access for their industries in each other's markets. "We don't want to negotiate the details of standards. I want to respect the role of U.S. regulators," Barnier said.

The EU would respect the independence of American regulators "just as I want our regulators respected," he added. While recognizing each other's systems, these provisions

would not be binding on either partner, he said. So far, TTIP talks have only discussed the scope of an agreement and have not gotten into the details of specific provisions, he reported. Other EU officials have expressed frustration with the slow pace of the negotiations and Washington's apparent reluctance to move faster. About his meeting with USTR Michael Froman, Barnier said, "We have a common interest in moving faster."

Separately, the nongovernment organization Knowledge Ecology International (KEI) said June 12 that it had "obtained the terms of reference (TOR) for the confidentiality of the [TTIP] negotiating texts." The TOR were laid out in a letter from U.S. Chief Negotiator Dan Mullaney to EU Chief Negotiator Ignacio Garcia-Bercero that KEI obtained from the USTR's office through a Freedom of Information Act (FOIA) request.

"Transparency is an important principle for the Obama Administration, just as it is for the EU. However, the United States also shares the EU's view that a certain level of special care in handling these documents is necessary to enable mutual trust between negotiators and for each side to preserve positions taken for tactical reasons with regard to third countries with which we are or could be negotiating in the future," said the letter dated July 5, 2013. The letter detailed the procedures that each side will apply to handling and protecting the confidentiality of TTIP documents.

*** * * Briefs * * ***

BALL BEARINGS: After Supreme Court denied petition for writ of certiorari June 2 in *NSK v. ITC*, CIT Judge Timothy Stanceu issued order June 11 denying motion by NSK co-plaintiff JTEKT Corporation for stay of Commerce remand determination to apply zeroing in eighteenth administrative review of antidumping duty order on ball bearings and parts from France, Germany, Italy, Japan and United Kingdom (see **WTTL**, June 2, page 3). Court of Appeals for Federal Circuit had denied NSK request for en banc rehearing in October. "Based on these developments, the court denies as moot plaintiff's request for a stay of these proceedings," Stanceu ruled.

EXPORT ENFORCEMENT: Sporting goods retailer Bass Pro, LLC of Springfield, Mo., agreed June 10 to pay BIS \$25,000 civil penalty to settle nine charges of unlicensed exports of rifle scopes to Canada, China and Cyprus between June 2010 and June 2011. Optical sighting devices were classified under ECCN 0A987 and worth \$3,513. Devices were controlled for Firearms Convention reasons when exported to Canada and for crime control reasons when exported to China and Cyprus, settlement noted. Bass Pro neither admitted nor denied charges.

MORE EXPORT ENFORCEMENT: Western Advanced Engineering Company (WAECO) of Orange, Calif., agreed to three-year denial order June 12 to settle BIS charge of exporting prepreg machine to Spain without required Commerce license in May 2005. Machine was classified under ECCN 1B001 and worth approximately \$825,215. Proposed charging letter initially was sent to WAECO in September 2010. In June 2013, BIS sent amended letter to C.A. Litzler Co. Inc. of Cleveland because it "had acquired at least a substantial portion of WAECO's assets." Litzler April 24 paid BIS \$45,000 to settle same charge (see **WTTL**, April 28, page 5).

TPP: Congress and women's rights group joined Hollywood in calls to stop TPP negotiations with Brunei until country revokes newly adopted penal code. "International trade partners have much to gain from an economic relationship with the United States, and our trade agreements should insist that participating countries adhere to internationally recognized civil, political, and human rights standards," 119 members of Congress wrote in letter to Secretary of State

John Kerry and USTR Michael Froman June 12. Separately, 12 women's rights group, including Feminist Majority Foundation (FMF), wrote letter to White House June 9 also protesting inclusion of Brunei in pact. "Women's rights and human rights cannot take a backseat to profit and trade," said FMF President Eleanor Smeal in statement. Former Tonight Show host Jay Leno and other entertainment personalities previously joined protests against inclusion of Brunei in TPP negotiations (see **WTTL**, May 12, page 8).

600 SERIES: Average processing time for BIS review of export licenses for items transferred already from USML to CCL's 600 series is 14.1 days, BIS Assistant Secretary Kevin Wolf reported June 10.

UNVERIFIED LIST: In June 16 Federal Register BIS added 29 entities in China, Hong Kong, Russia and UAE to its Unverified List (UVL). In addition, rule "reinserts a requirement for exporters to file an Automated Export System (AES) record for all exports subject to the EAR involving persons listed on the UVL following that provision's inadvertent removal from the EAR," BIS said.

TEXTILES: U.S., Mexican and Central American textile and apparel producers, including National Council of Textile Organizations (NCTO), met with congressional staff and leaders of House Textile Caucus June 10 to discuss textile rules in TPP. Discussions focused on "need for a strong 'yarn forward' rule of origin, robust customs enforcement, and reasonable tariff phase outs for sensitive products," NCTO statement said. Central Americans have been particularly concerned that TPP would undermine benefits they received under CAFTA-DR.

HOT-ROLLED STEEL FROM INDIA: Court of Appeals for Federal Circuit June 12 affirmed CIT decision that Commerce correctly applied adverse facts available in fifth administrative review of CVD order on hot-rolled carbon steel products from India. "We agree with the United States and U.S. Steel that the Trade Court did not abuse its discretion in holding that Essar failed to exhaust its administrative remedies regarding the new arguments on corroboration," wrote CAFC Judge Alan Lourie for three-judge panel in *Essar Steel v. U.S.* "The record shows that Essar failed to raise any of the new arguments before Commerce, and it cannot therefore raise those arguments now on appeal," he explained. "Those arguments were new when they were presented to the Trade Court, and there is no indication that exhaustion would have been a useless formality or that Essar lacked an opportunity to raise the argument before Commerce," her added.

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