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FCPA Enforcement “Hallmark” of Justice Dept., Says Breuer

Assistant Attorney General Lanny Breuer calls enforcement of the Foreign Corrupt Practices Act (FCPA) the “hallmark of the administration and for the Department of Justice.” In a presentation to State’s Advisory Committee on International Economic Policy (ACIEP) Jan. 30, he said he was proud of the effort Justice and the Securities and Exchange Commission (SEC) made to produce the FCPA resource guide they released in November (see **WTTL**, Nov. 19, page 3).

While Justice has stepped up FCPA enforcement, Breuer said the department is using discretion to prosecute cases. “We think we are very fair, but we are willing to take these cases to trial,” he said. At the same time, it isn’t going after small cases. “Show me the last time the Department of Justice indicted someone because they bought a government official a good bottle of cabernet. It just doesn’t happen. If you look at the kind of cases we bring, we feel we bring cases of real moment,” Breuer said.

Breuer said he urges companies to come to Justice to discuss FCPA compliance and to use the FCPA advisory opinion process to get binding advice. “Coming in sooner rather than later is a good decision and, in fact, a number of companies that have done it have found that we have required far less of them than their outside counsels have recommended they do before they came in,” he said. Breuer, who is leaving Justice in March, said the department isn’t targeting any specific industry sectors or regions, but investigations lead to a focus on certain industries and countries.

“If you are in an industry and you are in an industry that is subject to regulation or you are in an industry where you and your competitors have probably very similar products and they may be somewhat fungible...and you’re in the developing world where the actual government institutions are a little less mature, that to me is obviously a higher risk place than where you have a unique product, there are true market forces at hand and you’re in a more sustained, more mature market,” he said.

Proposal to Reform Night-Vision Controls Likely This Spring

One of the U.S. Munitions List (USML) categories on which it has been hardest to reach interagency agreement for reform is Category XII, which covers fire control and range

finders, including night-vision equipment. Despite these disagreements, a proposal to transfer some of the items in the category to the Commerce Control List (CCL) will be published “sometime later this spring, roughly,” Bureau of Industry and Security (BIS) Deputy Assistant Secretary Matthew Borman told the agency’s Sensors and Instruments Technical Advisory Committee (SITAC) Jan. 29.

Many of the people who have been working on other USML-CCL proposals are also working on Category XII, which has delayed the proposal, he explained. “It’s in sequence but certainly will be published,” Borman said.

Even before the proposed transfers, BIS has been licensing higher performance thermal imaging cameras that some exporters thought were under the jurisdiction of State’s Directorate of Defense Trade Controls (DDTC), according to Christopher Costanzo, the SITAC’s designated federal officer. “We have had a number of commodity jurisdictions [CJs] for 640 x 480 cameras that have resulted in Commerce having jurisdiction,” he told the committee. “You don’t need a CJ to do that,” he said.

“We are licensing commercial dual-use 640 x 480 camera systems for thermography applications, aircraft landing applications, for scientific applications,” Costanzo noted. “So I think it’s a misnomer to say 640 x 480 camera systems are USML,” he said. BIS also has licensed cooled systems. “In fact, we do have cooled 640 x 512 systems that we’ve licensed,” he told SITAC. “On the cooled systems, we have gotten commodity jurisdictions on cooled 640 x 480 and 512 architectures for a variety of systems, including aircraft systems,” he reported.

Latin Americans, New Zealander Lead in Bid for WTO’s Top Slot

The first round of jostling for selection of the next director-general of the World Trade Organization (WTO) appears to show that candidates from Latin America and New Zealand may be the favorites for the job. Former Mexican Trade and Industry Minister Herminio Blanco might be the one in the best position. All nine candidates made their first formal pitches for the job at the WTO General Council Jan. 29-31 and also appeared at press conferences afterwards to answer questions (see **WTTL**, Jan. 7, page 5).

Most of the questions posed during the General Council were prepared in advance and were neither tailored for a particular candidate nor pushed any subject very hard, one trade official said. A lot of ground was covered, including the Doha Round, new issues and WTO reform, he said. The questions were largely the same for each candidate, which helped in comparing them, he added.

After the meetings, sources say, there was a general feeling among trade officials that Tim Groser of New Zealand, Anabel Gonzalez of Costa Rica, Herminio Blanco of Mexico and Roberto Carvalho de Azevedo of Brazil were the leading candidates. Under the WTO selection process, candidates are expected to drop out of the running over the coming weeks as it becomes clear that they don’t have a shot at being chosen.

While the candidates from the Americas and New Zealand appear to be the strongest, Amina Mohamed of Kenya and Ahmad Thougan Hindawi of Jordan are seen as the weakest, sources in Geneva say. The two were both “very weak,” a trade official said

following three days of questioning. They didn't bring new ideas, personality or persuasion to the council meeting, he said. Nonetheless, sources say major trading nations may want to avoid a continuation of more than 10 years of fallout from the opposition to the Arab League gaining WTO observer status and Arab countries subsequently blocking other observers. South Korean Trade Minister Taeho Bark was "technically good," a trade official said without enthusiasm. Another source suggested that Gonzalez might have a handicap because she comes from a very small country.

Press conferences with candidates from Indonesia and Kenya were decidedly shorter than the 30 minutes the WTO had allotted for each candidate. Mohamed burned up just 17 minutes. Mari Elka Pangestu of Indonesia took less than 23 minutes. The lack of reporters' questions for some candidates was "terrible" and "excruciating," a trade official said. Presentations during the press conferences, which may be found online (<http://mcaf.ee/34mp5>), were largely similar to the presentations made to the council, he said.

The selection of the WTO director-general has always been marked by diplomatic intrigue and politics, and that might be the case again this year. Although equitable geographic distribution of candidates didn't feature in the questioning or in corridor discussions last week, it has influenced the process, sources say. For example, Alan John Kwadwo Kyerematen of Ghana said he is the African Union's candidate. European countries didn't float a candidate, at least in part, because current Director-General Pascal Lamy is French. There is a "widely held view" that the post should be filled by someone from the developing world, a trade official said.

New Zealand's Groser has spent 33 years preparing for the WTO job and is "very good," one trade official said. The fact that he's from a developed country, however, is "something of a handicap," he noted. He chaired Doha Round agriculture talks for a while when he was New Zealand's ambassador to the WTO. That experience, however, might be a negative for his selection, as he has "baggage" from those days, another former senior official said.

The questioning in the General Council was a "home match" for Brazil's Azevedo, who likely knew all of the 300 "Geneva insiders" who attended the meeting, another trade official said. However, Azevedo's insider track may be to his detriment, as well as his not holding a minister-level post. During his press conference, Azevedo defended the fact that he was one of two candidates who hasn't been a cabinet level minister. He began working in Geneva for Brazil nearly 20 years ago and at one point was its chief trade negotiator. His wife is the Brazilian ambassador to the U.N. Countries that have embraced policies of term limits for elected officials and the concept of rotating staff in government posts may have a more cautious approach to a family so entrenched in the U.N.'s European central hub.

State Proposes Ending Duplicate Controls on Nuclear Items

In its Jan. 30 proposal to revise controls on nuclear products covered by USML Category XVI, DDTTC has tried to address one of the biggest complaints from U.S. industry, the duplication of controls among more than one federal agency. To solve the problem, DDTTC in its Federal Register notice has proposed removing from the category items that are now also controlled by the Department of Energy and also moving other items to

the CCL. DDTC proposed that the category would no longer cover: (1) Nuclear weapons strategic delivery systems and all components, parts, accessories, and attachments specifically designed for such systems and associated equipment; (2) defense articles and services specific to design and testing of nuclear weapons; and (3) nuclear radiation measuring devices manufactured to military specifications.

“The only articles now covered under Category XVI that would remain subject to USML control are modeling or simulation tools that model or simulate the environments generated by nuclear detonations or the effects of these environments on systems, subsystems, components, structures, or humans, and technical data and defense services directly related to those defense articles,” DDTC noted. Other items currently in the category, including nuclear radiation detection and measurement devices, would be moved to CCL ECCNs 1A004 or 2A291.

DDTC is asking for public comments on the changes and specifically on whether the changes provide needed jurisdictional clarity. “With the thought that multiple perspectives would be beneficial to the USML revision process, the public is asked to provide specific examples of nuclear-related items whose jurisdiction would be in doubt based on this revision,” it said. Comments are due March 18, 2013.

WTO Approves Antigua Retaliation Against U.S.

In an unprecedented move Jan. 28, the WTO Dispute Settlement Body (DSB) granted Antigua and Barbuda authority to suspend its obligations to protect U.S. intellectual property rights (IPR) in retaliation for Washington’s failure to implement earlier WTO rulings that the U.S. violated the Caribbean nation’s rights by blocking online gambling sites based on the islands. An earlier arbitrator’s ruling said Antigua and Barbuda is authorized to retaliate up to \$21 million a year (see **WTTL**, Jan. 28, page 2).

The U.S. argued that Antigua and Barbuda was the only WTO member that has rejected compensation to balance the effects of the changes it wants to apply to its services schedules. In the long dispute between the two countries, the U.S. has claimed it never intended to include internet gambling in its schedules of concessions. It also said the withdrawal of IPR obligations under the Agreement on Trade-Related Intellectual Property (TRIPS) would be “theft” and “government authorized piracy.”

“The economy of Antigua and Barbuda has been devastated by the United States Government’s long campaign to prevent American consumers from gambling on-line with offshore gaming operators,” said Antigua’s Finance Minister Harold Lovell in a written statement. “If the same type of actions, by another nation, caused the people and the economy of the United States to be so significantly impacted, Antigua would without hesitation support their pursuit of justice,” he added.

WTO Panel to Examine Argentina’s Import Licensing

The WTO Dispute-Settlement Body (DSB) disregarded Argentina’s contention that it has fixed the problems with its import-licensing regime and agreed Jan. 28 to form a dispute-

settlement panel to examine U.S. complaints against the alleged restrictions. The U.S. was joined by Japan and the European Union (EU) in protesting what it claims are non-automatic licensing measures and other requirements that are non-transparent, discretionary and serve to restrict imports in breach of various WTO obligations and Import Licensing Agreements (see **WTTL**, Dec. 10, page 3).

At the DSB meeting, Argentina said that it has repealed all non-automatic import licences as of Jan. 25. It claimed its action provided a positive solution to the dispute. It also cited the “remarkable growth” in exports from the three complaining members to Argentina. This growth, it argued, proved that Argentinian measures were not import restrictive.

The U.S., Japan and EU told the DSB that they needed more information and clarification on the steps that Argentina has taken. Nonetheless, they said they were not convinced that the measures would solve the problem and they would proceed with their request for a panel. Thirteen other WTO members claimed third-party rights to participate in the panel proceedings.

The DSB also agreed to establish a panel to hear Argentina’s counter complaint against U.S. import restrictions on meat and animal products. At the meeting, Argentina repeated its complaint that the U.S. measures violate the WTO agreement on sanitary and phytosanitary measures (SPS) and other provisions of the General Agreement on Tariffs and Trade (GATT). The U.S. said that it was disappointed that Argentina’s request for a panel but was ready to defend its measures. Australia, China, EU, India and Korea reserved their third-party rights to participate in the panel’s proceedings.

Comments on Military Electronics Show Work Left to Do

Despite all the effort BIS and DDTC officials put in over two years to draft proposed transfers of items in USML Category XI from the USML to the CCL, they still receive over 200 pages of comments from industry on the proposed changes. Comments posted Jan. 30 to parallel BIS and DDTC proposals for revising rules for military electronics in Category XI cited the potential overlap in jurisdiction between BIS and State, a blurry line in jurisdiction, possible reconrol of items previously classified on the CCL or EAR99, Defense funding of research and potential control of items that are widely available on the commercial market (see **WTTL**, Dec. 3, 2012, page 4).

Concerns were raised in comments from companies including Airbus, United Technologies and BAE Systems, and such trade associations as the National Association of Manufacturers, TechAmerica, Semiconductor Industry Association and the American Association of Exporters and Importers.

Airbus noted the lack of clarity over “defense services” in this and prior proposals. Specifically, it said it “is concerned that there will remain an overlap in jurisdiction that will have the effect of requiring U.S. exporters to obtain licensing authority from DDTC to provide support services relating to 600 series items on the CCL.” GE Aviation questioned controls on Defense-funded research and development. “If DDTC’s intent is to capture items inherently military due to the fact that were developed by U.S. Department of Defense (DoD), then it needs to shift its focus to items developed using DoD-owned

intellectual property. Some items funded by DoD are not solely intended for a military application, thus this paragraph may capture items that are dual-use in nature,” the company commented. The Association of University Export Control Officers (AUECO) said it “identified several instances where the intended bright line between items on the USML and CCL is in fact blurred and appears to be an expansion of regulatory scope.”

Under the proposals, items moving to the CCL would include: electronic “equipment,” “end items,” and “systems” “specially designed” for military use; microwave monolithic integrated circuit (MMIC) power amplifiers; discrete radio frequency transistors; high-frequency (HF) surface wave radar capable of “tracking” surface targets on oceans; and microelectronic devices and printed circuit boards that are certified to be a ‘trusted device’ from a defense microelectronics activity (DMEA) accredited supplier.

U.S., Japan Reach Deal to Open Market to U.S. Beef

The contentious dispute over U.S. beef entering the Japanese market took a step toward resolution Jan. 28 as the U.S. and Japan agreed on “new terms and conditions which pave the way for expanded exports of U.S. beef and beef products to Japan,” U.S. Trade Representative (USTR) Ron Kirk and Agriculture Secretary Tom Vilsack announced.

Under these new terms, which enter into effect Feb. 1, Japan will now permit the import of beef from cattle less than 30 months old, compared to the previous limit of 20 months. The two governments also agreed to “regular and ad hoc consultations to review progress under the agreement and address any issues that may arise,” USTR said.

“This agreement also goes a long way toward normalizing trade with Japan by addressing long-standing restrictions that Japan introduced in response to bovine spongiform encephalopathy (BSE),” also known as mad cow disease, it said. In December 2003, Japan banned U.S. beef and beef products following the detection of a BSE-positive animal in the U.S. In July 2006, it partially reopened its market to allow imports of some U.S. beef from animals aged 20 months or younger (see **WTTL**, July 31, 2006, page 4).

Last October, Japan entered into consultations with the U.S. to revise the import requirements, including raising the age limit for U.S. cattle. “This is great news for American ranchers and beef companies, who can now – as a result of this agreement – increase their exports of U.S. beef to their largest market for beef in Asia,” said Kirk.

BIS, State Propose Moving Some Category IV Items to CCL

U.S. Munitions List (USML) Category IV is the latest subject of export control reforms in dual proposals BIS and DDTC published in the Jan. 31 Federal Register. The proposals would move certain items in Category IV, which controls launch vehicles, guided missiles, ballistic missiles, rockets, torpedoes, bombs and mines, into eight new Export Control Classification Numbers (ECCNs) in its “600 series” of the Commerce Control List. The proposed new ECCNs would be 0A604, 0B604, 0D604, 0E604, 9A604, 9B604, 9D604 and 9E604. Public comments on the proposal are due March 18, 2013. As BIS

has previously said, License Exception Strategic Trade Authorization (STA) would not be available for transferred items controlled for Missile Technology (MT) reasons under ECCNs 9A604, 9B604, 9D604 or 9E604, nor for ECCNs 0x604 and 9x604 ECCNs. STA for ECCNs 0A604, 0B604, 0D604, 0E604, 9A604, 9B604, 9D604, or 9E604 would be limited to the 36 countries listed in Sec. 740.20(c)(1) of the Export Administration Regulations (EAR).

BIS also proposed to amend ECCNs 0D001, 0E001, 9B115, 9B116, 9D001, 9D002, 9D003, 9D104, 9E001, 9E002, 9E101, and 9E102 to clarify and conform them to the addition of 0x604 and 9x604 to the CCL and proposed amendments to USML Category IV. Ablative materials that are currently in Category IV and used as a protective coating for rocket nozzles will remain under control of the International Traffic in Arms Regulations (ITAR) but will be moved to USML Category XIII(d), the DDTC proposal noted.

*** * * Briefs * * ***

EX-IM BANK: Manuel Ernesto Ortiz-Barraza, Mexican citizen and independent financial consultant in Chihuahua, Mexico, was extradited to U.S. Jan. 25 to face charges for his alleged role in scheme to defraud Ex-Im Bank of over \$2.5 million from January 2005 through February 2009. Indictment was unsealed in October 2011 in El Paso U.S. District Court. Ex-Im said it is actively seeking location and arrest of eight others indicted in case and believed to be residing in or near Ciudad Juarez, Chihuahua, Mexico.

OFAC: Offshore Marine Laboratories (OML) of Gardena, Calif., agreed Feb. 1 to pay \$97,695 to settle OFAC charges of violating Iranian Transactions Regulations between July 2007 and July 2008 by exporting spare parts and supplies to company in UAE but intended for oil rig in Iranian waters. Iranian rig owner and operator had been blocked.

TRADE PEOPLE: Marjorie Chorlins had been named senior director for Europe at U.S. Chamber of Commerce. She formerly worked for Lockheed Martin and Motorola and was principal deputy assistant secretary of Commerce for import administration. Earlier, she was on staff of Sen. John Danforth (R-Mo.).

KORUS: USTR Jan. 30 requested ITC Section 332 investigation of effect of U.S.-Korea Free Trade Agreement (KORUS) on production, distribution and export strategy of U.S. small and medium-sized enterprises (SMEs).

FIREARMS: DDTC Jan. 30 updated guidelines for permanent export, temporary export and temporary import of firearms and ammunition under USML Categories I and III.

JORDAN: U.S. and Jordan reached agreement Jan. 28 on Joint Principles for Information and Communication Technology (ICT) Services and Implementation Plan Related to Working and Living Conditions of Workers. ICT aims to provide “open and non-discriminatory investment regime, strong protection for foreign investment, transparency and public participation in the development of laws and regulations, and a level competitive playing field,” USTR’s office said. Labor plan seeks to address past complaints about labor rights in Jordan, particularly for foreign workers. It “reaffirms Jordan’s commitment to protect internationally recognized labor rights and effectively enforce its labor laws,” USTR office said. Plan would be implemented as part of Labor Subcommittee under U.S.-Jordan FTA.