

CLIENT ALERT

This Month in International Trade - December 2013

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THIS MONTH'S TOP TRADE DEVELOPMENTS

1) WTO "Bali Package"; Trade Facilitation Agreement Approved

On December 7, 2013, members of the World Trade Organization (WTO) approved an important set of measures at the organization's Ninth Ministerial Conference in Bali, Indonesia. The cornerstone is the *WTO Agreement on Trade Facilitation* or "Bali Package" and represents a small fraction of the organization's "Doha Development Agenda." The agreement represents the first multilateral agreement adopted by the members of the WTO since the 1995 formation of the organization. The WTO has seen the proliferation of bilateral and regional free trade agreements in the interim, and this new agreement may represent a reinvigoration of the organization as a whole.

The potential upside of the *Agreement on Trade Facilitation*, which binds each of the WTO's 159 members, is an estimated increase in global GDP of almost \$1 trillion, to be achieved through added predictability, simplicity and uniformity in customs and border procedures. For U.S. companies, the U.S. Trade Representative Mike Froman considers that it "will be of particular benefit to manufacturers, producers of perishable goods, freight forwarders, logistics providers, express carriers, and entrepreneurs."

Although implementation of certain aspects of the agreement may initially prove troublesome for certain developing countries currently lacking in the capacity to adjust to the agreed-upon terms, the scope of the agreement is such that widespread adherence to it should result in a significant reduction in trade transaction costs and a reduction of *de facto* discrimination of imported goods through customs measures. A sampling of the topics covered by the *Agreement on Trade Facilitation*, the provisions of which are now subject to WTO dispute settlement procedures, include advance publication and information on existing and adopted customs laws, regulations and procedures; enhanced rights of appeal for importers; the use of guarantees and customs bonds to allow rapid release of goods; the utilization of common customs standards; and further uniformity in border procedures and documents.

For more information, contact: John Brew, Josh Kallmer, Brian Gatta, Jini Koh

2) FDA Proposes New Food Defense Rule

On December 24, 2013, the Food and Drug Administration (FDA) published a proposed rule on protection of food against intentional adulteration in the Federal Register. This rule, entitled "Focused Mitigation Strategies to Protect Food against International Adulteration," is the sixth rule issued by the FDA under the Food Safety Modernization Act (FSMA), which is known

as the most sweeping reform of U.S. food safety law in more than 70 years. The FDA has already proposed rules on 1) produce safety; 2) preventative control for human food; 3) preventative control for animal food; 4) a Food Supplier Verification Program; and 5) accreditation of third-party auditors to conduct reviews on foreign facilities.

The proposed food defense rule would require large domestic and foreign food businesses to take steps to prevent their facilities from being the target of intentional attempts to contaminate the food supply. Although intentional adulteration can take many forms with different intentions, the objective of the proposed rule is to protect food from intentional adulteration when the intent is to cause large-scale public harm. According to the FDA, there are four key activities within the food system that are most vulnerable to this type of adulteration:

- Bulk liquid receiving and loading;
- Liquid storage and handling;
- Secondary ingredient handling (the step where ingredients other than the primary ingredient of the food are handled before being combined with the primary ingredient); and
- Mixing and similar activities.

The FDA will be focusing on these activities rather than specific foods or hazards.

Under the proposed rule, each food facility must prepare and implement a written food defense plan that identifies vulnerable activities in its food production process and adopt "focused mitigation strategies" to address those vulnerabilities. The facility must also establish monitoring procedures and take corrective actions if the strategies are not properly implemented. Moreover, the facility must verify that the system is working properly, ensure that personnel assigned to the vulnerable activities receive appropriate training, and maintain records of its food defense program.

The FDA is proposing that the requirements be effective 60 days after publication of the final rule in the *Federal Register*. Once the requirements are in place, there will be staggered dates for compliance based on facility size. For example, "very small" businesses with less than \$10,000,000 in total annual sales of food will have three years to comply while "small" businesses with fewer than 500 employees will have two years to comply. Businesses that are neither "very small" nor "small" will have one year to comply. The rule will only apply to domestic and foreign facilities that are required to register with the FDA under the Federal Food, Drug, and Cosmetic Act (FFDCA). Farms and animal food facilities will be exempt.

The proposed rule is available for public comment until March 31, 2014. The FDA will hold a public meeting on February 20, 2014, in College Park, MD.

For more information, contact: John Brew, John Fuson, Jini Koh, Pierce Lee

3) EU Proposes Common Approach to Customs Violations

On December 13, 2013, the European Union (EU) unveiled a plan to standardize penalties for customs violations across the EU's 28 member countries. The European Commission proposed this plan in order to improve certainty for businesses trading in Europe and to eliminate distortions of the European market caused by differences in enforcement among its members.

Although customs law is uniform across the EU, member nations can currently use their own discretion in assessing penalties for violations. This approach has led to inconsistencies in how rule-breakers are treated in different member countries. For example, sanctions for certain infringements range from small fines in some countries, to imprisonment in others. These differences can have negative outcomes, including legal uncertainties for traders or an unfair advantage to those who violate customs law in a more lenient member country.

The Directive lists the actions that would be considered infringements of the EU's customs rules and differentiates the violations by the level of severity. It also categorizes the violations as to whether there was intent or negligence and provides examples of listed infringements. Furthermore, the Directive establishes a framework for imposing sanctions, with penalties ranging from one percent of the value of the goods for inadvertent violations to 30 percent of the value of goods (or a flat penalty of €45,000 if not related to specific goods) for more serious violations.

Ultimately, the proposal seeks to harmonize the sanctions imposed against those found to have violated EU customs law. Algirdas Semeta, the European Commissioner in charge of taxation and customs, said in the Commission's statement that "there is no point in a solid, single set of rules if we do not also have a common approach to responding when they are broken. We must ensure that EU customs law is respected to the same high standards across the Single Market. Today's proposal will create a more level playing field for businesses, a more secure market for citizens and a more uniformly managed customs union." According to the Commission, the proposal bridges the gap between different legal regimes through a common set of rules in order to encourage a more standard and effective application of customs law throughout the EU.

For more information, contact: John Brew, Thomas De Meese, Brian Gatta, Carolyn Esko

4) Obama to Nominate Baucus as Next Ambassador to China

Senate Finance Committee Chairman Max Baucus (D-Montana) is expected to be nominated by President Barack Obama as the next U.S. Ambassador to China, replacing current U.S. Ambassador Gary Locke. Senator Baucus will leave the Senate prior to the end of his term after working for more than 20 years to deepen the relationship between the two countries. Baucus has visited China eight times and has also hosted Chinese diplomats in Washington D.C. and Montana for numerous trade delegations, including meetings with current President Xi Jinping, former Premier Wen Jiabao, former Vice Premier Wu Yi and the current Chinese Ambassador to the United States Cui Tiankai.

While Senator Baucus has stood firmly against some of China's trade practices, he also successfully guided U.S. efforts in the 1990's to admit China to the World Trade Organization and helped normalize U.S.-China trade relations. Baucus has also focused on opening markets for agricultural exports, particularly beef. As Ambassador, Baucus would further promote trade as well as address concerns about China's territorial claims and protection of U.S. companies' intellectual property.

Senator Ron Wyden (D-Oregon), who is expected to replace Baucus as Chairman of the Finance Committee, has different international trade priorities. Wyden has emphasized that effective trade policy involves addressing the needs of the digital economy and reflecting broad public input. He also believes in effectively enforcing U.S. trade laws, and providing Trade Adjustment Assistance for workers and firms.

For more information, contact: John Brew, Josh Kallmer, Carolyn Esko

5) Royal Bank of Scotland Settles Sanctions Violation Charges for \$100M

On December 11, 2013, the Department of the Treasury's Office of Foreign Assets Control (OFAC) announced a settlement with the Royal Bank of Scotland (RBS) for claims arising from allegations of U.S. sanctions laws. Without admitting guilt, the RBS agreed to pay a total of \$50M to the Federal Reserve (an amount which encompasses the \$33M OFAC portion of the penalty) as well as the New York Department of Financial Services.

The settlements—which arise from alleged violations of Iran, Cuba, Burma and Sudan sanctions regimes—represent the latest in a string of similar agreements between non-U.S.-based financial institutions and the U.S. government. Apart from the penalties, these cases have also involved similar allegations, in particular the intentional concealment of information, which would identify parties to certain transactions as sanctioned entities or governments.

Although high in relation to the majority of OFAC-issued penalties, OFAC's \$33M settlement figure represents a substantial discount from the statutory maximum of about \$132M, and was reduced to that extent in light of the voluntary disclosure by RBS of the apparent violations along with other mitigating factors. The penalty therefore highlights both the U.S. Government's continued focus on non-U.S. financial institutions with respect to sanctions violations, along with the importance of voluntary self-disclosure of violations.

For more information, contact: Alan Gourley, Jeff Snyder, Cari Stinebower, Brian Gatta, Dj Wolff

THIS MONTH IN TRADE – OTHER NEWS

Agency Enforcement Actions

Bureau of Industry and Security (BIS)

- Chinese National Sentenced to 57 Months for Attempted Unauthorized Export of Carbon Fiber to China
- [North Carolina Man Sentenced to 12 Months for Brokering Sale of Defense Articles to Venezuela](#)

Office of Foreign Assets Control (OFAC)

- [HSBC Settles for \\$32,000 for Violations of Global Terrorism Sanctions Regulations](#). HSBC Bank USA (HSBC) allegedly processed fund transfers to an entity, Tajco, that is both a Specially Designated Global Terrorist (SDGT) and a party on the Specially Designated Nationals and Blocked Persons List (SDN List). OFAC determined that HSBC voluntarily self-disclosed these violations and that the violations were non-egregious. HSBC agreed to settle the charges for \$32,400.

- Compass Bank Settles for \$19,000 for Violations of Sudan Sanctions. Compass Bank (Compass), an Alabama-based retail bank, allegedly originated a wire transfer payment for the shipment of tractor to Sudan. OFAC determined that Compass voluntarily self-disclosed this violation, and Compass agreed to pay \$19,125 to settle the charge.

Securities and Exchange Commission (SEC)

- ADM Settles for \$36 Million for Violations of FCPA. Archer-Daniels-Midland Company (ADM) allegedly paid \$21 million in bribes to Ukrainian officials in order to get preferential VAT refund treatment. ADM agreed to pay \$33.3M, plus \$3.1M in interest, to settle the charges.

U.S. Customs and Border Protection (CBP)

- Default Judgment Entered Against Customs Broker for \$30,000 Penalty for Alleged False Claims. On December 26, 2013, the Court of International Trade (CIT) issued an opinion granting Customs' motion for default judgment against a licensed customs broker in *United States v. Alejandro Santos and Alejandro Santos, CHB*. The defendant, a license customs broker, had allegedly violated numerous of Custom's regulations, including making false claims for duty-free treatment. The CIT found the statutory maximum penalty of \$30,000 that was assessed on the broker to be reasonable in light of the scope and number of the violations, as well as the previous warnings given to the broker by Customs

For more information, contact: John Brew, Richard Massony, Dj Wolff

ITC Assesses Proposed NAFTA Rules of Origin Modifications

According to a report released by the U.S. International Trade Commission (ITC) on December 19, 2013, the fourth set of proposed North American Free Trade Agreement (NAFTA) rules of origin modifications could result in a significant increase in U.S. trade for some products, and will have negligible harm to U.S. industry. Therefore, the proposed rule will likely be implemented by the President.

The report, requested by the U.S. Trade Representative, covers 212 proposed changes to NAFTA rules of origin. For the 20 proposed modifications that could have a significant impact on NAFTA trade, the likely effect on U.S. production is expected to be insignificant since the change in total U.S. imports and exports is expected to be small relative to U.S. production of the affected products.

The proposed modifications would impact a variety of items such as edible preparations; mineral fuels; chemicals; plastics; rubber articles; cork; glass and glassware; copper, nickel, and other base metals; machinery and parts; rail locomotives; trailers; optical and medical instruments; furniture; toys and games; lighters; and smoking pipes. Many of these modifications allow more inputs that do not originate in NAFTA countries due to changes in tariff shift rules and/or by reductions of regional value content requirements.

According to the report, none of the 212 proposed rules are expected to have a substantial effect on total U.S. imports. In addition, total U.S. exports may increase for sauces derived from fish and non-alcoholic preparations of yeast extract while increases in total U.S. exports of all other products are expected to be negligible.

Furthermore, eight of the proposed rules are likely to significantly increase U.S. imports from NAFTA partners for certain chemical products, diesel engines for marine propulsion, and smoking pipes. At the same time, 12 of the proposed rules may also significantly increase U.S. exports to NAFTA partners for products including sauces derived from fish and non-alcoholic preparations of yeast extract; certain chemical products; plastics; articles of rubber; certain articles of copper; certain electronic products; sunglasses; and various toys and games.

For more information, contact: John Brew, Daniel Cannistra, Carolyn Esko

New Rule Published for Commerce's Unverified List

The Bureau of Industry and Security (BIS) published a [final rule](#) effective January 21, 2014 strengthening the Export Administration Regulation's (EAR) Unverified List (UVL) procedures. This is in response to public concerns about how this BIS "red flag" should be handled.

If BIS is unable to establish a person's *bona fides* through an end-use check, that individual may be added to the UVL. Prior to conducting any transactions with a UVL-listed person, an exporter, reexporter, and/or transferor (in-country) must obtain a UVL statement from the UVL-listed person(s) certifying the end use, end user, and country of ultimate destination of items, as well as consent to an end-use check by the U.S. Government. Other changes include a suspension of license exceptions when dealing with a person on the UVL and a requirement for exporters to file an Automated Export System (AES) record for exports dealing with UVL-listed individuals. Finally, procedures on adding and removing individuals to the UVL is described in Part 744.15 of the EAR.

For more information, contact: Brian Gatta, Edward Goetz

Export Control Reform Update – Second Set of Final Rules Become Effective

On January 6, 2014, the Department of State's Directorate of Defense Trade Controls (DDTC) and the Department of Commerce's Bureau of Industry and Security (BIS) implemented the second in a series of final rules amending the [International Traffic in Arms Regulations \(ITAR\)](#) and [the Export Administration Regulations \(EAR\)](#). This second set of rules revises U.S. Munitions List (USML) Category VI (Surface Vessels of War and Special Naval Equipment), USML Category VII (Ground Vehicles), USML Category XIII (Materials and Miscellaneous Articles), and USML Category XX (Submersible Vessels and Related Articles).

As will be the case with each set of changes, this revision also creates new 600 series Export Control Classification Numbers (ECCN) in the Commerce Control List (CCL) for items in the categories above determined to no longer warrant USML control.

Also effective on January 6, 2014 are minor amendments both agencies have made since the final rules were published last July. These updates correct regulatory text and punctuation, identify exact effective dates for paragraphs regarding developmental articles, and provide an updated listing of categories subject to special license exemptions for Canada, Australia, and the UK.

The complete text of the DDTTC rule may be found [here](#).

The complete text of the BIS rule, dated 1/2/14 (79 FR 22) may be found [here](#).

For more information, contact: Brian Gatta, Edward Goetz

CBP to Begin Test to Accept Other Government Agency Import Data via ACE

On January 13, 2014, the U.S. Customs and Border Protection (CBP) will begin conducting a National Customs Automation Program (NCAP) test regarding the transmission of electronic filings of certain import data to CBP for commodities regulated by the Environmental Protection Agency (EPA) and the U.S. Department of Agriculture Food Safety and Inspection Service (FSIS).

The NCAP was established in the Customs Modernization Act of the North American Free Trade Agreement Implementation Act in 1993. This program was intended to encourage trade compliance and develop the Automated Commercial Environment (ACE), which is an automated electronic system for commercial trade processing that facilitates participation and growth in trade, streamlines business processes, and ensures cargo security. The Automated Broker Interface enables participants to electronically file the required import data with CBP, which is then transferred into ACE.

According to the Federal Register notice, filers participating in this [new test program](#) will submit Partner Government Agency (PGA) message set data, which is the data needed to satisfy the PGA reporting requirements, for the EPA for vehicles, engines and ozone-depleting substances (ODS) and for the FSIS for meat, poultry and eggs. Data found in current EPA forms 3520-1 and 3520-21 (importation declaration) and FSIS form 9540-1 (import inspection application and report) are being accepted, which include data submissions related to ODS imports that are currently handled via phone, email and/or paper communication. Only data for type 01 (consumption) and type 11 (informal) commercial entries filed at the following ports: EPA - Newark, NJ (ocean) and Long Beach, CA (ocean); FSIS - Champlain, NY (truck), Houston, TX (ocean) and Philadelphia, PA (ocean) will be accepted at this stage of the test. See Federal Register on December 13, 2013, 78 FR 75931.

Under this test, the PGA message set data must be submitted as part of an ACE entry summary at any time prior to the arrival of the merchandise on the conveyance transporting it to the U.S. The data will be validated and made available to the EPA or FSIS, which eliminates the need for paper documents. The data will also be used to fulfill merchandise entry requirements, providing more certainty for importers in determining the logistics of cargo delivery as well as enabling earlier release decisions. An eligible applicant for this test must be a self-filing importer or broker who has the ability to file ACE entry summaries certified for cargo release and must only file entries for EPA and FSIS commodities that are relevant to this test. CBP plans to accept an unlimited number of participants for the test, but will accept less than ten for the ODS portion.

This test is a continuation of the CBP International Trade Data System initiative provided in the Security and Accountability for Every Port Act of 2006 designed to achieve the vision of ACE as the "single window" for the Government and trade community. This initiative will increase efficiency and reduce costs over the paper-based interactions that have been in place. The PGA message set will improve communication between agencies and will allow test participants to submit the required data once rather than submitting data separately to each agency. During this test, participants will have the opportunity to collaborate with CBP, EPA, and FSIS to examine the effectiveness of the "single window" function.

This test is intended to last approximately two years and comments will be accepted throughout the duration of the test. At its conclusion, an evaluation will be conducted to assess the effectiveness of the PGA message set on the submission of EPA and FSIS import data and the processing of EPA and FSIS entries.

For more information, contact: John Brew, Jini Koh, Carolyn Esko

Update on the "P5+1" Iran Sanctions Deal

Though the last month has seen little in the way of substantive details concerning the implementation of the "Joint Plan of Action" outlining the sanctions-easing measures to be taken by the U.S. and EU, the EU Council of Ministers recently met and issued a [formal statement](#) on December 16th making clear that "[f]or its part, the Council is committed to take the necessary steps and to suspend those EU sanctions as set out in the Joint Plan of Action immediately after the IAEA has verified the implementation of the nuclear-related measures by Iran..." While a lack of support from the Council for the deal was not seen as the sort of potential stumbling block to finalization that U.S. Congressional action may prove to be, this development represents one less hurdle to the enactment of the measures envisaged by the Joint Plan of Action.

For more information, contact: Jeff Snyder, Cari Stinebower, Chris Monahan, Brian Gatta, Dj Wolff

2013 Updates to Wassenaar Arrangement Control Lists Announced

Countries belonging to the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies held their annual meeting in Vienna on December 3-4, 2013 to update the Wassenaar Control Lists.

The member countries agreed to new export controls focused on surveillance and law enforcement/intelligence gathering tools and Internet Protocol (IP) network surveillance systems and equipment. Participating countries also clarified, and in some cases relaxed, existing controls in a number of other areas.

The U.S. Commerce Department will update its Commerce Control List with Wassenaar changes via future Federal Register Notice(s). Crowell & Moring's International Trade Group will continue to monitor any changes to the Wassenaar Arrangement and U.S. export control regulations.

For more information, contact: Chris Monahan, Edward Goetz

CBP - Downloading Is Not Programming for Determining Origin

On December 11, the U.S. Customs and Border Protection (CBP) published a Notice in the Federal Register concerning its final determination under the Trade Agreements Act regarding the country of origin of certain Ethernet switches. CBP issued its final determination in Headquarters (HQ) Ruling H241177 (December 3, 2013) in which it found that, for the switches at issue, mere downloading of software developed in a third country is not alone sufficient to effect a substantial transformation. According to CBP, *Data General v. United States*, 4 CIT 182 (1982) and its progeny require "programming" to effect a substantial transformation—writing, testing and implementing code necessary to make a computer function in a certain way—which appears to require both significant software development effort to occur in the country where the software is loaded on the hardware device to make it functional.

Since the U.S. origin software download in Singapore was insufficient to rise to the level of substantial transformation, the last substantial transformation occurred in Malaysia, where the major assembly processes (printed circuit board component population, PCBA testing, installation of power supply, fans and PCBA into the switch chassis, etc.) were performed. Therefore, Malaysia was the country of origin of the switches for the purposes of U.S. Government procurement.

This follows on previous CBP determinations earlier this year regarding whether or not software and firmware downloads constitute substantial transformation. CBP issued the determination for Ethernet switches on December 3 and parties-at-interest should seek judicial review of the determination by January 10, 2014.

For more information, contact: John Brew, Alan Gourley, Michael Larmoyeux

CBP East Coast Trade Symposium

The U.S. Customs and Border Protection (CBP) will hold the 2014 East Coast Trade Symposium on March 6-7 at the Washington Hilton Hotel in Washington, D.C. Registration for the Symposium opened on December 18, 2013 and the theme is "Increasing Economic Competitiveness through Global Partnerships and Innovation."

For more information, contact: John Brew, Michael Larmoyeux, Norlene Karim

CROWELL & MORING SPEAKS

John Brew will be speaking at the annual International Compliance Professionals Association conference in Orlando on Monday, March 23, 2014. He will discuss the topic of customs valuation and assists.

Recap of Top Stories from 2013

- [EU and U.S. Launch Transatlantic Trade and Investment Partnership Negotiations](#)
- [BIS and DDTTC Issue First Final Rules to Implement the Administration's Export Control Reform Initiative](#)
- [New Iran Sanctions Target Financial, Energy, Insurance, Shipping, and Automotive Sectors](#)
- [Trading Deadline?: The Looming Government Shutdown](#)
- [The Iran Deal – What It Means for Sanctions](#)

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