

# Washington Tariff & Trade Letter®

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

Vol. 28, No. 11

March 17, 2008

## STATE REVISING STATEMENT ON AIRCRAFT JURISDICTION

After getting objections from the Bureau of Industry and Security (BIS) and members of Congress, State's Directorate of Defense Trade Controls (DDTC) has pulled back and is revising an amendment to the International Traffic in Arms Regulations (ITAR) that is intended to clarify the licensing jurisdiction for aircraft parts that are certified by the Federal Aviation Administration (FAA) (see **WTTL**, Feb. 11, page 1). The amendment won't change any of DDTC's current Commodity Jurisdiction (CJ) claims but supposedly will clarify provisions in Section 17(c) of the Export Administration Act (EAA) which say BIS has jurisdiction when an FAA-certified part is "standard equipment" in civil aircraft and "an integral part of such aircraft."

"I think we will have that done soon," BIS Deputy Assistant Secretary for Export Administration Matthew Borman told the agency's Regulations and Procedures Technical Advisory Committee (RAPTAC) March 11. The coming rule will explain DDTC's interpretation of 17(c) and say "here's how it applies," he said. The clarification will help makers of small parts, such as latches, bolts and sealants, determine when they are subject to ITAR export requirements when used in military aircraft, Borman explained.

Although BIS, DDTC and State reportedly reached agreement on the interpretation of 17(c) in November, DDTC's initial draft of the ITAR amendment didn't completely reflect that agreement, sources told **WTTL**. BIS also was concerned that the rule would not adequately protect intellectual property rights for information used to determine whether an item was standard and integral to an aircraft. Moreover, there was a complaint that the draft only clarified the licensing issues for 60 to 70% of aircraft parts. The final version should clarify policy for 80- 90% of parts, one source said. "State took Commerce's comments to heart," the source added.

## CONGRESS TELLING WHITE HOUSE: DON'T SEND UP COLOMBIA FTA

Bush administration officials reportedly are fanning out on Capitol Hill to muster support for legislation to implement the U.S.-Colombian Free Trade Agreement (FTA), which President Bush March 12 said he intends to send up to Congress possibly after lawmakers return from their Easter recess at the beginning of April. The message those officials are getting, even from supporters of the deal, is: Don't send up the legislation without an agreement with Democratic leaders. In a speech to the U.S.-Hispanic Chamber of Commerce, Bush confirmed reports that the administration wants to send the Colombia pact to Congress this spring (see **WTTL**, March 10, page 3). "There needs to be a vote on Colombia this year," Bush said. "And that means that members of the Congress must be ready to move forward with the

Copyright © 2008 Gilston-Kalin Communications, LLC. All rights reserved. Reproduction, copying, electronic retransmission or entry to database without written permission of the publisher is prohibited by law.

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

agreement when they return from the Easter recess,” he added. After the president’s speech, House Speaker Nancy Pelosi (D-Calif.) issued a statement saying the administration should follow the normal fast-track process and consult with Congress before sending up the accord. “Any deviation from this normal procedure for the Colombia FTA could prove to be counterproductive and would work against both countries’ long-term interests,” she warned.

The next day she told reporters that action must be taken first on Trade Adjustment Assistance (TAA) before lawmakers will deal with Colombia. Congressional sources claim there are no negotiations about tying TAA and Colombia into one bill, but there has long been speculation that such a deal might evolve.

At a White House briefing for reporters after the president’s speech, Deputy U.S. Trade Representative (USTR) John Veroneau said that under Trade Promotion Authority (TPA) or fast-track rules “in order to assure a vote we are very close to the point where the agreement needs to be sent.” He said the administration is working with congressional leaders to find a way to get a vote on the deal. “There is no agreement -- there is no bipartisan agreement right now on a path forward,” he conceded. The idea of sending the FTA to Congress in April appears to be based on the calculation that under fast-track deadlines both houses of Congress would have to vote on the measure before the August recess. But some lawmakers are telling the administration that there is no need to rush the vote, since Congress is likely to remain in session through October and might have to come back in December after the elections for a lame-duck session.

#### **INTRA-COMPANY TRANSFER EXCEPTION WILL REQUIRE BIS PRE-APPROVAL**

A draft plan that BIS has circulated for interagency comment would require companies to first get BIS approval if they want to use an intra-company transfer (ICT) license exception to share controlled items and technology with their overseas facilities and with foreign nationals, explained BIS Deputy Assistant Secretary for Export Administration Matthew Borman. The ICT would work in the same way as the Verified End User (VEU) authorization for exports to China, with BIS having to approve the specific goods and technology that would be covered and the foreign locations where they would be shipped, Borman told the RAPTAC March 14. The exporting community has been pressing for creation of an ICT-type exception for many years (see **WTTL**, Dec. 10, page 1). Commerce’s Deemed Export Advisory Committee (DEAC) had recommended similar treatment for companies that it called “trusted entities.”

#### **FINAL MANDATORY AES RULE IS “IMMINENT,” CENSUS OFFICIAL SAYS**

The Census Bureau intends to roll out a nationwide education program, including seminars, videos and webinars, to inform exporters about the new requirements that will be in a final, revised and renamed Foreign Trade Regulation (FTR). “Publication of the regs is imminent and that’s all the detail that I will give you,” Census Foreign Trade Division Director William Bostic Jr. told the BIS Regulations and Procedures Technical Advisory Committee (RAPTAC) March 11. Among other changes, the final FTR will make it mandatory to use the electronic Automated Export System (AES) for filing export documentation for all exports and will raise the maximum penalty for each violation of the regulation to \$10,000 from \$1,000.

Once the rule is published in the Federal Register, it will go into effect in 30 days and then filers will have an additional 90 days to come into compliance for a total of 120 days. Enforcement will begin on the 91<sup>st</sup> day after the effective date, Bostic warned. “On the 91<sup>st</sup> day we intend to send Foreign Trade Division staff to the ports to work with Customs to stop paper [Shipper’s Export Declarations] from coming in,” he said.

Census has reached an agreement with BIS and Customs and Border Protection (CBP) delegating to those agencies authority to enforce the new FTR. Bostic said Census is working with BIS and CBP to draft penalty and mitigation guidelines. “We are still working out some details

with Customs,” he reported. Although the guidelines may not be issued by the time the final regulation is published, they will be by the 91<sup>st</sup> day, he assured RAPTAC. “We are taking an informed compliance approach” to enforcement of the new regulation, Bostic said. “If we have identified your company as not being compliant, we’re going to actually visit you and provide corrective actions,” he offered. Firms will get 90 days to come into compliance.

“Only if we feel we are being ignored and no corrective action is really happening with the company after we visited, we will consider making a referral to CBP or BIS,” he said. Census also will visit some Foreign Trade Zones to help them use a new Customs electronic filing system, the E214, and will develop “best practices” advice for the zones. Visits are also planned for some users of the Option 4 post-shipment filing system that have low AES compliance rates, as well as for some users of the Kimberly diamond certification program.

### **COURT ORDERS NEW TRIAL FOR QUINN BASED ON WITHHELD INFORMATION**

D.C. U.S. District Court Judge John Bates Feb. 28 granted a new trial to Robert Quinn based on the government’s failure to reveal that at the time of his trial it had suspicions that a key part of its case was based on a false statement by Quinn’s boss. After Quinn was convicted in December 2005 for shipping forklift parts to Iran and sentenced to 39 months in jail, Justice reached an agreement with his boss at Clark Material Handling Corp., David Tatum, who pled guilty to making false statements to federal investigators (see **WTTL**, May 8, 2006, page 4).

Before and during his trial, Quinn had argued that he was unaware that the export of the parts to Iran through an intermediary in the United Arab Emirates without a license from the Office of Foreign Assets Control (OFAC) was illegal. He claimed Tatum had told him it was okay to make the shipments. Tatum had told investigators that he had informed Quinn the exports were not allowed. Federal agents used Tatum’s statements as grounds to arrest and charge Quinn.

Government suspicion about the veracity of Tatum’s statements led Justice Department prosecutors to decide not to call him as a witness at Quinn’s trial, although his name was originally on the witness list. Quinn’s attorneys weren’t informed that Tatum wouldn’t be called until after opening statements had been made. Moreover, prosecutors didn’t reveal that Tatum was under investigation for giving a false statement when Quinn’s sentencing hearing was held in February 2006. Under his plea deal, Tatum ended up getting sentenced to probation. Clark previously had reached an agreement with the Bureau of Industry & Security (BIS) to pay a \$200,000 civil fine to settle charges related its role in the exports.

“Remarkably enough, not only were the prosecution aware that Tatum was under investigation for possibly giving false statements critical to the case, but they were the ones who had him under investigation,” Bates said in his 36-page order. “The government had no excuse for withholding this information from Quinn, and its decision to do so violates its *Brady* duty of disclosure,” he ruled, citing a Supreme Court ruling in *Brady v. Maryland*.

### **ANTIDUMPING ORDERS CAN BE CHALLENGED AFTER LIQUIDATION, CAFC RULES**

The fact that Customs has already liquidated entries subject to an antidumping order doesn’t bar parties from challenging the order, the Court of Appeals for the Federal Circuit (CAFC) ruled March 12, vacating and remanding a decision issued by the Court of International Trade (CIT). In *Gerdau Ameristeel Corp. v. U.S.* (case 2007-1143), Gerdau hadn’t sought to stop liquidation but only to get the International Trade Administration (ITA) to revise its *de minimis* determination in the sixth administrative review of the order on steel concrete reinforcing bars (rebars) from Turkey. This was the second *de minimis* finding for these items, and Gerdau wanted to prevent a third *de minimis* ruling which would have led to termination of the order. CIT Judge Gregory Carman had ruled that Gerdau’s suit was moot because liquidation had

occurred and the court had no jurisdiction because there was no remedy it could grant. His ruling was based on a 1983 CAFC ruling in *Zenith Radio Corp. v. U.S.*

“We agree that while Zenith may bar remedy as to the liquidated goods, Zenith did not concern consequences of the dumping margin review apart from the duties imposed on the liquidated goods,” the three-judge appellate court ruled. “Zenith does not resolve the facts of the Gerdau situation,” it declared.

“Zenith did not establish a blanket rule that there can never be a post-liquidation review of an administrative review determination, even when that determination affects matters other than the specific liquidated goods,” the ruling explained. “Ensuing decisions of the Court of International Trade reflect this scope,” it added. “Gerdau's request for judicial review of the Sixth Review was not rendered moot by liquidation of the entries subject to the Sixth Review, for there remains an issue having ongoing legal consequences: if Commerce erred in calculating a *de minimis* dumping margin for [the respondent] in the Sixth Review, this could affect the future lifting of the 1997 Antidumping Order,” the CAFC ruled. “The Court of International Trade has jurisdiction of the subject matter, in accordance with statute,” it said.

### **BIS DENIAL ORDER CLAIMS FUGITIVE FAILED TO ANSWER CHARGING LETTER**

BIS March 3 issued a denial order suspending the export licensing privileges of Ali Asghar Manzarpour for the next 20 years based on his failure to respond to a Charging Letter the agency sent him on July 27, 2007, a time when the government knew he was a fugitive from the law. The letter came two and a half years after a federal grand jury indicted Manzarpour on the same charges made by BIS. In February 2005, the Justice Department announced that he had been arrested in Poland at the request of the U.S. and was awaiting extradition. The D.C. U.S. District Court docket shows no record of Manzarpour ever reaching the U.S. or being arraigned. A Nov. 26, 2007, notice said “defendant has been a fugitive for more than 90 days.”

BIS issued the denial order following the recommendations of an administrative law judge (ALJ). Because Manzarpour had failed to respond to the Charging Letter, despite BIS efforts to deliver it by mail, facsimile, Federal Express and electronic mail, the ALJ found him in defaulted and recommended a 20-year denial order. Manzarpour, last known to live in Brighton, England, was director of Preston Technical Services, Ltd. The indictment and Charging Letter had accused him of exporting a single engine aircraft to Iran in 2004 without a license from the Office of Foreign Assets Control (OFAC).

### **BIS REVISES NOTICE FOR RECEIPT OF VOLUNTARY SELF-DISCLOSURES**

Exporters who file voluntary self-disclosures (VSDs) with BIS are being reminded that they cannot provide service or any spare parts for items they know or believe were exported illegally without getting clearance from the agency's Office of Exporter Services (OES). The advice to exporters is included in a revised letter that the BIS Office of Export Enforcement (OEE) has started to issue to firms that file VSDs to acknowledge receipt of the disclosure. The letters include a case number that the exporter should cite in its request to OES. If firms don't cite the case number or don't file a VSD, their request to OES is likely to face delays, said BIS Deputy Assistant Secretary for Export Enforcement Kevin Delli-Colli.

The letter acknowledging receipt of the VSD does not imply any BIS decision on how to treat the reported violation, Delli-Colli indicated. Because of Prohibition 10 in the Export Administration Regulations (EAR), it is illegal to deal with the item without BIS approval. “Section 764.2(e) of the EAR (15 C.F.R. 764.2(e)) provides that no person may order, buy, remove, conceal, store, use, sell, loan, dispose of, transfer, transport, finance, forward, or otherwise service, in whole or in part, any item exported from the United States, or that is otherwise subject to the EAR, with the knowledge that a violation of the EAR, or any order, license or

authorization issued thereunder, has occurred or will occur in connection with the item,” the revised OEE letter states. “Section 764.5(f) provides that a person who has made a VSD of a violation may request permission from BIS's Office of Exporter Services to engage in activities that would otherwise constitute a violation of Section 764.2(e),” it adds.

Firms involved in mergers and acquisitions often submit VSDs to cover illegal exports they discover during due diligence reviews of the acquired companies. “Once we get it, those letters are turned around in the same week,” he said.

Delli-Colli said an analysis of closed VSDs since fiscal year 2005 found that 97% received only a warning letter. In fiscal year 2007, which end Sept. 30, 2007, the average fine imposed after a VSD was only 35% of the maximum potential fine, he reported. Only two cases exceeded 50%, with one of those involving a false statement to the government and the other only a partial VSD. Delli-Colli tried to assuage concerns that the new maximum fines for EAR penalties will lead to significantly higher fines. “I’ve only been here six-seven months, but I’ve never seen a maximum penalty assessed in any administrative case,” he said. “\$250,000 is the maximum and it is only going to be applied in the most egregious situations with specific knowledge, involving very critical technologies,” he continued.

## **BIS TO SEEK COMMENTS ON TWO DEAC RECOMMENDATIONS**

BIS will shortly publish a “notice of inquiry” in the Federal Register, seeking public comments on two of the proposals that were in the recommendations in the final report submitted in December by Commerce’s Deemed Export Advisory Committee (DEAC). BIS wants to hear industry reaction to the idea of changing the deemed export licensing rules so the licensing requirement for foreign nationals would not be based on their current country of affiliation but on other information, including their country of birth, BIS Deputy Assistant Secretary for Export Administration Matthew Borman told the agency’s RAPTAC March 11.

The other question would ask if there are technologies for which deemed export licenses are required for transfers inside the U.S. but not for export out of the country. Exporters have complained for several years that some technology that is eligible for export under License Exception TSR without a license still needs a license when transferred to subject foreign nationals inside the U.S. The goal would be to “narrow the universe of technology subject to deemed export” requirements, Borman explained.

## **PRESIDENT’S CALL FOR “TOUGH CHOICES” IN DOHA TALKS NOT HEEDED**

When President Bush March 12 said the time for “debating Doha is over” and it was “time for leaders to make tough choices” to move the round forward,” diplomats in Geneva responded by asking whether the U.S. had made those choices yet. “Does that mean that the U.S. has already made its tough decisions?” a Latin American trade diplomat told WTTL. “Perhaps if they announced their tough decisions, it would help us make our tough decisions,” he said.

In a speech to the U.S.-Hispanic Chamber of Commerce, Bush said the U.S. will continue to press for an ambitious, successful Doha Round. “We’re prepared to lead to ensure Doha reaches a successful conclusion,” he asserted. “We understand the role of the United States. We’re not going to shirk our duty to lead. But we’re not going to make unilateral concessions either. We want negotiations to come from -- as a result of meaningful contributions by all folks.”

World Trade Organization (WTO) negotiators are trying to keep one eye on the Doha Round talks while keeping the other on presidential politics in the U.S. They have doubts about the ability of the Bush administration to conclude a Doha deal and get it passed by Congress, but they also have uncertainties about the prospects for the talks under a new administration. The

problem with dealing with a new administration is that it will take a long while to get into place, the Latin trade diplomat said. The deteriorating economy is another factor, he noted.

Meanwhile, another week of informal agriculture negotiations has surfaced new problems that negotiators are encountering trying to get domestic food consumption data from several developed countries – known as the G10 – that want to limit concessions on “sensitive” products. The data are needed to set tariff-rate quotas for these products. “We haven’t been having progress that you could extrapolate and enable the chair next week or 10 days from now to make a revised text,” the Latin negotiator said. Agriculture Committee Chairman Crawford Falconer told negotiators March 14 that lack of this data down to an adequate level of detail is holding up the talks. Falconer said he isn’t planning new farm talks until after Easter.

\* \* \* BRIEFS \* \* \*

EXPORT ENFORCEMENT: In settlements with Justice and BIS, MTS Systems Corporation of Eden Prairie, Minn., agreed to pay \$400,000 criminal fine and \$400,000 civil fine. Under its plea agreement, it was required to send letter March 12 to its stockholders explaining that it violated export control regulations by exporting seismic testing equipment to entity in India that could use equipment for testing in nuclear power plants. It also promised to pay for symposium on export controls. This is one of first cases where BIS has applied new higher \$250,000 fine under IEEPA. In separate case in March 2006, MTS had reached settlement with BIS under which it paid \$36,000 fine for unlicensed exports to Indian research center that was on BIS Entity List (see WTTL, April 17, 2006, page 4).

MORE EXPORT ENFORCEMENT: Parthasarathy Sudarshan pleaded guilty March 12 in D.C. U.S. District Court to conspiracy to violate IEEPA, EAR and ITAR, with unlicensed exports of microprocessors and electronic components to government entities in India that participate in development of ballistic missiles, space launch vehicles, and fighter jets. Sudarshan was president of Cirrus Electronics of Simpsonville. He and other employees were indicted originally in March 2007 (see WTTL, June 18, 2007, page 4).

BIS ADVISORY OPINION: BIS has issued advice on who is “permanent employee” under EAR, including treatment of contract employees. Agency identifies eight factors, ranging from individual’s location to who determines employees work schedule and duties.

CATFISH: True World Foods Chicago, LLC, was sentenced March 11 in L.A. U.S. District court to pay \$60,000 criminal fine for purchasing and re-selling falsely labeled frozen fish fillets in violation of the Lacey Act. It also was order to forfeit \$197,930, which was value of fish, and agreed to publish full page advertisement regarding this incident in seafood industry publication of wide circulation. Firm had entered plea agreement in December to charges that it circumvented antidumping duties of 63.88% on frozen catfish fillets from Vietnam by claiming imported fish was different species. Its former employee, David S. Wong, previously pleaded guilty for his part in case (see WTTL, Jan. 31, page 1).

CRIME CONTROLS: BIS plans soon to publish notice of inquiry in Federal Register asking for public comment on potential changes in licensing requirements for items subject to Crime Control (CC) rules. Agency will ask for advice on potential changes to items and countries subject to these controls.

ENCRYPTION: BIS is about to send out for interagency comment proposal to revise encryption regulations to clarify outdated provisions, including those on management infrastructure software, BIS Deputy Assistant Secretary Matthew Borman said March 11. Potential changes will only deal with unilateral U.S. controls and not those subject to Wassenaar Arrangement agreement, he said.

TRADE FIGURES: Goods exports in January jumped 15.9% to \$104.6 billion compared to January 2007, Commerce reported. Services exports surged 18.2% from year ago to \$43.7 billion. Merchandise imports increased just 11.7% from January 2007 to \$173.3 billion, as services imports rose 12.7% to \$33.1 billion.

INDIA: At end of sixth meeting of India-U.S. High Technology Cooperation Group of Feb. 29, joint statement said U.S. and India have agreed on action plan that includes “timetable for reviewing export controls in respect of India, building on innovative efforts already underway for simplifying export controls.”

CFIUS: House Financial Services Committee Chairman Barney Frank (D-Mass.) March 13 sent letter to Treasury Secretary Henry Paulson, saying current regulations are not sufficiently clear in describing role of 10% test for control for CFIUS’s purposes. “We urge you to clarify in the new regulations that this threshold is only one of the indicia of control and does not represent a bright line below which CFIUS has no ability or intent to review a transaction,” letter said.