

# CLIENT ALERT

## This Month In International Trade - May 2012

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### THIS MONTH'S TOP FIVE DEVELOPMENTS

#### 1) CBP Expands Use of Transaction Value in Related Party Transactions Involving Transfer Price Adjustments

On May 30, 2012, CBP published notice that will increase an importer's ability to use related party transfer prices as the appropriate customs value even if there are post-importation price adjustments. Specifically, U.S. Customs and Border Protection (CBP) revoked Headquarters ruling (HQ) 547654 (Nov. 8, 2001) which previously held that in situations of post-importation transfer pricing adjustments, where price was not fixed or determinable pursuant to a pre-importation objective formula, transaction value could not be used to appraise the value of the imported merchandise. Transaction value is the primary method of appraisal for merchandise imported into the United States. CBP initially proposed revoking this ruling and requested comments in a [December 2011 Customs Bulletin notice](#) following its September 2011 proposal to allow importers to use transaction value in transfer pricing adjustments.

CBP's action represents a significant change in prior Customs valuation practice and may offer benefits to the related party importers that make post-importation price adjustments under their transfer pricing policies. Issued as part of the May 30 notice, HQ W548314 (May 16, 2012) permits related-party transactions, subject to post-importation adjustments, to be appraised under the transaction value method, provided the formal transfer pricing policy meets five critical factors (from the original proposal's eight factors, revised and consolidated, in response to comments):

- A written "Intercompany Transfer Pricing Determination Policy" is in place prior to importation and the policy is prepared taking IRS Code section 482 into account;
- The US taxpayer uses its transfer pricing policy in filing its income tax return, and any adjustments resulting from the transfer pricing policy are reported or used by the taxpayer in filing its income tax return;
- The company's transfer pricing policy specifies how the transfer price and any adjustments are determined with respect to all products covered by the transfer pricing policy for which the value is to be adjusted;
- The company maintains and provides accounting details from its books and/or financial statements to support the claimed adjustments in the United States; and,
- No other conditions exist that may affect the acceptance of the transfer price by CBP.

Notably, in its final ruling, CBP revised factor one, concluding that transfer pricing policies must be prepared in the manner consistent with IRS Code section 482 and adding language to that effect. In addition, unlike in its initial proposal, in its final ruling CBP will not require the use of the Reconciliation program to report post-importation adjustments. In the new ruling, CBP

describes using Reconciliation as the "most efficient mechanism" for reporting these post-entry adjustments, recognizing the flexibility allowed by the program's 21-month filing timeframe.

Will this lead to duty savings for importers who chose to utilize Reconciliation and a qualifying transfer pricing policy? For example, downward post-entry adjustments will result in a lower entered value of the imported merchandise and subsequently lower duties; reductions will not be treated as discounts or rebates.

The new policy takes effect July 30, 2012.

### **2) FTA Proposes Requiring 100% U.S.-Origin Components for Rolling Stock Overhauls**

To "reclarify" an issue the Federal Transit Administration (FTA) thought it had settled in its 2007 rulemaking, on May 21, 2012, the [FTA provided notice](#) (with opportunity to comment on or before June 20, 2012) of its interpretation that the statutory exception permitting acquisition of rolling stock with only 60% U.S.-origin components did NOT apply to overhauls, because overhauls are more akin to replacement and repairs. Engine rebuilds, on the other hand, which extend the useful life of the rolling stock, would continue to qualify for the reduced level of domestic content (but also subject, presumably, to the requirement that 60% of the subcomponents used in a rebuild must be U.S.-origin for the component to qualify as domestic).

### **3) China Files Complaint against U.S. at WTO**

China filed suit against the U.S. at the WTO alleging that it had misapplied trade remedy rules on 22 Chinese products. The complaint [accuses the U.S. of improperly "double counting" duties on Chinese goods](#) in violation of a 2011 WTO ruling. The total value of exports at issue is estimated at \$7.3 billion.

The first step in the dispute process will be for China and the U.S. to engage in consultations at the WTO to resolve the complaint. If those fail, China can then request the WTO to rule on the dispute.

The dispute is related to legislation passed by the U.S. Congress in March of this year affirming that the Department of Commerce may apply countervailing duties on exports from non-market economies. The legislation was enacted in response to the ruling by the Court of Appeals for the Federal Circuit in *GPX Int'l Tire Corp. v. United States*.

### **4) Two More Settlements Announced for Antiboycott Violations**

The Commerce Department's Office of Antiboycott Compliance ("OAC") announced in May settlements with a U.S. trade logistics provider and a U.S. manufacturer for alleged violations of the U.S. antiboycott regulations.

Samuel Shapiro & Company, Inc., a Maryland international trade logistics provider, paid \$10,000 to settle allegations that it [failed to report receipt of five boycott compliance requests](#). Each of the five violations involved a request to provide an agent-signed vessel eligibility certificate for the sale of goods or services to the United Arab Emirates between 2006 and 2008. Samuel Shapiro did not comply with the prohibited requests; the violations were limited to its failure to report the requests to OAC.

SteelSummit International Inc., a U.S. steel producer, paid \$14,400 to settle allegations that it committed four violations of the antiboycott regulations. OAC alleged that on four occasions between 2009 and 2011, SteelSummit provided a negative certificate of origin to Saudi Arabia certifying that imported goods were not of Israeli origin.

## 5) DDTC and BIS Continue Aligning Export Control Lists

The Administration continues to move towards its stated goal of making the United States Munitions List ("USML") and the Commerce Control List ("CCL") positive, tiered, and aligned so that eventually the USML and CCL can be combined into a single control list. To further that effort, on May 2, 2012, the Department of State's Directorate of Defense Trade Controls ("DDTC") published a proposed new USML Category V addressing explosives and energetic materials, propellants, incendiary agents and their constituents to establish what DDTC refers to as a "bright line" between the USML and CCL for the purposes of controlling these articles. The Department of Commerce's Bureau of Industry and Security ("BIS") issued a related proposed rule on the same day describing how articles that the President determines no longer warrant control under Category V would be controlled under the CCL in new Export Control Classification Numbers ("ECCNs") 1B608, 1C608, 1D608, and 1E608.

On May 18, 2012, DDTC proposed a new USML Category XIII, re-titled "Materials and Miscellaneous Articles," and addressing, for example, such items as military information security and cryptographic devices, ablative materials, armor, and classified materials. BIS issued a related proposed rule on the same day describing how items in the current Category XIII that no longer warrant control on the USML would be controlled on the CCL in new ECCNs 0A617, 0B617, 0C617, 0D617, and 0E617.

Comments on the May 2nd proposed rules are due by June 18, 2012, and comments on the May 18th proposed rules are due by July 2, 2012.

## THIS MONTH IN TRADE – OTHER NEWS

### C-TPAT/AEO Mutual Recognition Decision

On May 4, 2012, David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection (CBP) and Heinz Zourek, Director-General, Taxation and Customs Union Directorate (TAXUD) of the European Union (EU), signed a Mutual Recognition Decision between CBP's Customs-Trade Partnership Against Terrorism (C-TPAT) program and the EU's Authorized Economic Operator (AEO) program, recognizing the compatibility between the two cargo security programs.

C-TPAT focuses on cooperation between government and trade designed to improve supply chain security involving cargo bound for the United States; AEO is a similar program focused on risk-assessment, common standards and transparency, and collaboration between EU customs administrations. Through the Mutual Recognition Decision, C-TPAT participants should receive the same benefits as AEO participants in the EU; AEO program members to be treated by CBP as C-TPAT program participants in the U.S.

### **Ex-Im Bank Reauthorization**

On May 30, President Obama signed the Export-Import Bank Reauthorization Act of 2012, extending the authority of the Import-Export Bank of the United States ("Ex-Im Bank") to approve export financing through September 2014 and increasing the financing cap from \$100 billion to \$120 billion in 2012 (and eventually to \$140 billion by 2014). The new law requires the Ex-Im Bank to provide more detailed information on its operations, including default rates and small business support, with particular focus on the U.S. textile and aircraft industries.

The Ex-Im Bank is the official U.S. export credit agency (ECA). It operates under a renewable charter, the Export-Import Bank Act of 1945 (P.L. 79-173), as amended. The Ex-Im Bank provides credit and insurance to support manufacturing and services exports through direct loans, loan guarantees, working capital guarantees, and other financing programs.

### **CBP to Add Two New CEEs for Automotive/Aerospace, Oil/Gas/Minerals Imports**

On May 10, Customs and Border Protection (CBP) acting Commissioner David V. Aguilar announced the expansion of its Centers of Excellence and Expertise (CEE) initiative. One center, based in Detroit, will provide one-stop processing for Automotive and Aerospace industry imports. Houston will host the Petroleum, Natural Gas and Minerals center. The new centers join the existing CEEs in Los Angeles (Electronics) and New York (Pharmaceuticals).

The CEEs represent CBP's efforts to provide uniformity and predictability across ports of entry, facilitate more efficient processing and timely resolution of national trade issues, and enhance agency knowledge tailored to specific industries with unique trade environments. CBP will staff the centers with a variety of trade personnel positions, utilizing account management principles, to serve as primary contacts for trade information and compliance concerns. For businesses participating in the Customs-Trade Partnership Against Terrorism (C-TPAT) and Importer Self-Assessment (ISA) trusted shipper programs, the CEEs will serve as the single point of processing for those entities for validation activities including protests, post entry amendments and prior disclosure. This will allow the ports of entry to focus on revenue collection and high-risk shipments and importers that do not take part in the trusted shipper programs.

CBP plans to continue the expansion in 2013 to five additional centers in the following industries: Agriculture and Prepared Products; Base Metals and Machinery; Consumer Products and Mass Merchandising; Industrial and Manufacturing Materials; and Textiles, Wearing Apparel and Footwear. CBP has yet to release information on the locations of the additional centers.

### **CROWELL & MORING SPEAKS**

**Dan Cannistra** (Crowell) and **Chris Wilson** (CMI) spoke on [supply chain issues and global competitiveness](#) at the United States-Mexico Chamber of Commerce conference on Competitiveness, Supply Chain and Transportation in the NAFTA Region, May 17, 2012.

**Lindsay Denault** will speak on a panel about "[Facilitating Access to International Markets](#)" at the AICPA International Business Conference, June 11-12, 2012.

**John Brew** joins a panel for discussion of "Joint CPSC-Customs Inspections" for the Sporting Goods Manufacturing Association (SGMA) Thought Leadership Webinar, June 21, 2012 from 1:00 pm to 2:00 pm.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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