

Run to the end zone

BIS pumps out new regulations in waning days of Bush administration.

BY CHRIS GILLIS

While many federal agencies significantly scaled back on announcing any further rule-makings until after the presidential election, the U.S. Commerce Department's Bureau of Industry and Security took the tact of introducing as much new regulations as possible before the next administration takes office in January.

BIS officials attribute the eleventh hour drive to implementing President Bush's export control reform directives issued in January 2008.

"Over the last months, we have been working hard to finalize a number of regulations, which are designed to target more precisely the threats we face, to ensure proper levels of control for continued U.S. economic competitiveness and innovation while protecting national security, and to improve the efficiency and transparency of the export licensing process," explained Christopher R. Wall, Commerce's assistant secretary for export administration, to the hundreds of industry representatives attending BIS's Update 2008 conference in Washington on Sept. 30.

"My role has been to get them down the last 20 yards and into the end zone, helping to shape the final product in the process," he added.

Wall, who previously served as senior international partner at Washington law firm Pillsbury Winthrop Shaw Pittman, said 80 percent of the proposed regulations were drafted by the time he was confirmed by the Senate on June 27. Each regulation is put through a rigorous interagency process before it's published.

"The issues raised are serious and require careful thought," he said. "The outcome of such a process is rarely perfect, but I believe these regulations make substantial improvements in the administration of export controls and they prepare the foundation for further regulations and improvements."

President Bush's directives "signaled a shift in export controls away from a country- and technology-based system to one that targets more precisely the risks we now face," Wall said. In the post-Cold War

environment, BIS is focused on how best to keep U.S.-made technologies and products with both commercial and military applications — in other words with "dual use" properties — out of the hands of pariah states, terrorists and criminal organizations.

Wall also pointed out the directives address the security and economic realities of ensuring that export controls keep pace with rapidly changing technologies and mandated improvements in transparency and efficiency. "Getting right the questions of 'who' and 'what' we control is essential, but that doesn't help much if 'how' the controls are administered is inefficient and ineffective," he said.

Since the summer, BIS has piled onto the industry more than a half-dozen proposed and final export control regulations.

First, on June 2, BIS published the long awaited regulations for mandatory filing of export information in the government's Automated Export System and the rewrite of the Census Foreign Trade Division regulations (October *American Shipper*, pages 42-43).

This regulation was followed on June 16 with the publication of regulations to implement changes to the Commerce Control List for items controlled for missile technology reasons, and on July 8 with the amendments to the Export Administration Regulations to reflect changes to the control lists of biological agents.

On Aug. 21, BIS imposed license requirements for exports and re-exports to entities acting contrary to U.S. national security or foreign policy interests, followed by revisions to the "unverified list" and guidance to its so-called "red flags" for wrongdoing on Sept. 30.

BIS published on Oct. 3 amendments to the Export Administration Regulations to simplify encryption rules and requested comments on a proposed change to the regulations to establish a license exception

for intra-company transfers. On Oct. 14, BIS revised the Commerce Control List and Export Administration Regulations to implement the Wassenaar Arrangement, an international agreement to control trade in conventional weapons.

"The presidential directives made clear that U.S. export control policy should focus more on end-uses and end-users," Wall said. "At BIS, we look at end-uses and end-users in both a positive and negative sense — positive in the sense of trusted exporters and recipients of products and technology, and negative in the sense of individuals and entities acting against U.S. national security and foreign policy interests."

Many export control experts, however, view the attempt to implement these regulations as the "last gasp" of a fading administration.

Carol Kalinoski, president of Carol A. Kalinoski & Associates, a Washington-based consultancy, said proposed BIS regulations, such as the one for intra-company transfers, may ultimately wither under the scrutiny of the incoming president's team. "A new administration will surely come with its own ideas and goals," she said.

Paul DiVecchio, president of Boston-based DiVecchio & Associates, a 25-year-old firm specialized in assisting exporters and forwarders with their U.S. export compliance, said BIS's recent regulatory blitz only proves that export controls are "never static."

"They are constantly changing based on foreign policy issues, multilateral U.S. agency agreements, and negotiations with regime partners for indexing controls and sanctions," DiVecchio said. "Add to this, companies' business processes are evolving at a rapid pace in order for them to take advantage of marketing opportunities."

He said the changes proposed by BIS put an enormous amount of responsibility on the shoulders of corporate compliance officers, who must:

- Know when and where to access the regulatory additions, changes and deletions.
- Interpret the regulation notifications.
- Communicate those regulations to company personnel.



Wall



Kalinoski



DiVecchio

- Implement them within corporate processes.

Information about regulatory changes may be obtained through various means, but the U.S. government's *Federal Register*, which is published Monday through Friday with the exception of federal holidays, is the official vehicle for notification of implementation dates and comprehensive content related to regulations.

"You cannot rely on the various government Web sites to post the notification at the time of issuance and to provide the complete reading of the regulation," DiVecchio warned.

He cited recent confusion involving BIS's addition of 33 persons to its Entity List. (These individuals have alleged links to supplying bomb-making materials to Iraq and Afghanistan for use against U.S. troops.)

The *Federal Register* notice was published on Sept. 22 and came into effect that day, mandating no transactions by U.S. persons with those parties. BIS did not post the list from the *Federal Register* on its Web site until Sept. 23. When BIS posted the notice, the agency inadvertently removed five previous proliferation entities from India and Pakistan. (The entities were still officially listed in the *Federal Register* but not on the BIS Web site.) BIS did not correct the discrepancy on its Web site until Sept. 25.

"Any U.S. party conducting business with these five listed parties during the voided period would technically have been in violation even though the BIS Web site had them removed," DiVecchio said.

There are also other informational tools to assist companies with their export control compliance. More than a dozen firms provide detailed and timely information to exporters and freight forwarders through various subscription services.

"The information we cover is in the public domain. We take it, consolidate it and make it user friendly" said Ken Harris, managing partner of MK Data Services, based in Columbia, Md.

Harris admits that lackluster information management on federal agency Web sites, when referenced by exporters and forwarders, causes an influx of inquiries from clients.

The management of incoming export control regulatory changes remains an ongoing challenge. "It's a lot of detail coming at us, but this is what we do. If we can't handle it, then we shouldn't be here," Harris said.



Harris

Homegrown solution

U.S. produce industry launches supply chain tracking plan.

BY KEITH HIGGINBOTHAM

A coalition of 34 leading produce growers, handlers and retailers has adopted a plan to implement by 2012 a standardized labeling system, analogous to the UPC code on retail products, allowing the electronic tracking of produce moving throughout the U.S. supply chain.

The Produce Traceability Initiative involves the adoption of a standardized system of case-level codes for all produce sold in the United States, with the goal of moving toward item-level coding. In addition to the commercial benefits, the initiative said it would help the industry and federal regulators more efficiently respond to produce recalls.

PTI is being developed and administered by the Produce Marketing Association, United Fresh Produce Association, and the Canadian Produce Marketing Association. The 34 companies endorsing the plan are members of PTI's supply chain steering committee.

Committee members have endorsed GS1, the global organization that created the ubiquitous UPC barcode system, as the standard for the new system. The group chose GS1 because it is "recognized and accessible worldwide, provides a code that can be readily incorporated into a UPC barcode and works with RFID (radio frequency identification) or human readable codes."

The PTI steering committee is encouraging companies to begin at case-level coding initially, paving the way toward item-level coding using the same set of standards.

"Everyone out there today has internal traceability procedures that allow them to have records of who their supplier is, who their customers are, where the ingredients come from, and where the products went," said David Gombas, senior vice president of food safety and technology for United Fresh.

The problem is that each time the information enters one of these "internal" systems, the data is translated for that firm's proprietary internal system, making tracking of products across more than one player in the supply chain difficult and time consuming, Gombas said.

"What's missing is the ability to look at

the produce item anywhere in the supply chain and know where it came from," he said.

A primary goal of PTI is to achieve "external" traceability by introducing a GS1-based coding standard that allows firms to exchange data and business processes between trading partners.

"This initiative was designed to come up with one set of standards — one language — that everyone could use so that no matter where you are in the supply chain you would recognize what that code meant," he said.

At the heart of the new initiative is the implementation of a 14-digit global trade identification number (GTIN) and a lot number.

"Whereas most information necessary for traceability is already captured during each firm's normal business processes, the inclusion and tracking of the GTIN and lot number will bring the connectivity between firms and across the supply chain that is currently missing," the PTI steering committee said. "The GTIN will identify who the 'brand owner' is (i.e., the firm whose brand appears on the produce case) and the type of produce inside; while the lot number specifically identifies the lot or batch from which the produce came."

The information will be labeled on each case so that it can be "read and understood by personnel throughout the supply chain, as well as a machine-readable bar code which each member of the supply chain will be able to scan and maintain in their computer systems," the steering committee said.

The GTIN is composed of different segments that include a unique six-digit company prefix that will be assigned by the GS1 group, an item-reference number, and indicators for the country of origin and the type of packaging.

Gombas said the group has been working with the Food and Drug Administration and the Agriculture Department, and both have indicated PTI is in line with the federal government's long-term goals.

The steering committee has identified steps to implement the initiative by 2012:

- By the first quarter of 2009, brand

owners will obtain GSI-issued company prefixes required to create GTINs, and assign 14-digit GTINs to every case configuration they pack.

- Those GTINs will be provided to their buyers by the third quarter, so that buyers can input this data into their information systems.

- By the third quarter of 2010, brand owners will begin placing the GTIN and lot number on case labels in human-readable form and machine-readable bar codes.

- Each subsequent handler of the case will be able to scan and store the GTIN and

lot number on inbound cases in 2011 and outbound cases by 2012.

The Produce Marketing Association, United Fresh and Canadian Produce Marketing Association plan industry outreach, communications, education and public advocacy to achieve what Gombas described as a “critical mass” within the industry.

While compliance with the produce tracking program is voluntary, Cathy Green, PTI steering committee chairman and chief operating officer for Food Lion, expects “market forces” to drive the pro-

gram as buyers demand a produce supply chain which can quickly and efficiently react to recalls.

“We encourage companies to follow the timetable as closely as possible to stay on top of the changes that they’ll need to make to their current traceability systems,” she said.

Gombas said some challenges still need to be overcome, such as what type of labeling will be used with reusable packing containers and how to deal with foreign suppliers, but the PTI group is confident these will not present serious obstacles. ■