

CLIENT ALERT

This Month in International Trade - March 2014

Apr.04.2014

THIS MONTH'S TOP TRADE DEVELOPMENTS

1) New (and Expanding) Sanctions on Ukraine & Russia

In response to the escalating tensions in Ukraine, as well as the Russian Federation's role in the purported secession of Crimea from the Ukraine, the United States and European Union issued an escalating series of sanctions over the course of the month. Both governments have warned of additional sanctions and designations in the coming days and have publicly raised the specter of sanctions against key companies in the Russian economy.

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Since March 6, the United States has issued three new Executive Orders sharply expanding the President's authority to sanction individuals and entities in Russia. As of March 31, 2014, the United States has sanctioned a total of 31 individuals and 1 entity under this authority. The European Union has also acted, issuing its own set of designations targeting more than 40 Russian and Ukrainian political figures.

For additional details, please see our contemporaneous summaries of the designations or please contact Cari Stinebower or Alan Gourley.

["The U.S. and EU Respond: New Sanctions and Authorities in Response to Developments in Ukraine"](#) (March 6, 2014)

["Escalating Tensions: Crimea Votes and the EU, U.S., and Canada Issue Sanctions in Response"](#) (March 17, 2014)

["Round Three: New Russian Sanctions, Including Against Companies and Businessmen, Announced"](#) (March 20, 2014)

For more information, contact: Alan Gourley, Cari Stinebower, Dj Wolff

2) Senate Confirms First New CBP Commissioner in Five Years

On March 6, 2014, the Senate confirmed R. Gil Kerlikowske as commissioner of U.S. Customs and Border Protection (CBP). Previously, Kerlikowske was director of the White House National Drug Control Policy Office since 2009. He also has 37 years of law enforcement and drug policy experience, including nine years as chief of police in Seattle, WA, and five years as police commissioner in Buffalo, NY. Kerlikowske will be the first permanent CBP commissioner since 2011, when former commissioner Alan Bersin stepped down, and is also the first Senate-confirmed commissioner since 2009.

At a hearing before the Senate Finance Committee on January 15, 2014, Kerlikowske stated that while CBP is responsible for preventing entry to terrorists and their weapons, enforcing immigration laws and interdicting a range of cross-border threats, its historic customs responsibilities are "equally important." He also stated that his experience as a police chief has taught him that "law enforcement and commerce are interconnected," that "commerce depends on a consistent, stable, and predictable environment for business, and [that] law enforcement plays a critical role in creating and protecting those conditions."

He plans to further modernize and streamline CBP's trade and business processes by prioritizing completion of the Automated Commercial Environment and the International Trade Data System to modernize CBP's export process to streamline exports and foster growth. He also intends to focus CBP's enforcement resources to protect U.S. producers from unfair competition, ensure that innovative national technologies and brand names are protected from threats, and protect domestic consumers from unsafe, substandard products. Furthermore, he aims to eliminate paperwork, increase enrollment in trusted traveler programs, minimize wait times at entry ports, and provide sustained leadership attention to effective training, development and management of agency employees.

On March 7, 2014, he even made an unexpected appearance at the closing of CBP's annual East Coast Trade Symposium where he assured the audience his understanding of the importance of economic security and promised to work hand in hand with the trade community. He stated: "I do recognize and understand the importance of what you all do" and vowed to follow the example of Thomas Winkowski, the most recent acting commissioner who had an open door policy with the trade community. He added that the development of policies and practices has to be transparent and those practices and policies have to be "co-created. Nothing works well when it's done in a vacuum."

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

3) Federal Circuit En Banc Panel to Rule on Personal Liability for Civil Import Penalties

On March 5th the Court of Appeals for the Federal Circuit (CAFC) vacated its July 2013 [decision](#) in *United States v. Trek Leather Inc. and Harish Shadadpuri* and agreed to grant an "en banc" hearing to determine questions of potentially significant importance for all importers and corporate officers and employees. The undisputed facts of the case involve Shadadpuri, the President and sole shareholder of Trek Leather, failing to include the value of certain statutory assists in connection with 72 entries of dutiable suits, thereby depriving the Government of the full amount of import duties which would have otherwise been owed.

The Court of International Trade (CIT) had found Shadadpuri personally liable for the Customs penalties assessed in relation to the Customs' claim of gross negligence under 19 U.S.C § 1592, which provides for penalties when a "person" enters or introduces any merchandise into the commerce of the United States by means of a written statement which is material and false. This case is significant because the Government sought to impose individual liability without "piercing of the corporate veil," but instead relied solely upon the language of the statute to seek personal liability for actions ostensibly taken on behalf of a corporation.

On appeal, the original CAFC panel reversed the CIT, holding that Shadadpuri could only have been held personally liable if his actions had amounted to criminal fraud, rather than gross negligence, or if the Government had established the facts needed to

pierce the corporate veil. The CAFC accordingly declined to hold that the language of 19 U.S.C § 1592, and in particular the unmodified use of "a person," need not necessarily give the government an avenue to personal liability in the case of a materially false or misleading import entry statement. The recent CAFC opinion vacates the original CAFC panel decision, and orders a rehearing en banc to consider under what circumstances would officers or employees be considered "persons" under the penalty statute and individually liable for customs penalties. This case will be closely watched by the international trade community due to its potential to significantly expand the scope of liability in cases of erroneous import entries to officers, directors and non-managerial employees.

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

4) Commerce Updates the EAR with Australia Group's Latest Export Control Changes for Chemical and Biological Agents and Related Equipment

On March 26, 2014, the Bureau of Industry and Security (BIS) implemented a final rule amending the Export Administration Regulations (EAR) to reflect changes made at the Australia Group's (AG) December 2012 and June 2013 meetings. The AG is a multilateral forum with 41 participating countries that maintains export controls on chemicals, biological agents, and related equipment.

The Commerce Country Chart was amended to show that Mexico is now no longer subject to Chemical and Biological Weapons (CB) Column 2 Controls, as they are now a participating member of the AG. This change means a license will not be required for most exports of precursor chemicals and chemical/biological production and processing equipment to Mexican entities.

Several minor updates were made to the Commerce Control List (CCL) entries controlling pathogens and toxins to match the AG's updated export control listing of biological agents, animal pathogens, and plant pathogens. Most significantly, a paragraph for License Exception STA (Strategic Trade Authorization) was added to the entry governing human and zoonotic pathogens and toxins, which clarifies existing eligibility requirements for certain items in this group.

Slight amendments were also made to the entries for chemical and biological equipment in order to better specify the controls for fermenters and reaction vessels or reactors. Also, the requirement for "Sample Shipment" reports for precursor chemicals has been relaxed from quarterly to annually.

Somalia and Syria have been added as parties to the Chemical Weapons Convention (CWC), but controls to these destinations remain largely unchanged. In some instances, a license would not be required to export certain mixtures and test kits to Somalia.

Although the changes to the scope of the EAR were minor, Crowell recommends companies exporting commodities under Export Control Classification Numbers (ECCN) 1C350 – 352 and 2B350 to review the complete text of the rule at the link below. As always, do not hesitate to contact Crowell with any questions on the changes.

For more information, contact: Brian Gatta, Edward Goetz

5) U.S. Sugar Industry Initiates Anti-Dumping and Countervailing Duty Case on Mexican Sugar

On Friday, March 28, the American Sugar Coalition (a consortium of U.S. sugarcane, sugar beet, and sugar refining interests) filed an antidumping and countervailing duty (AD/CVD) case with the U.S. Department of Commerce and the U.S. International Trade Commission (ITC). In the petition, the petitioners allege that all forms of sugar – including raw and refined cane and beet sugar, in dry and liquid forms, colored and flavored sugars – from Mexico are being dumped – aka sold at less than "fair" value – on the U.S. market. It also alleges that the Mexican industry has received substantial subsidies from the Mexican federal and state governments.

The ITC has already issued its initial questionnaires to U.S. importers of Mexican sugar; responses are due by April 11, 2014. Following that, a preliminary conference will be held at the ITC on April 18, at which importers, producers and consumers may all appear in support or in opposition to the continuation of this investigation. The ITC's preliminary decision is expected in early May.

If the investigation continues, the Commerce Department will undertake its own investigation of Mexican producers and U.S. importers to identify any potential dumping and/or subsidies. A successful petition would result in the imposition of additional duties on imports of Mexican sugar which correspond with the dumping margins identified (the petition alleges 45 percent) as well as any subsidies identified by the U.S. Commerce Department. Supplemental AD/CVD import duties on sugar from Mexico could begin as early as July 2013.

For more information, contact: Dan Cannistra, Alex Schaefer

THIS MONTH IN TRADE – OTHER NEWS

Agency Enforcement Actions

Office of Foreign Assets Control (OFAC)

- California Company Settles for \$504, 225 for Alleged Violations of Iranian Sanctions Regulations. Ubiquiti Networks, Inc., located in San Jose, California, allegedly engaged in the sale, directly or indirectly, of goods for broadband wireless connectivity to Iran, facilitated the sale of such goods to Iran when it entered into an agreement granting a distributor exclusive rights to distribute Ubiquiti's goods in Iran, and engaged in 13 exports of goods for broadband wireless connectivity to a distributor located in Greece with knowledge or reason to know that the goods were intended for supply, directly or indirectly, to Iran. Ubiquiti will pay \$504,225 to settle these alleged violations.

Department of Justice (DOJ)

- March 13, 2014 - Bizlink Technology, Inc. (BTI) Pays \$1.2 Million to Settle Accusations That It Underpaid Customs Duties. BTI allegedly underpaid customs duties on goods imported into the United States from a factory in China from 2006 to 2008. BTI used false invoices to calculate the customs duties that BTI owed on the imported goods, resulting in substantial underpayments.

- March 19, 2014 - Marubeni Corporation Pleads Guilty to Bribery and Agrees to Pay \$88 Million Fine. Marubeni Corporation, a Japanese trading company, entered a plea of guilty for violations of the Foreign Corrupt Practices Act. Marubeni and its employees paid bribes to officials in Indonesia in exchange for securing a \$118 million contract. Marubeni has agreed to pay a criminal fine of \$88 million, subject to approval by the U.S. District Court for the District of Connecticut. Marubeni has also agreed to implement an enhanced global anti-corruption compliance program as part of its plea agreement.

Department of State (DOS)

- March 5, 2014 – Esterline Technologies Corporation Pays \$20 Million for Alleged Violations of the Arms Export Control Act. Esterline Technologies Corporation, a Delaware incorporated manufacturing company principally serving aerospace and defense markets, entered into a Consent Agreement for numerous violations of the Arms Export Control Act and the International Traffic in Arms Regulations including unauthorized exports of defense articles, unauthorized provision of defense services, and unauthorized temporary imports of defense articles. Esterline was ordered to pay a civil penalty of \$20 million of which \$10 million will be suspended on the condition that Esterline applied this amount to self-initiated, pre-Consent Agreement remedial measures.

Environmental Protection Agency (EPA)

- March 27, 2014 – American Lifan Industry, Inc. Will Pay \$630,000 to Settle Allegations that It Violated the Clean Air Act. American Lifan Industry Inc., a California-based vehicle and engine importer, entered into a Consent Agreement for selling and importing nearly 28,000 vehicles and engines that were not certified by the Environmental Protection Agency to meet applicable federal emission standards; failing to provide purchasers with full emissions warranties; importing and selling vehicles without proper emission-compliance labels; and failing to adhere to recordkeeping requirements. In addition to paying a civil penalty fine of \$630,000, America Lifan Industry Inc. must post a \$300,000 - \$500,000 bond to satisfy any Clean Air Act penalty arising from the importation of model years 2014 – 2016 by certain companies.

For more information, contact: Michael Appel, Nancy Cruz, Dj Wolff

CBP Modifies Centers of Excellence and Expertise Test

U.S. Customs and Border Protection (CBP) published a Federal Register Notice on March 10, 2014, to notify the public of modifications to its Centers of Excellence and Expertise (Centers) Test. The notice made modifications to the scope of coverage for some of the Centers, added new entry types that will be processed by the Centers, permitted test participants to submit corrected claims of duty-free treatment to the Centers, and clarified the submission process for responses to Requests for Information and Notices of Action.

For inclusion in a particular Center, importers must be part of the described industry, with the highest percentage of their entries comprised of merchandise related to that industry. The notice modified the scope of coverage for the following Centers:

- Automotive & Aerospace: heading 8511, HTSUS, was added to this Center.

- Base Metals: heading 7415 and headings 8307 through 8311, HTSUS were added to this Center. Headings 7414 and 7309 through 7311, HTSUS were removed from this Center.
- Consumer Products & Mass Merchandising: headings 9619, 8210, and 8539, HTSUS were added to this Center. Heading 7013, HTSUS was removed.
- Industrial & Manufacturing Materials: headings 7013, 7309 through 7311, and 9406, HTSUS were added to this Center. Headings 4414 and 4815 were removed from this Center.
- Machinery: headings 8210, 8307 through 8311, 8485, 8511, 8539, and 9406, HTSUS were removed from this Center.
- Petroleum, Natural Gas & Minerals: heading 3826, HTSUS was added to this Center and headings 2501 through 2503, HTSUS were removed.

Previously, all consumption entries filed before and during participation in the test, except for antidumping and countervailing duty entries, would be processed by the designated Center, regardless of the commodity listed on the entry line upon transition of processing as set forth in the Centers of Excellence and Expertise Trade Process Document. CBP will now process the following additional entry types that were filed by a test participant before and after the test participant joined the Center test:

- Consumption Entries: Free & Dutiable (Type 01);
- Consumption Entries: Appraisalment (Type 04);
- Consumption Entries: Foreign Trade Zone (Type 06);
- Consumption Entries: Duty Deferral (Type 08);
- Informal Entries: Free & Dutiable (Type 11);
- Temporary Importation under Bond (TIB) (Type 23); and
- Trade Fair (Type 24).

Additionally, CBP is modifying its approach regarding processing of Antidumping and Countervailing Duty Consumption Entries (Type 03). Type 03 Entries filed before the participant joined the Center test will be processed by the port director, but Type 03 Entries filed during participation in the Center test will be processed by the Center directors.

The notice also stated that test participants may now submit their corrected claim of duty-free treatment to the Center where the claim was originally filed, instead of at the port, and further clarified that written responses to Requests for Information and Notices of Action must be sent electronically to the test participant's designated Center.

For more information, contact: John Brew, Jini Koh, Julia Rieper

Treasury Publishes Admin Ruling: Foreign Exchange Dealers Can Use Non-Resident Aliens' Alternative Travel Docs for Recordkeeping

The Financial Crimes Enforcement Network (FinCEN) issued, on March 11, 2014, an Administrative Ruling for dealers in foreign exchange allowing the use in certain circumstances of a travel document other than a passport as suitable identification documentation in currency transactions in excess of \$1,000. The exceptive relief in this case is applicable only to the

recordkeeping requirement in connection with verifying the identity of a non-resident alien. Current examples of such alternatives are the Border Crossing Card bearing a B1/B2 visitor visa issued by the Department of State, and the Radio Frequency Identification Document issued by the U.S. Customs and Border Patrol pursuant to the [SENTRI program](#).

Allowing dealers to satisfy the recordkeeping requirements of [31 CFR § 1022.410\(b\)\(3\)](#) with alternative travel documents for non-resident aliens without a passport reconciles current border crossing policy with the interests of financial institutions (FIs). In the case of a transaction with a non-resident alien exceeding the \$1,000 threshold, each foreign exchange dealer must retain the number and description of the government document used to verify the customer's identity. This ruling also applies to non-resident aliens using alternative documents who do possess a passport issued by their country of origin.

As always, this ruling does not negate an FI's obligation to file a suspicious activity report (SAR) when due diligence suggests a transaction will in some way violate or circumvent the Bank Secrecy Act or the reporting requirements of any other Federal law or regulation.

Clients should contact Crowell with any questions they might have on alternative travel documents and their impact on due diligence and recordkeeping.

For more information, contact: Cari Stinebower, Edward Goetz

CBP to Solicit Volunteers for New Trusted Trader Program

On March 7, 2014, U.S. Customs and Border Protection (CBP) published a notice soliciting nine importer volunteers to participate in an integrated trusted trader pilot program, which combines benefits from the Customs' Trade Partnership Against Terrorism (C-TPAT) supply chain security program and the Importer Self-Assessment compliance program. The C-TPAT program focuses on the security of private company supply chains with regard to terrorism while the ISA is a voluntary program for importers who maintain sufficient internal controls to ensure a high level of import compliance.

The primary goal of this program is to decrease administrative costs of becoming a trusted trader by streamlining the application and validation process. It is also designed to achieve cost savings for the trade community and the government. Once the new program is up and running with the nine volunteers for about six months, CBP will assess cost savings incurred from the newly added incentives. Firms currently in C-TPAT but not in ISA will not be forced to join the trusted trader program and incentives under both individual programs will still continue as CBP found that 85 percent of questions asked to C-TPAT and ISA applicants were duplicative.

Once the Federal Register notice is finalized and posted, CBP will likely provide a 30-day comment period so that it can receive volunteer applications. Additionally, CBP anticipates that the trusted trader test will run for at least 12 months.

Furthermore, the Food and Drug Administration (FDA) and the Consumer Product Safety Commission have also been working with CBP on this issue. In February, the FDA launched a supply chain security pilot for pharmaceutical imports, which will run for two years and includes AbbVie Inc.; Allergan Inc.; Astellas U.S. Technologies Inc.; Bristol-Myers Squibb Co.; Celgene Corp. and several other firms.

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

Korean Customs Issue on the Country of Origin of U.S. Frozen Orange Juice Concentrate Finally Thawed

Until the U.S. – Korea Free Trade Agreement (KORUS FTA) was implemented two years ago, U.S. citrus growers were subject to 54 percent tariff on their exports to Korea which kept their market share minimal. In 2012, when the tariff was removed, the U.S. export of frozen orange juice concentrate to Korea soared almost instantly from \$11 million to \$30 million.

About a year later, the Korean Customs Office (KCO) raised the possibility that the orange juice concentrate imported from the United States may have come from different countries such as Mexico – thus raising an important country of origin and verification issue.

The U.S. exporters of orange juice concentrate, represented by the Korean Law Firm Yulchon LLC, asserted that their products only contained ingredients from U.S. grown oranges. Under KORUS FTA, goods made from natural products that are "wholly obtained" (i.e., extracted or harvested) in a country are considered the products of that country. During the verification process conducted by the KCO, the U.S. exporters submitted the certificates issued by the U.S. Department of Agriculture (USDA) and asserted that the certificates provided sufficient evidence that the orange juice concentrate originated in the United States. The KCO, however, requested additional evidence.

In February 2014, the Technical Committee of KORUS FTA, consisting of officials from both the United States and Korea, decided that the USDA certificates were sufficient to prove the country of origin of U.S. orange juice concentrate and agreed to conclude the matter upon a successful audit of the U.S. manufacturing facilities. The KCO conducted the audit in mid-March and found the results satisfactory. Accordingly, the Korean government decided to accept USDA certificates as proof of origin of U.S. goods.

This article was written by customs lawyers from the law firm of Yulchon in Korea.

For more information, contact: John Brew, Pierce Lee

CBP East Coast Trade Symposium Overview

The U.S. Customs and Border Protection (CBP) East Coast Trade Symposium took place on March 6-7, 2014 in Washington, D.C. This year's theme was "Increasing Economic Competitiveness through Global Partnerships and Innovation." Many speakers emphasized the importance of broadening the export base of the United States as well as strengthening public-private sector engagement. Governmental inter-agency activities have also been increasing to harmonize regulations in order to reach the goals of both the public and private sectors.

The Trusted Trader Program is one of the inter-agency initiatives that received much attention. The program seeks to expand the Customs-Trade Partnership Against Terrorism into a broader authorized economic operator-type of program by unifying it

with Importer Self-Assessment program, which focuses on compliance with traditional customs issues such as classification and valuation. A Federal Register notice announcing the program is expected soon.

In addition, CBP believes automation is the foundation for transforming the supply chain and trade processes. The Automated Commercial Environment (ACE) is the "single window" international trade data system. ACE relies on modern and flexible technology while requiring heavy collaboration between key stakeholders in the system. CBP expects to complete the core ACE system by 2016 and the other 47 government agencies are required to complete the system by December 2016.

Revenue collection is also a high priority for the CBP, which continues to be a largely manual and burdensome process. ACE and the Automated Clearinghouse (ACH) are two possible methods for improving efficiency. Importers, exporters, freight providers and brokers, however, prefer to continue exploring additional transactional methods such as the possibility of developing online payment systems similar to the credit card industry and PayPal. Since the current model is no longer beneficial to parties engaged in international trade, various technologies and business models will continue to be considered throughout the process of reforming revenue collection.

Furthermore, the event included an update on the North American Free Trade Agreement (NAFTA). The NAFTA was signed over 20 years ago to reduce trading costs, increase business investment, and help North America become more competitive in the global marketplace. Since it was implemented, trade within the continent has grown at least 265 percent, and investment among the three countries has grown six times. Over the past three years, the United States has also been developing a series of key initiatives under the umbrella of the 21st Century Border with Mexico and the Beyond the Border agreement with Canada. In February, the leaders of the three countries discussed their vision for North America and announced initiatives that will increase economic competitiveness through trilateral efforts such as joint investment and cooperation to foster tourism and travel. These initiatives include a North American Trusted Traveler program, an exchange of information on bilateral border initiatives, harmonization of trade data, strengthening of regulatory cooperation to ease burdens on business, and an increase trilateral cooperation to combat the importation of counterfeit products.

For more information, contact: John Brew, Norlene Karim

CROWELL & MORING SPEAKS

John Brew will be speaking at the American Conference Institute's 9th National Forum on Import Compliance & Enforcement on June 11, 2014. The session will be an import workshop on customs enforcement of other government agency (FDA, CPSC, FDA, DOT, EPA, Commerce and others) regulations.

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