

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. 28, No. 4

January 28, 2008

LITTLE NEW OFFERED IN BUSH DIRECTIVE ON DUAL-USE EXPORT CONTROLS

Members of the exporting community say they saw nothing new in the White House statement explaining export control reforms the Bureau of Industry and Security (BIS) is supposed to implement under directives President Bush issued Jan. 22. The details of the directives, which also cover defense trade licensing (see story below), are unknown because the texts are classified and not being released to the public, a White House staffer told WTTL.

A slim fact sheet explaining the president's directive said BIS will place more focus on foreign end users through such mechanisms as the Validated End User authorization and expansion of the Entity List – two measures already implemented or proposed. To increase transparency, it said the agency would post advisory opinions on its website, which it has been doing for a couple of years.

To put more focus on U.S. competitiveness, the directive instructs BIS to establish an intra-company license exception. Work on such a license exception has been underway for a year and a draft proposal is close to being ready for interagency review (see WTTL, Dec. 10, page 1). The directive also calls for revising encryption controls, another effort that has been going on for over a year with little progress. The president also told BIS to “review” reexport controls, which BIS staffers say will involve consideration of the current “de minimis” rules, another exercise already underway after years of industry pressure to revise those rules.

“This is not the first time an administration has launched export control reforms,” said Bill Reinsch, president of the National Foreign Trade Council and the under secretary for export administration in the Clinton administration. “Ultimately, their success or failure depends on prompt aggressive implementation by a sometimes unenthusiastic bureaucracy,” he said.

The directive to reform BIS rules and procedures comes as agency staffers are complaining about budget cut backs that might force employees, including enforcement staff, to reduce travel and perhaps stop hiring to fill vacant positions. Because no appropriations bill has been passed for Commerce, all parts of the department and other federal agencies are operating under a “continuing resolution” that limits spending to 2007 levels with mandatory spending cuts.

STATE CONSIDERS USER FEES TO FINANCE ENHANCED EXPORT LICENSING

State Department officials say they are considering user fees as one of several ways of “self-financing” the expansion of the staff and resources of the Directorate of Defense Trade Controls (DDTC) to implement the export control reforms President Bush outlined in a Jan. 22

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Published weekly 50 times a year except last week in August and December. Subscription in print or by e-mail is \$647 a year. Combo subscription of print and e-mail is \$747. Additional print copies mailed with full-price subscription are \$100 each. Circulation Manager: Elayne F. Gilston

directive. Under Secretary of State John Rood emphasized to reporters that no decision has been made on fees or other fund-raising methods. Despite a White House statement saying State will increase resources for DDTC, Rood said there will be no request for additional funds for the office in the fiscal year 2009 budget that President Bush will send Congress in February or in a supplemental budget request for fiscal 2008, which started Oct. 1, 2007.

“I want to be clear on this point, we have not settled on the precise mechanism by which there would be self financing,” Rood said. “We have determined that we would have self-financing to cover the resources for these new reforms. We are still in the process of determining the specifics. We have several options we are evaluating,” he added. Frank Ruggiero, the deputy assistant secretary for defense trade and regional security said, “Now that we have the guidance to do this, we are going to start to explore with various people with a stake in this issue how we will do that.” Rood and Ruggiero conceded that it is not clear whether State would have legal authority to impose any type of fees without congressional authorization. “We will have a conversation with the Congress,” Ruggiero said.

Bush’s directive isn’t likely to stop congressional proposals for broad legislation to reform DDTC licensing policies and resources. “Both the Commerce and State Departments have only issued bare-bone explanations about what these directives entail,” Rep. Brad Sherman (D-Calif.), chairman of the House Foreign Affairs Committee’s subcommittee on terrorism, nonproliferation and trade, told WTTL in an e-mail. “Many of these items sound very good and it looks like the administration has at least taken some steps in the right direction. But we do need to see the details. My staff and I look forward to learning the specifics. What I have seen so far has not changed my plan to move forward with this bill,” he stated

Several trade groups issued statements praising the president’s action and applauding the high-level attention being given to export control issues. But speaking on background, many industry representatives criticized the directive for not doing enough to change the ingrained attitudes at DDTC about licensing, Commodity Jurisdiction and the treatment of exporters or to reduce the number of licenses required, especially under Project Licenses and military assistance contracts that have already received Defense Department and White House blessings.

The outline of reforms in the president’s directive includes many measures DDTC is already implementing. The directive calls for easing controls on dual and third-country nationals in NATO and other close allies. DDTC amended the International Traffic in Arms Regulations (ITAR) Jan. 4 to implement that change. It also seeks an upgrade in DDTC’s electronic licensing system, D-Trade, to permit submissions of all licenses, including Technical Assistance Agreements (TAA) – a goal the agency has been working toward for a year.

The directive instructs DDTC to write guidelines that would impose a 60-calendar-day deadline for completing action on a pending applications unless there is a “strong reason for additional time.” Industry executives question why it was left to DDTC to draft these guidelines rather than mandating a deadline as President Clinton did in a directive setting deadlines for Commerce to complete action on dual-use applications and creating a process for escalating disagreements over licenses up the political chain of command.

BUSH ORDER ON CFIUS SEEN WELCOMING TO FOREIGN INVESTMENT

With foreign investors riding to the rescue of many U.S. companies and banks in recent days, President Bush’s Jan. 23 Executive Order on the operation of the Committee on Foreign Investment in the U.S. (CFIUS) is seen by many trade advisors as a positive signal that foreign money is still welcomed in the U.S. The order implements parts of the legislation enacted last year to amend Exon-Florio Act requirements for reviewing foreign acquisitions of U.S. companies that might pose a national security risk (see WTTL, Oct. 29, page 1). The order, however, goes beyond the legislation and establishes rules and procedures that could lessen some of the harsher requirements that could have resulted from the amendments, observers

point out. In a statement issued with the order, Bush said the new policy on investigating foreign investments in the U.S. “reaffirms our commitment to open economies and our policy of welcoming foreign investment and the important economic benefits that such investment brings.” The order “sets forth procedures for protecting our national security, recognizing that our openness is vital to our prosperity and security,” the president said.

“This is very positive from the standpoint of people concerned about foreign direct investment in the United States,” said Joe Dennin, a partner with McKenna, Long and Aldridge in Washington. “This will come as a reassuring sign that the administration is committed to welcoming foreign investment,” he said.

In addition to implementing changes to CFIUS that were mandated by the legislation, Bush expanded the committee’s membership, imposed rules on risk mitigation, and changed the conditions for a president’s role in approving an investigated foreign investment. He added to the committee officials who were not identified in the new law and who represent the economic side of the administration.. This was a “deliberate rebalancing” of the committee, said Dennin. While the legislation mandated the membership of the secretary of Homeland Security and the director of the Office of National Intelligence, among others, Bush’s order included the U.S. Trade Representative (USTR), the head of the Council of Economic Advisors and the director of the Office of Management and Budget (OMB).

A key addition is language in the “risk mitigation” section prohibiting CFIUS from requiring foreign acquirers – as a condition for approval of a deal – to sign an agreement that they will abide by all U.S. laws. “A risk mitigation measure shall not, except in extraordinary circumstances, require that a party to a transaction recognize, state its intent to comply with, or consent to the exercise of any authorities under existing provisions of law,” the order stated.

This is an important addition, because foreign firms were concerned about having to make commitments to comply with U.S. export controls that their American competitors were not required to make and becoming subject to additional legal liabilities, explained Christopher Wall, a partner with Pillsbury, Winthrop Shaw Pittman in Washington. “It’s a positive sign,” he said. “It was good that there is a focus on this issue,” he added. Wall also said that under the order “Treasury came out on top as the dominant agency as chair of CFIUS.”

FULL TRADE AGENDA GIVES CONGRESS OPPORTUNITIES FOR DEALS

There are so many items on the congressional trade agenda for 2008 that the opportunities and necessity for reaching compromises on key issues seems high. Both Democrats and Republican lawmakers have priorities that aren’t likely to get enacted unless deals can be reached across the aisle and with the White House. The long list of legislation is likely to renew interest in the negotiation of a comprehensive omnibus trade bill – similar to the 1988 Trade Act – that will wrap everything together and only force lawmakers to vote on one trade bill this year.

The long agenda raises concerns that Congress won’t have time to deal with all of it in a legislative year that will be shortened by elections in November and with many members reluctant to vote on any trade bills, let alone numerous pieces of legislation. House and Senate Democratic leaders seem intent on avoiding having to put any congressional or presidential candidates at risk with a dispute over trade legislation except for minor bills with little opposition.

In addition to pending free trade agreements (FTA) with Colombia, Panama and Korea, lawmakers will have to deal with trade preference programs that expire this year, including the Andean Trade Preferences Act, the Caribbean Basin Initiative and the Generalized System of Preferences. Both the House Ways and Means Committee and the Senate Finance Committee are expected to hold hearings examining the value of these programs and the need for potential changes. Also on the table is legislation to renew Trade Adjustment Assistance (TAA), which expired in December. A TAA bill passed the House in 2007 but with the threat of a veto

from the White House. Finance Chairman Max Baucus (D-Mont.) has made renewal and expansion of TAA a top priority. Ranking Finance Republican Sen. Charles Grassley (R-Iowa) reportedly is preparing his own TAA bill.

Ways and Means and Finance will also start work this year on Customs reauthorization, with many proposals already surfacing to deal with import valuations, drawback rules, container scanning requirements, intellectual property protection at the border and import safety. Work on the biennial miscellaneous tariff bill began in the House in 2007 and Finance will begin soon to invite senators to submit their tariff bills. Ways and Means has received proposals for 600 tariff bills and will soon seek public comment on them.

China legislation is also moving toward consideration in both the House and Senate, with various proposals dealing with currency manipulation, subsidies, and import safety. The Bush administration will likely threaten to veto any China bill unless it is tied to some other legislation the White House wants. Completion of Doha Round negotiations this year would also put pressure on Congress to renew the president's fast-track negotiating authority.

* * * BRIEFS * * *

DEEMED EXPORTS: BIS has started work on implementing at least one of recommendations made by Deemed Export Advisory Committee (DEAC) in December (see **WTTL**, Jan. 7, page 3). Agency staff is drafting paperwork needed to create Emerging Technology Advisory Committee, BIS Under Secretary Mario Mancuso told reporters Jan. 25. ETAC will include technology experts from academia and scientific research communities who will help BIS identify new technologies that might affect export controls.

CZECH REPUBLIC: USTR's office Jan. 22 placed Czech Republic on Special 301 Watch List after completing "out-of-cycle" review of Czech enforcement of intellectual property rights (IPR). Review found continuing lack of action to stop piracy and counterfeiting of films and music recordings. Industry sources say Czechs operate flea markets on German border that sells pirated goods. "We remain concerned at the continuing lack of effective enforcement measures against traders openly selling pirated and counterfeit goods in the notorious border markets," said USTR Susan Schwab.

TOMATOES: Commerce Jan. 22 signed new suspension agreement with Mexican growers and exporters of fresh or chilled tomatoes to monitor pricing of tomato exports to U.S. to assure they don't suppress or undercut U.S. tomato prices. Agreement extends program first initiated in 1996 and renewed in 2002.

APO: ITA in Jan. 22 Federal Register amended rules for parties filing administrative protective orders in antidumping and countervailing duty cases. Most changes reflect transfer of functions related to APOs from Central Records Unit to Administrative Protective Order Unit.

OFAC: Agency has imposed \$5,500 civil fine on Diversified Business Communications of Portland, Maine, on charge that it violated IEEPA and Iranian Transactions Regulations by arranging booth space for Iranian fish company at seafood exposition in Europe. OFAC Penalty Notice said company had claimed it believed trade with food companies in Iran, including those selling nuts and caviar, was exempt from controls. Booth space was arranged for Shilat Trading Company, Iran's exclusive producer of caviar. Despite this defense, OFAC said company had violated regulations. Because company promised to take affirmative steps to prevent future violations, OFAC said it reduced potential fine by 50%.

MALAYSIA: After week of talks with Malaysian trade officials on long stalled FTA, Assistant USTR Barbara Weisel Jan. 17 said both sides "will continue to work toward concluding agreement by this summer." She said week's talks produced significant progress on goods, services, intellectual property rights, investment and legal rules. Toughest issue in talks, Malaysia's special government procurement set asides for Malay population, was not covered in latest negotiations. "There are consultations going on on both sides internally" on the issue, she reported, calling issue "politically sensitive." Malaysia "is aware that U.S. needs to see government procurement chapter to conclude this agreement," she said.

EXPORT ENFORCEMENT: James Angehr and John Fowler, owners of Engineering Dynamics, Inc. of Kenner, La., were subject of information filed Jan. 4 by New Orleans U.S. Attorney, charging them with conspiracy to export structural analytical computer software to Iran without license from OFAC. Information claims they provided software to consultant in Brazil who sold it to Iranian customers who once bought systems from EDI before embargo was imposed. [Copy will be sent to subscribers on request.]