DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of Industry and Security (BIS).

Title: Offsets in Military Exports.

OMB Control Number: 0694–0084.

Form Number(s): None.

Type of Request: Regular submission.

Burden Hours: 270.

Number of Respondents: 30.

Average Hours per Response: 9.

Needs and Uses: This information collection is required by the Defense Production Act. The Act requires United States firms to furnish information to the Department of Commerce regarding offset agreements exceeding $5,000,000 in value associated with sales of weapon systems or defense-related items to foreign countries or foreign firms. Offsets are industrial or commercial compensation practices required as a condition of purchase in either government-to-government or commercial sales of defense articles and/or defense services as defined by the Arms Export Control Act and the International Traffic in Arms Regulations. Such offsets are required by most major trading partners when purchasing U.S. military equipment or defense-related items.

Affected Public: Business or other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Jasmeet Seehra, (202) 395–3123.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Jasmeet Seehra, OMB Desk Officer, FAX number (202) 395–5167, or *Jasmeet_K._Seehra@omb.eop.gov*.

Dated: January 29, 2009.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–2239 Filed 2–2–09; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

[Docket No. 07–BIS–0028]

Under Secretary for Industry and Security; In the Matter of: Wayne LaFleur, Respondent

Final Decision and Order

This matter is before me upon a Recommended Decision and Order (''RDO'') of an Administrative Law Judge (''ALJ''), as further described below.

In a charging letter filed on December 18, 2007, the Bureau of Industry and Security (''BIS'') alleged that Respondent Wayne LaFleur committed one violation of the Export Administration Regulations (currently codified at 15 CFR Parts 730–774 (2008) (''Regulations'')), issued pursuant to the Export Administration Act of 1979, as amended (50 U.S.C. app. sections 2401–2420 (2000)) (the ''Act''),[1] when he exported a vessel to Cuba during a regatta without the license required by the Regulations. Specifically, the charge against Respondent Wayne LaFleur is as follows:

Charge 1 15 CFR 764.2(a)—Exporting a Vessel Without the Required License

Between on or about May 22, 2003 through on or about May 31, 2003, [LaFleur] engaged in conduct prohibited by the Regulations when he exported the vessel

EKA, an item subject to the Regulations and classified on the Commerce Control List under Export Control Classification Number (''ECCN'') 8A992.f, to Cuba during a regatta without the required Department of Commerce authorization. On more than one occasion prior to the regatta, BIS's Office of Export Enforcement had advised race organizers that all regatta participants required a Department of Commerce export license prior to exporting their vessel to Cuba. On or about May 22, 2003, the Office of Export Enforcement met with [LaFleur] and other regatta participants at the regatta's pre-launch party and informed [LaFleur] that a license was required for the temporary export of vessels to Cuba during the regatta. On or about May 23, 2003, the Office of Export Enforcement provided [LaFleur] with a written letter indicating again that an export license was required by all regatta participants who took their vessels to Cuba and that a particular license that had been identified by some participants as authority to take their vessel to Cuba during the regatta did not in fact authorize the temporary export of a vessel. Pursuant to Section 746.2 of the Regulations, a license is required for the export of vessels to Cuba and no license was obtained for the export of the EKA to Cuba. In temporarily exporting a vessel to Cuba without the required license, [LaFleur] committed one violation of Section 764.2(a) of the Regulations.

December 18, 2007 Charging Letter against Wayne LaFleur, at 1–2 (Exhibit Q to BIS's Motion for Decision).[2]

On October 31, 2008, BIS filed a motion for decision on the record against Respondent LaFleur as to the above charge. Based on the record before him, the ALJ determined that reliable and substantial evidence demonstrated clearly, under the applicable preponderance standard, that the facts described in the charging letter more probably than not occurred as alleged by BIS. RDO, at 7.[3] The ALJ found that LaFleur committed one violation of Section 764.2(a) of the Regulations when he exported to Cuba the vessel EKA, an item subject to the Regulations and classified under ECCN 8A992.f, without the export license required by the Regulations. Id. The ALJ also recommended, following consideration of the record, that LaFleur be assessed a monetary penalty of $8,000.00 and a denial of export privileges for three years. RDO, at 10–11. The ALJ further recommended that the denial of export privileges be

[1] From August 21, 1994 through November 12, 2000, the Act was in lapse. During that period, the President, through Executive Order 12924, which had been extended by successive Presidential Notices, the last of which was August 3, 2000 (3 CFR, 2000 Comp. 397 (2001)), continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. sections 1701–1707) (''IEEPA''). On November 13, 2000, the Act was reauthorized and remained in effect through August 20, 2001. Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of July 23, 2008 (73 FR 43603, July 25, 2008), has continued the Regulations in effect under IEEPA.

[2] In the charging letter, LaFleur's name was inadvertently misspelled as ''Lefleur'', which BIS sought to correct in its Motion for Decision. I agree with the conclusion in the RDO that this spelling change was not substantive and in no way prejudiced LaFleur, who clearly understood that the charging letter was addressed to him. RDO, at 3, fn. 4.

[3] The certified record, including the original copy of the RDO dated December 8, 2008, was received in my office on December 11, 2008.

suspended for the entire three-year period provided that LaFleur pays the monetary penalty within 30 days of the Final Decision and Order and that LaFleur commits no further violations during the period of suspension. Id. In his RDO, the ALJ indicated that, should LaFleur fail to abide by any of the conditions of suspension, then the denial order will become active with regard to LaFleur. Id.

The RDO, together with the entire record in this case, has been referred to me for final action under Section 766.22 of the Regulations. I find that the record supports the ALJ's findings of fact and conclusions of law, including that Section 764.2(a) of the Regulations, like most of the violation provisions in Section 764.2, is a strict liability offense, and that the movement of a vessel from the United States to Cuba, even if only temporary, is considered an export to Cuba under the Regulations. RDO, at 4–5, 10. I also agree with the ALJ that when BIS decides to seek, or declines to seek, charges in an administrative or civil enforcement action, BIS is entitled to the discretion that a criminal prosecutor is afforded in determining whether or which charges to bring or not to bring. Such decisions are committed to the agency's prosecutorial discretion and unsuitable for review by an ALJ. RDO, at 8–10 (citing cases).

Moreover, LaFleur's assertion that he ''applied for and obtained from the United States Coast Guard permission to leave the security zone with stated destination being Varadero[,] Cuba,'' (LaFleur's Response to Interrogatory No. 7; see also Answer of LaFleur dated January 17, 2008), neither was substantiated by the record nor is a defense under the Regulations. It is well established that approval of an action by one agency does not alleviate the need of a person to comply with another agency's regulatory requirements', even if such agency responsibilities might overlap. Nor is there any inconsistency in requiring the person subject to different regulation to meet all such requirements. As the DC Circuit has observed:

> [W]e expect persons in a complex regulatory state to conform their behavior to the dictates of many laws, each serving its own special purpose. In cases of this type, an administrative agency need not make any ''accommodation'' to the constraints that other laws place upon the regulated person.

N.Y. Shipping Ass'n., Inc. v. *Federal Maritime Commission,* 854 F.2d 1338, 1367 (DC Cir. 1988) (finding there was no ''conflict'' requiring compliance with federal shipping laws even though activities which might be sanctioned under federal labor laws violate federal shipping laws). That for another purpose the U.S. Coast Guard might have given its approval for LaFleur to leave the ''security zone'' of the United States did not relieve him of his legal obligation to obtain the required export license under the Regulations before taking his vessel to Cuba.

I also find that the imposition of a civil monetary penalty and suspension of export privileges for three years is appropriate based upon a review of the entire record, given the nature of the violations, the facts of this case, and the importance of deterring future unauthorized exports.[4] Albeit LaFleur may have received warning from the BIS agents shortly before the beginning of the regatta, these warnings were clear and unequivocal in informing him of the need to secure the requisite authorization under the Regulations before exporting the vessel to Cuba, even on a temporary basis. LaFleur ignored these warnings at his peril.

Based on my review of the entire record, I affirm the findings of fact and conclusions of law in the RDO.

Accordingly, *it is therefore ordered,*

First, that a civil penalty of $8,000.00 is assessed against Wayne LaFleur, which shall be paid to the U.S. Department of Commerce within (30) thirty days from the date of entry of this Order.

Second, pursuant to the Debt Collection Act of 1982, as amended (31 U.S.C. 3701–3720E (2000)), the civil penalty owed under this Order accrues interest as more fully described in the attached Notice, and, if payment is not made by the due date specified herein, LaFleur will be assessed, in addition to the full amount of the civil penalty and interest, a penalty charge and administrative charge.

Third, for a period of three (3) years from the date that this Order is published in the **Federal Register**, Wayne LaFleur, 339 Torrey Pines Point, Naples, FL 34113, and his successors or assigns, and when acting for or on behalf of LaFleur, his representatives, agents, or employees (hereinafter collectively known as the ''Denied Person'') may not participate, directly or indirectly, in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefiting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

Fourth, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Fifth, that, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any person, firm, corporation, or business organization related to the Denied Person by affiliation, ownership,

[4] The sanction recommended by the ALJ also is consistent with the sanction proposed by BIS.

control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of the Order.

Sixth, that this Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology.

Seventh, that, as authorized by Section 766.17(c) of the Regulations, the denial period set forth above shall be suspended in its entirety, and shall thereafter be waived, provided that: (1) Within thirty days of the effective date of the Decision and Order, LaFleur pays the monetary penalty imposed against him of $8,000.00 in full, and (2) for a period three years from the effective date of the Decision and Order, LaFleur commits no further violations of the Act or Regulations.

Eighth, that the final Decision and Order shall be served on LaFleur and shall be published in the **Federal Register**. In addition, the ALT's Recommended Decision and Order, except for the section related to the Recommended Order, shall also be published in the **Federal Register**.

This Order, which constitutes the final agency action in this matter, is effective upon publication in the **Federal Register**.

Dated: January 7, 2009.

Daniel O. Hill,

Deputy Under Secretary of Commerce for Industry and Security.

United States Department of Commerce
Bureau of Industry and Security
Washington, DC 20230

In the Matter of: Wayne LaFleur, Respondent. [Docket No.: 07–BIS–0028]

Recommended Decision and Order [1]

Issued: December 8, 2008.

Issued by: Hon. Waiter J. Brudzinski, Administrative Law Judge.

Preliminary Statement

This Recommended Decision and Order is issued in response to the October 31, 2008 Motion for Decision on the Record as to the charge filed against Respondent Wayne LaFleur (''LaFleur'' or ''Respondent'') submitted by the Bureau of Industry and Security, United States Department of Commerce (''BIS'' or ''Agency''). In accordance with the undersigned's Scheduling Order of May 7, 2008, Respondent had until December 1, 2008 to respond to BIS's motion. Since that time has passed with no response, this matter is now ripe for decision.

On April 1, 2008, the undersigned consolidated the following BIS cases: (1) In the Matter of Peter Goldsmith, Docket: 07–BIS–0026; (2) In the Matter of Michele Geslin, Docket: 07–BIS 0027; and (3) In the Matter of Wayne LaFleur, Docket: 07–BIS–0028. However, this Recommended Decision and Order pertains only to Respondent LaFleur. On September 8, 2008, BIS moved for a summary decision against Geslin and Goldsmith on the charge that each had aided and abetted a violation of the Regulations through their organization of and participation in the regatta. On October 15, 2008, the undersigned issued a Recommended Decision and Order granting BIS's Motion for Summary Decision. Accordingly, the matters involving Geslin and Goldsmith have been excluded from the case caption.

On December 18, 2007, BIS issued a charging letter initiating administrative enforcement proceedings against LaFleur. The charging letter alleged that LaFleur committed one violation of the Export Administration Regulations (currently codified at 15 CFR parts 73 0–774 (2008)) (the ''Regulations''),[2] issued under the Export Administration Act of 1979, as amended (50 U.S.C. App. sections 2401–2420 (2000)) (the ''Act'').[3]

Specifically, the charging letter alleged that, between on or about May 22, 2003 through on or about May 31, 2003, LaFleur engaged in prohibited conduct by exporting a vessel to Cuba in violation of the Regulations. The charge read as follows:

Charge 1 15 CFR 764.2(a)—Exporting a Vessel without the Required License

Between on or about May 22, 2003 through on or about May 31, 2003, [LaFleur] engaged in conduct prohibited by the Regulations when he exported the vessel EKA, an item subject to the Regulations and classified on the Commerce Control List under Export Control Classification Number (''ECCN'') 8A992.f, to Cuba during a regatta without the required Department of Commerce authorization. On more than one occasion prior to the regatta, BIS's Office of Export Enforcement had advised race organizers that all regatta participants required a Department of Commerce export license prior to exporting their vessel to Cuba. On or about May 22, 2003, the Office of Export Enforcement met with [LaFleur] and other regatta participants at the regatta's pre-launch party and informed [LaFleur] that a license was required for the temporary export of vessels to Cuba during the regatta. On or about May 23, 2003, the Office of Export Enforcement provided [LaFleur] with a written letter indicating again that an export license was required by all regatta participants who took their vessels to Cuba and that a particular license that had been identified by some participants as authority to take their vessel to Cuba during the regatta did not in fact authorize the temporary export of a vessel. Pursuant to Section 746.2 of the Regulations, a license is required for the export of vessels to Cuba and no license was obtained for the export of the EKA to Cuba. In temporarily exporting a vessel to Cuba without the required license, [LaFleur] committed one violation of Section 764.2(a) of the Regulations.

Ex. Q (Charging Letter against LaFleur).[4]

On October 31, 2008, BIS moved for decision on the record as to the charge against LaFleur, on the basis that the preponderance of evidence, including admissions from LaFleur, demonstrated clearly that LaFleur committed the violation of § 764.2(a), as alleged. Section 764.2(a) provides as follows:

(a) Engaging in prohibited conduct. No person may engage in any conduct prohibited by or contrary to, or refrain from engaging in any conduct required by, the EAA, the EAR, or any order, license or authorization issued thereunder.

15 CFR 764.2(a) (2003, 2008). Section 764.2(a) thus makes it unlawful, inter alia, for a person to engage in conduct prohibited by or contrary to the Regulations, such as engaging in the unlicensed export of an item when a license was required for such export under the Regulations. Id.

As with most of the Section 764.2 violation provisions, Section 764.2(a) of the Regulations is a strict liability offense. See 15 CFR 764.2; *Iran Air* v. *Kugelman,* 996 F.2d 1253, 1258–9 (D.C. Cir. 1993) (upholding the Department of Commerce's reading of the Regulations as allowing for strict liability charges); In the Matter of Kabba & Amir Investments, Inc., d.b.a. International Freight Forwarders (''International Freight Forwarders''), 73 FR 25649, 25652 (May 7, 2008) (concluding that Section 764.2(b) is a strict liability offense), aff'd by Under Secretary, 73 FR 25648; see also In the Matter of Petrom GmbH International Trade, 70 FR 32743, 32754 (June 6, 2005).[5]

[1] For proceedings involving violations not relating to Part 760 of the Export Enforcement Regulations, 15 CFR 766.17(b) and (b)(2) prescribe that the Administrative Law Judge's decision be a ''Recommended Decision and Order.'' The violations alleged in this case are found in Part 764. Therefore, this is a ''Recommended'' decision. That section also prescribes that the Administrative Law Judge make recommended findings of fact and conclusions of law that the Under Secretary for Export Administration, Bureau of Industry and Security, U.S. Department of Commerce, must affirm, modify or vacate. 15 CFR 766.22. The Under Secretary's action is the final decision for the U.S. Commerce Department. 15 CFR 766.22(e).

[2] The charged violation occurred in 2003. The Regulations governing the violation at issue are found in the 2003 version of the Code of Federal Regulations (15 CFR parts 730–774 (2003)). The 2008 Regulations establish the procedures that apply to this matter.

[3] Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), as extended most recently by the Notice of July 23, 2008 (73 FR 43,603 (July 25, 2008)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.5.C 1701–1706 (2000)).

[4] In the charging letter, LaFleur's name was inadvertently misspelled as ''Lefleur'', as discussed in BIS's Motion for Decision. This spelling correction is not substantive and in no way prejudices LaFleur, who clearly understood that the charging letter was addressed to him, as evidenced by his participation in this matter. This Court has previously found that BIS may amend typographical errors, especially when no prejudice to the Respondent would result from such amendment. See International Freight Forwarders, 73 FR at 25649 fn. 4, aff'd, 73 FR at 25648.

[5] Section 764.2(b) states a violation for causing, aiding or abetting ''the doing of any act prohibited

Under the Regulations, the movement of a vessel from the United States to Cuba is considered an export, even if the vessel remains in Cuba only temporarily. See 15 CFR 734.2(b) (2003, 2008) (defining ''export'' to include ''an actual shipment or transmission of items subject to the [Regulations] out of the United States * * *.''). [6] The Regulations also provide that an exporter ''will need a license to export or reexport all items subject to the [Regulations] * * * to Cuba * * * '' except in circumstances, not applicable to the current situation, where a License Exception would authorize the export or reexport. 15 CFR 746.2(a) (2003, 2008)).

Pursuant to 5 U.S.C. 556(d), BIS bears the burden of proving the allegations in the charging letter under the traditional ''preponderance of the evidence'' standard of proof typically applicable in administrative or civil litigation. In the Matter of Ihsan Medhat Elashi, 71 FR 38843, 38847 (July 10, 2006), aff'd, 71 FR 38843–38844. See also *Steadman* v. *S.E.C.,* 450 U.S. 91, 102 (1981); *Sea Island Broadcasting Corp. of S.C.* v. *F.C.C.,* 627 F.2d 240, 243 (D.C. Cir. 1980). Thus, BIS must establish simply that it is more likely than not that the respondent committed the violation alleged in the charging letter. See *Herman & Maclean* v. *Huddleston,* 459 U.S. 375, 390 (1983). BIS needs, in other words, to show ''that the evidence of a fact is more probable than its nonexistence.'' *Concrete Pipe & Products* v. *Construction Laborers Pension Trust,* 508 U.S. 602, 622 (1993). To satisfy this burden, BIS may rely upon direct or circumstantial evidence. See, generally, *Monsanto Co.* v. *Spray-Rite Serv. Corp.,* 465 U.S. 752, 764–765 (1984).

Section 764.3 of the Regulations sets forth the sanctions BIS may seek for violations of the Regulations. The applicable sanctions are: (i) A monetary penalty, (ii) a denial of export privileges under the Regulations, and (iii) suspension from practice before the Bureau of Industry and Security. 15 CFR 764.3. Pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706 (2000)) (''IEEPA''), as amended, the maximum monetary penalty in this case is $250,000 per violation. International Emergency Economic Powers Enhancement Act of 2007, Public Law 110–96, 121 Stat. 1011 (2007); see also International Freight Forwarders, 73 FR at 25653, aff'd at 73 FR 25648.

BIS requests that I recommend to the Under Secretary of Commerce for Industry and Security [7] that LaFleur (1) be assessed a civil penalty in the amount of $8,000 and (2) be made subject to a denial of export privileges to last for three years and remain suspended during that period provided that LaFleur pays the monetary fine against him within thirty days of the date of the Final Decision and Order, and does not commit any further violations of the Regulations during the three year period of the suspension. BIS seeks this sanction because the item exported in this case involved a vessel controlled for anti-terrorism reasons to a country that the United States Government has designated a state sponsor of international terrorism.[8] In addition, LaFleur was advised numerous times by federal agents before the regatta in question began that taking a vessel to Cuba without the proper Department of Commerce (DOC) authorization was a violation of U.S. law.[9]

I find that decision on the record in favor of BIS is appropriate as to the charge filed against Respondent Wayne LaFleur because reliable and substantial evidence demonstrates clearly, under the preponderance standard, that the facts described in the charging letter more probably than not occurred as alleged. This decision has been made based on my review of the entire record before me.

In LaFleur's January 17, 2008 answer to the charging letter, LaFleur failed to deny that he took the vessel EKA to Cuba without the proper DOC authorization, as alleged in the charging letter. Ex. M. More directly, in response to BIS's requests for admission and interrogatories, LaFleur admitted that he took the vessel EKA from Key West, Florida, to Cuba during the regatta and that he was owner of the vessel EKA during the regatta. Exs. J & N (at Requests & Admissions 19, 20, 21); Exs. I & O (at Interrogatories & Responses 2, 10).

LaFleur has admitted, and BIS has confirmed through a search of its licensing database, that no DOC license was obtained for the export of the vessel EKA to Cuba. Exs. L & P; see Exs. J & N (at Request & Admission 22) (when asked to admit that he did not apply for a license, LaFleur stated that he ''had no knowledge that a vessel was being exported,'' therefore failing to specifically deny the request and implicitly acknowledging that he did not, in fact, apply for a license for the export of his vessel).

Although the provision of the Regulations that LaFleur violated was a strict liability offense, it is notable, for purposes of the penalty, that LaFleur also admitted to receiving numerous written warnings from BIS Special Agents prior to the regatta in question. LaFleur admits that he received a letter on May 22, 2003 explaining that vessels are ''exported'' to Cuba ''even if they merely visit a Cuban port,'' and that he received two letters on May 23, 2003, informing him that taking a vessel into Cuban territorial waters without the proper export license would be a violation of federal law. Exs. J & N (at Requests & Admissions 24, 25); see also Exs. B & C. In addition, LaFleur acknowledged, in response to BIS interrogatories, that he was cautioned by DOC officials on May 22, 2003, the day before the regatta started, that a license issued to an organization called Conchord Cayo Hueso for the export of certain medical items to Cuba would not authorize members or asserted members of that organization to export vessels to Cuba. Exs. I & O (at Interrogatory & Response 4) (stating that at the pre-launch party on May 22, 2003, he was informed by DOC that the license in question ''may not be valid''). [10] LaFleur further admits that this latter fact was confirmed to him by BIS Special Agents on the day of the regatta. Exs. J & N (at Request & Admission 25) (admitting receipt of warning on day of regatta); Ex. C.

LaFleur has asserted that other captains involved in the regatta in question were not charged with violations of the Regulations. Even if true, this would not be relevant to the case at hand. Criminal prosecutors have broad discretion over whom to prosecute, a position that ''rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.'' *Wayte* v. *U.S.,* 470 U.S. 598 at 607 (1985). ''Such factors as the strength of the case, the prosecution's general deterrence value, the government's enforcement priorities, and the case's relationship to the government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.'' Id. Similarly, ''when an agency decides to seek enforcement actions (or declines to seek enforcement actions), it is entitled to the same type of discretion that a prosecutor is afforded in bringing (or not bringing) criminal charges.'' *Greer* v. *Chao,* 492 F.3d 962 at 964 (8th Cir. 2007) (parentheticals in original). Indeed, the Supreme Court ''has

* * * by the Regulations,'' and thus, inter alia, sets forth a violation for causing, aiding or abetting conduct that would constitute a violation of Section 764.2(a). Compare 15 CFR 764.2(a) and (b). Moreover, where the Regulations include a knowledge or intent requirement, such a requirement is explicitly set forth in Section 764.2. See e.g., 15 CFR 764.2(e) (Acting with knowledge of a violation). The Regulations and their history also make clear that a knowledge or intent requirement will be included specifically in the pertinent violation provision when such a requirement is intended. See 45 FR 84022 (Dec. 22, 1980) (removing knowledge requirement from several violation provisions in the Regulations).

[6] Temporary exports have been subject to export control laws for more than 60 years. See e.g., 7 FR 5007 (July 2, 1942) (amending Part 802 of title 32 of the Code of Federal Regulations to authorize the export of certain stores and spare parts that are carried abroad on vessels and planes for use or consumption by the crew); cf. 15 CFR 740.1 5(b)(2008).

[7] Pursuant to Section 13(c)(1) of the Export Administration Act and § 766.17(b)(2) of the Regulations, in export control enforcement cases, the ALJ makes recommended findings of fact and conclusions of law that the Under Secretary must affirm, modify or vacate. The Under Secretary's action is the final decision for the U.S. Department of Commerce.

[8] See 15 CFR Part 766, Supp. No. 1, section III.A. (discussing the factors that BIS considers in the context of settling an enforcement action and stating that ''BIS is more likely to seek a greater monetary penalty and/or denial of export privileges * * * in cases involving: (1) Exports or reexports to countries subject to anti-terrorism controls * * * ''). Cuba has been designated as a Terrorist Supporting Country and is subject to such anti-terrorism controls. See 15 CFR Part 740, Supp. No. 1 Country Group E:1 (2003); 15 CFR 742.1, 746.2 (2003).

[9] See 15 CFR Part 766, Supp. No. 1, section III.A. (discussing the factors that BIS considers in the context of settling an enforcement action and stating that ''[i]n cases involving gross negligence, willful blindness to the requirements of the EAR, or knowing or willful violations, BIS is more likely to seek a denial of export privileges * * * and/or a greater monetary penalty than BIS would otherwise typically seek'').

[10] BIS provided evidence in this matter that it had searched its electronic licensing database and determined conclusively that no license for the export of vessels to Cuba was applied for or issued to Conchord Cayo Hueso or its president during the applicable time period. Ex. P.

recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.'' *Heckler* v. *Chaney,* 470 U.S. 821, 831 (1985). Such agency decisions are unsuitable for judicial review because they involve ''a complicated balancing of a number of factors which are particularly within [the agency's] expertise,'' such as assessing where agency resources are best spent and whether a particular enforcement action fits the agency's overall policies. Id. at 837. ''The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.'' Id.

After admitting the material facts against him, and in light of the absence of any viable defense by LaFleur, it is clear that the preponderance of the evidence weighs in favor of BIS, and that BIS is entitled to decision in its favor with regard to the charge against LaFleur.

Recommended Findings of Fact and Conclusions of Law

Based upon the record before me, I make following findings of fact and conclusions of law:

I. Findings of Fact

1. The vessel EKA was classified under Export Control Classification Number 8A992.f on the Commerce Control List at the time of the alleged violations. Ex. K.

2. The vessel EKA was exported to Cuba during the regatta described in the charging letter. Exs. J & N (at Request & Admission 20).

3. Prior to the regatta that began on May 23, 2003, Wayne LaFleur waswarned specifically at least twice by BIS that a Department of Commerce license was required to export a vessel to Cuba. Exs. J & N (at Requests & Admissions 24, 25).

4. No Department of Commerce authorization was obtained for the export to Cuba of the vessel EKA. Exs. J & N (at Request & Admission 22); Ex. L; Ex. P.

5. Wayne LaFleur owned the vessel EKA during the regatta described in the charging letter and traveled upon the vessel EKA to Cuba during the regatta. Exs. J & N (at Requests & Admissions 19, 21); Exs. I & 0 (at Interrogatory & Response 10).

II. Conclusions of Law

1. The export of the vessel EKA to Cuba required an export license from the Department of Commerce. Ex. L.

2. Section 764.2(a) of the Regulations is a strict liability provision.

3. LaFleur engaged in conduct prohibited by the Regulations when he exported the vessel EKA to Cuba without the required Department of Commerce export license.

Respondent's role in the export of a vessel from the United States to Cuba in this case demonstrates indifference to U.S. export control laws. Therefore, I find that BIS's penalty recommendation is entirely reasonable, especially given the repeated efforts made by BIS agents to specifically inform Respondent of the proper export licensing requirements.

Accordingly, I recommend that the Under Secretary enter an Order imposing an $8,000 penalty against LaFleur and a denial of export privileges for three years. Further, I recommend the Order state that the denial of export privileges shall be suspended for the entire three year period, provided that LaFleur pays the monetary penalty within 30 days of the Final Decision and Order and that LaFleur commits no further violations during the period of the suspension. Should LaFleur fail to abide by any of the conditions of suspension, then the denial order will become active. This penalty is consistent with prior cases decided by this Court. See, e.g., International Freight Forwarders, 73 FR at 25652, aff'd at 73 FR 25648 (imposing a monetary penalty of $6,000 and a conditional denial of export privileges for three years against a freight forwarder that aided and abetted an attempted export of medical equipment to Cuba).

The terms of the denial of export privileges against Respondent should be consistent with the standard language used by BIS in such orders, with modifications as necessary to comply with the conditional nature of the denial of export privileges described above.

Wherefore,

Recommended Order

[REDACTED SECTION]

Accordingly, I am referring this Recommended Decision and Order to the Under Secretary of Commerce for Industry and Security for review and final action for the agency, without further notice to the Respondent, as provided in Section 766.7 of the Regulations.

Within thirty (30) days after receipt of this Recommended Decision and Order, the Under Secretary will issue a written order affirming, modifying or vacating the Recommended Decision and Order. 15 CFR 766.22(c). A copy of the Agency's regulations for Review by the Under Secretary is attached as Appendix B.

Done and dated this 8th day of December, 2008 at New York, New York.

Hon. Walter J. Brudzinski,
Administrative Law Judge.

Appendix A—List of Exhibits

A. Agency's Exhibits

Exhibit A Letter to Michele Geslin dated April 24, 2003, with copy of certified mail receipt signed by Michele Geslin. (3 pages)
Exhibit B Letter to race participants from BIS Special Agent dated April 22, 2003. (1 page)
Exhibit C Letter to All Third Annual Conch Republic Cup Race Participants dated May 23, 2003; letter to race participants, dated May 23, 2003. (2 pages)
Exhibit D Letter to Peter Goldsmith dated April 10, 2003, with copy of certified mail receipt initialed by Peter Goldsmith. (3 pages)
Exhibit E Charging Letter addressed to Michele Geslin dated December 18, 2007. (3 pages)
Exhibit F Charging Letter addressed to Peter Goldsmith dated December 18, 2007. (3 pages)
Exhibit G Michele Geslin's answer to Charging Letter dated February 10, 2008. (1 page)
Exhibit H Peter Goldsmith's answer to Charging Letter dated February 10, 2008. (1 page)
Exhibit I BIS's Interrogatories and Requests for Production of Documents, with certificate of service dated May 14, 2008. (14 pages)
Exhibit J BIS's Requests for Admission to include Exhibits A through D, and certificate of service dated May 14, 2008. (15 pages)
Exhibit K Certified Licensing Determination dated September 4, 2008. (2 pages)
Exhibit L Certified copy of letter indicating results of BIS's search of its electronic licensing database for records of export licenses or applications related to the transactions in question. (2 pages)
Exhibit M Wayne LaFleur's answer to Charging Letter, dated January 17, 2008. (1 page)
Exhibit N Wayne LaFleur's response to BIS's Requests for Admission (see Ex. J for requests). (1 page)
Exhibit O Wayne LaFleur's response to BIS's Interrogatories and Requests for Production of Documents (see Ex. I for interrogatories and requests). (2 pages)
Exhibit P Certified copy of letter indicating results of BIS's search of its electronic licensing database for records of export licenses or applications related to the transaction in question. (2 pages)
Exhibit Q Charging Letter addressed to Wayne LaFleur, dated December 18, 2007. (5 pages)

B. Respondent's Exhibits

Respondent did not file any exhibits.

Appendix B—Notice to the Parties Regarding Review by Under Secretary

Title 15—Commerce and Foreign Trade

Subtitle B—Regulations Relating to Commerce and Foreign Trade

Chapter VII—Bureau of Industry and Security, Department of Commerce

Subchapter C—Export Administration Regulations

Part 766—Administrative Enforcement Proceedings

15 CFR 766.22

Section 766.22 Review by Under Secretary

(a) Recommended decision. For proceedings not involving violations relating to part 760 of the EAR, the administrative law judge shall immediately refer the recommended decision and order to the Under Secretary. Because of the time limits provided under the EAA for review by the Under Secretary, service of the recommended decision and order on the parties, all papers filed by the parties in response, and the final decision of the Under Secretary must be by personal delivery, facsimile, express mail or other overnight carrier. If the Under Secretary cannot act on a recommended decision and order for any reason, the Under Secretary will designate another Department of Commerce official to receive and act on the recommendation.

(b) Submissions by parties. Parties shall have 12 days from the date of issuance of the

recommended decision and order in which to submit simultaneous responses. Parties thereafter shall have eight days from receipt of any response(s) in which to submit replies. Any response or reply must be received within the time specified by the Under Secretary.

(c) Final decision. Within 30 days after receipt of the recommended decision and order, the Under Secretary shall issue a written order affirming, modifying or vacating the recommended decision and order of the administrative law judge. If he/she vacates the recommended decision and order, the Under Secretary may refer the case back to the administrative law judge for further proceedings. Because of the time limits, the Under Secretary's review will ordinarily be limited to the written record for decision, including the transcript of any hearing, and any submissions by the parties concerning the recommended decision.

(d) Delivery. The final decision and implementing order shall be served on the parties and will be publicly available in accordance with § 766.20 of this part.

(e) Appeals. The charged party may appeal the Under Secretary's written order within 15 days to the United States Court of Appeals for the District of Columbia pursuant to 50 U.S.C. app. 2412(c)(3).

Certificate of Service

I hereby certify that I have served the foregoing Recommended Decision and Order as indicated below to the following person(s):

Mario Mancuso, Under Secretary of Commerce for Industry and Security, U.S. Department of Commerce, Room H–3892, 14th Street & Constitution Avenue, NW., Washington, DC 20230. (By Facsimile to 202–482–2387 and Federal Express.)

Charles G. Wall, Gregory Michelsen, Attorneys for Bureau of Industry and Security, Office of Chief Counsel for Industry and Security, U.S. Department of Commerce, Room 11–3 839, 14th Street & Constitution Avenue, NW., Washington, DC 20230. (By Facsimile to 202–482–0085 and Federal Express.)

Wayne LaFleur, 339 Torrey Pines Point, Naples, FL 34113. (By Federal Express.)

Peter Goldsmith, 2627 Staples Avenue, Key West, FL 33040. (By Federal Express.)

Michele Geslin, 2627 Staples Avenue, Key West, FL 33040. (By Federal Express.)

Hearing Docket Clerk, ALJ Docketing Center, 40 S. Gay Street, Room 412, Baltimore, Maryland 21202–4022. (By Facsimile to 410–962–1746 and Federal Express.)

Done and dated this 8th day of December 2008, New York, New York.

Regina V. Maye,

Paralegal Specialist to the Hon. Walter J. Brudzinski, Administrative Law Judge.

[FR Doc. E9–654 Filed 2–2–09; 8:45 am]

BILLING CODE 3510–DT–M

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Emerging Technology and Research Advisory Committee; Notice of Partially Closed Meeting

The Emerging Technology and Research Advisory Committee (ETRAC) will meet on February 10, 2009, 10:45 a.m., Room 4830, in the Herbert C. Hoover Building, 14th Street between Pennsylvania and Constitution Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on emerging technology and research activities, including those related to deemed exports.

Agenda

Open Session

1. State Department—What is ITAR and its scope? What is the line of demarcation of dual-use? Areas of regulatory uncertainty. Importance of deemed export controls on dual-use technologies subject to the CCL.

2. BIS view: What are dual-use technologies; how they differ from ITAR; where regulatory jurisdiction becomes fuzzy; jurisdictional issues on how best to resolve the issues.

3. Deemed Exports—BIS National Security & Technology Transfer Controls

- What is a deemed export in all of its flavors.
- What services does EA provide to help academics and industry researchers understand current regulations and comply with these rules.

4. BIS Export Enforcement (EE)—deemed export rules for dual-use technologies subject to EAR over 5 years.

- Describe the levels of violations; prime reasons for violations.
- Typical EE responses.
- Frequency of prosecution.
- Real life examples.

5. ISTAC, MTAC briefings

- Approaches BIS/TACs use in identifying, ranking, or prioritizing technologies in terms of importance, sensitivity, availability, etc.
- Describe decision trees, process models, systematic processes individual TACs.
- Discuss methods TACs use to identify, rank, or prioritize technologies that might be subject to deemed export regulations.
- Describe types of guidance and tools BIS provides to TACs to enable sound decision making on imposition or relaxation of deemed export regulations.

6. Public Comments and Questions.

Closed Session

7. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yspringer@bis.doc.gov* no later than February 3, 2009.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate the distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer via e-mail.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on January 14, 2009, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 (10)(d)), that the portion of the meeting dealing with matters the disclosure of which would be likely to frustrate significantly implementation of an agency action as described in 5 U.S.C. 552b(c)(9)(B) shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 10(a)1 and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information, call Yvette Springer at (202) 482–2813.

Dated: January 29, 2009.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. E9–2266 Filed 2–2–09; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Materials Technical Advisory Committee; Notice of Partially Closed Meeting

The Materials Technical Advisory Committee will meet on February 12, 2009, 10 a.m., Herbert C. Hoover Building, Room 3884, 14th Street between Constitution & Pennsylvania Avenues, NW., Washington, DC. The Committee advises the Office of the