

Trade Suffers As Gov't Shutdown Nears Third Week

By **Scott Flaherty**

Law360, New York (October 10, 2013, 9:24 PM ET) -- With the U.S. government shutdown in its second week, businesses in the chemical, defense and other industries are starting to see delays as they try to ship or import products that require licenses or inspections from short-staffed federal agencies, experts say.

The government shutdown — which took effect at midnight on Oct. 1, following a failure in Congress to pass a temporary spending resolution — has had a varied impact on the federal agencies that regulate trade, with some, like U.S. Customs and Border Protection, saying it would retain about 88 percent of its staff, while others effectively closed up shop.

Since Customs has continued to operate at near-normal staffing levels in the wake of the government shutdown, many goods have been able to move in and out of the U.S. without much disruption, according to Marianne Rowden, president of the American Association of Exporters and Importers.

But Rowden added that about 40 different federal agencies regulate trade in some capacity, with approximately 14 of them holding “release and hold” authority, meaning that Customs cannot release a shipment without their approval. Since some of those agencies have furloughed a large portion of their staff, the shutdown has created a significant amount of uncertainty for imports and exports in particular industries, she said.

Agencies like the U.S. Food and Drug Administration have done a relatively good job releasing shipments, despite reductions in its staff, said Rowden, but there has been a big slowdown at the U.S. Environmental Protection Agency. The EPA, which regulates chemical imports such as pesticides, planned to furlough more than 90 percent of its staff, according to a contingency plan the agency released shortly before the government shutdown.

“Pesticide shipments are a big problem, as they are time-sensitive shipments for American farmers,” said Rowden. “I have no idea what the impact will be on U.S. agriculture.”

Dale Moore, executive director of public policy at the American Farm Bureau Federation, said he hasn't heard many complaints so far from members of the agricultural industry about pesticide shortages. But that could be, in part, because it's harvest season for corn and soybeans, so farmers who grow those crops would be done applying pesticide for now. Farmers of fruits and vegetables, which are grown year-round in some places, may be affected, he said, adding that, either way, the shutdown has cast a level of doubt that is affecting farmers and ranchers.

"It's one of those things that creates some uncertainty," said Moore.

The aviation industry is another that has pointed to uncertainty stemming from the government shutdown when it comes to shipping goods.

Bell Helicopter Textron Inc., which makes aircraft used commercially and by the military, said it has experienced issues trying to ship products into the U.S. from a manufacturing facility in Canada because the Federal Aviation Administration's Aircraft Registration Branch is closed due to the shutdown.

"The closure of the FAA aircraft registry office impacts our ability to register and de-register aircraft," company spokeswoman Bridget Garcia said in a statement. "Without the FAA's involvement, we cannot ship aircraft from our Canadian manufacturing site into the U.S., nor can we deliver aircraft to customers here in the U.S. We are currently evaluating the impacts to our business if the shutdown continues."

About one-third of FAA's more than 46,000 employees were expected to be furloughed as a result of the shutdown, according to the contingency plan released by the U.S. Department of Transportation, which oversees the FAA.

The government shutdown has also impacted businesses that make products falling within the scope of the U.S. export control and sanctions programs, says John Fusco, a partner in Edwards Wildman Palmer LLP's international trade compliance practice.

"The shutdown, in general, is harming a company's ability to properly process their license applications and get a response," he said.

The impacts of the shutdown have been felt differently among the "triumvirate" of agencies — the State Department's Directorate of Defense Trade Controls, the Commerce Department's Bureau of Industry and Security, and the Treasury Department's Office of Foreign Assets Control — involved in export controls and sanctions, according to Doug Jacobson, who heads his own international trade law firm.

He said the DDTTC, which controls exports of defense-related items on the U.S. Munitions List, was operating relatively normally, at least through Monday. But OFAC, which oversees much of the government's economic sanctions programs, and BIS, which handles export controls of certain items not under the DDTTC's authority, have stopped accepting new license applications and reviewing pending applications.

BIS has said, however, that exporters can request emergency processing of a license application “for national security reasons.”

Jacobson said the impact at BIS, in particular, is poorly timed, since the first wave of the Obama administration's efforts to reform the U.S. export control system is set to take effect Oct. 15. Among other things, export control reform would transfer many items currently on the U.S. Munitions List to the Commerce Control List, which BIS oversees.

“The timing could not be worse, in terms of export control reform,” he said. “You have 30,000 licenses per year that were at State that are now moving over to BIS.”

The issues at BIS are also notable, according to Klint Alexander of Baker Donelson Bearman Caldwell & Berkowitz PC, because many of the potential delays affect goods made by companies in the high technology sector, one area where the U.S. has a competitive leg-up over many other countries.

The disruptions, he said, “really go to America's comparative advantage.”

Applied Materials Inc., for instance, a Silicon Valley-based company that makes equipment and software used in the process for manufacturing semiconductors and other high technological items, said its shipments may be impacted by the changes at BIS in the wake of the shutdown.

“The lapse in BIS’ routine functions due to the shutdown could affect our ability to ship products to certain markets,” company spokesman Kevin Winston said in a statement. “Pending applications and future submissions are on hold, and our hope is for a quick resolution to mitigate the potential impact to our customers and business.”

The stoppage in license application reviews, Alexander added, also carries with it a more general risk: Companies may try to skirt export control rules, since they aren't being enforced in the typical way.

“It's very important that companies in this country realize that the law still applies,” he said.

--Editing by John Quinn and Melissa Tinklepaugh.

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