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EU Takes First Shot at Electronic Commerce Proposal

The European Union (EU) May 3 launched the opening salvo in talks on trade-related aspects of electronic commerce that 75 World Trade Organization (WTO) countries announced in January. The proposal of future rules and obligations aims to provide a starting point for discussions in Geneva.

> The WTO members, including the U.S., China, the European Union (EU) and 45 other WTO partners, made the announcement from the margins of the World Economic Forum in Davos, Switzerland (see **WTTL**, Jan. 28, page 1). The members will discuss the EU proposal along with others May 13-15.

"Businesses and consumers instead have to rely on a patchwork of rules agreed by some countries in their bilateral or regional trade agreements. The EU considers that global trade policy responses can most effectively address the global opportunities and challenges brought by digital trade," the EU said in a statement announcing the proposal.

The EU's initial negotiating proposals would: guarantee the validity of e-contracts and e-signatures; strengthen consumer consumers' trust in the online environment; adopt measures to effectively combat spam; tackle barriers that prevent cross-border sales; and address forced data localization requirements, while ensuring protection of personal data.

In addition, the proposals would: prohibit mandatory source code disclosure requirements; permanently ban customs duties on electronic transmissions; adhere to the principle of open internet access; upgrade existing WTO disciplines on telecommunication services; and improve market access commitments in telecom and computer-related services.

NAFTA Update Faces Growing Opposition

While never a done deal, passage of a revised U.S.-Mexico-Canada trade agreement (USMCA) faced growing opposition in Congress from both sides of the aisle. Despite a

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jovial meeting at the White House, both Democratic and GOP leaders are dampening any hopes of a swift resolution if the president fails to iron out disagreements on what a final bill should look like before it meets Republican and Democratic approval.

At her regular press briefing May 2, House Speaker Nancy Pelosi said building consensus with her caucus is all about "strict enforcement" of environmental, climate and workers' rights. "The overarching issue is enforcement. You can have all the good language in the world that you want, but if you don't have enforcement, you're just having a conversation. You're not having a real negotiation," the speaker asserted.

For Republicans, a new NAFTA agreement has stalled due to the president's insistence that both Mexico and Canada agree to import tariffs before he reaches a final agreement. This has put the squeeze on many small and middle-size farmers at odds with the administration. Nowhere is this more animated than by Senate Finance Committee Chairman Chuck Grassley (R-Iowa) in a statement May 2.

> "I'll continue to work with my colleagues in Congress and the Trump administration to make sure the tariffs go so USMCA can replace NAFTA and become law this year. We should keep in mind that tariffs are a tax on Americans, and we shouldn't undermine the benefits of historic tax reform with tariffs," Grassley argued.

Unions, including the AFL-CIO, have said they cannot support the new agreement unless the present bill is fixed (see **WTTL**, April 8, page 2). In a TV interview April 30, AFL-CIO President Richard Trumka criticized the administration's insistence on an immediate vote on the bill. "Look, we want to get to yes. And, the way to get to yes is for us to fix an agreement that is probably the most important economic agreement to American, Canadian, and Mexican workers. And, you can't simply say, 'Take it or leave it.' It needs to be fixed," Trumka insisted.

But the administration may be getting closer to what congressional leaders have been insisting on. U.S. Trade Representative (USTR) Robert Lighthizer April 29 applauded Mexico's passage of what he calls a "historic labor reform" as part of the USMCA: "These reforms will greatly improve Mexico's system of labor justice and are exactly what labor leaders in the United States and Mexico have sought for decades," the USTR noted.

For the administration this moves the USMCA one step closer to ratification. The administration "will work closely with members of the United States Congress and the Mexican government to ensure these reforms are implemented and enforced," Lighthizer said.

Administration Tackles Corporate Compliance

In an attempt to preempt common compliance violations, Treasury's Office of Foreign Assets Control (OFAC) May 2 published a "Framework for Compliance Commitments" to provide U.S. companies with the agency's perspective on the essential components of a

sanctions compliance program (SCP). Three days earlier, Justice issued a separate guidance document for white-collar prosecutors on the evaluation of corporate compliance programs.

"As the United States continues to enhance our sanctions programs, ensuring that the private sector implements strong and effective compliance programs that protect the U.S. financial system from abuse is a key part of our strategy," said Sigal Mandelker, Treasury under secretary for terrorism and financial intelligence.

> "While each risk-based SCP will vary depending on a variety of factors—including the company's size and sophistication, products and services, customers and counterparties, and geographic locations—each program should be predicated on and incorporate at least five essential components of compliance: (1) management commitment; (2) risk assessment; (3) internal controls; (4) testing and auditing; and (5) training," the framework noted.

In an appendix to the document, OFAC analyzes ten root causes of apparent violations that it has identified during its investigative process, which loyal WTTL readers will recognize immediately. These root causes include: lack of a formal OFAC SCP; misinterpreting, or failing to understand the applicability of, OFAC's regulations; facilitating transactions by non-U.S. persons; and exporting or re-exporting U.S.-origin goods, technology, or services to OFAC-sanctioned persons or countries.

Other root causes include: utilizing the U.S. financial system, or processing payments to or through U.S. financial institutions, for commercial transactions involving OFAC-sanctioned persons or countries; sanctions screening software or filter faults; improper due diligence on customers/clients; de-centralized compliance functions and inconsistent application of an SCP; utilizing non-standard payment or commercial practices; and individual liability.

The Justice guidance includes the Foreign Corrupt Practices Act (FCPA) and updates a February 2017 version (see **WTTL**, Feb. 27, 2017, page 5). "Any well-designed compliance program entails policies and procedures that give both content and effect to ethical norms and that address and aim to reduce risks identified by the company as part of its risk assessment process," the most recent update noted.

"As a threshold matter, prosecutors should examine whether the company has a code of conduct that sets forth, among other things, the company's commitment to full compliance with relevant Federal laws that is accessible and applicable to all company employees," it added. "As a corollary, prosecutors should also assess whether the company has established policies and procedures that incorporate the culture of compliance into its day-to-day operations," the guidance noted.

The new edition included a compilation of sample topics and questions it "found relevant" in evaluating corporate programs, including senior and middle management; vendor management; outsourced compliance functions; policies and procedures; training and

communications; incentives and disciplinary measures; and mergers and acquisitions. Legal observers noted that the new guidance takes a more holistic approach to compliance than the previous edition. "Whereas the 2017 Evaluation Guidance included questions tilted towards a retrospective analysis of the specific misconduct at issue and the corresponding program issues, the Updated Evaluation Guidance applies a broader lens that first seeks to capture the company's general approach to compliance, and then to focus in on how the program did or did not work in connection with the alleged misconduct under investigation," attorneys at Miller & Chevalier noted in a post on the firm's website.

Appeals Court Affirms Santa Costume is "Fancy Dress"

In a decision that could have waited for December 25, the Court of Appeals for the Federal Circuit (CAFC) April 29 affirmed the Court of International Trade's (CIT) classification of a nine-piece Santa Claus costume set as "fancy dress" of textile material, rather than "festive articles" under chapter 95 of U.S. Harmonized Tariff Schedule (HTSUS).

> "That a person wears the Santa Suit or portions thereof during festive Christmas holiday occasions does not preclude it from classification as 'fancy dress' of textile material," Circuit Judge Jimmie Reyna wrote for the three-judge panel in *Rubies Costume Company v. U.S.* "An article classified as 'fancy dress of textile material' can plainly constitute a costume worn on festive occasions without conflicting with the requirement set forth in *Rubies I* that a 'festive article' is 'not generally recognized as normal wearing apparel,'" he added.

In addition, Rubies manufactured the jacket and pants to "survive multiple wears throughout the Christmas season and subsequent Christmas seasons" and both require dry cleaning. "These are characteristics of normal wearing apparel," Reyna wrote, adding that both the jacket and pants are "are of durable and nonflimsy construction."

* * * Briefs * * *

EX-IM BANK: President May 2 nominated Paul Shmotolokha to be Export-Import (Ex-Im) Bank first vice president. Shmotolokha leads international division for Alpha Technologies. Senate Banking Committee in February approved by voice vote Kimberly Reed to lead bank and former Rep. Spencer Bachus (R-Ala.) and Judith DelZoppo Pryor to be Ex-Im board members (see **WTTL**, March 4, page 6).

WOVEN SACKS: In 5-0 final vote May 1, ITC found U.S. industry is materially injured by dumped and subsidized imports of laminated woven sacks from Vietnam.

NOMINATION: Senate April 30 confirmed R. Clarke Cooper to be assistant secretary of State for political-military affairs in 90-8 vote. Senate Foreign Relations Committee approved nomination April 3 (see **WTTL**, April 8, page 5).

SANCTIONS: MID-SHIP Group LLC of Port Washington, N.Y., agreed May 2 to pay OFAC $871,837 civil penalty to settle five charges of violating Weapons of Mass Destruction Proliferators

Sanctions Regulations. Between February 2011 and November 2011, MID-SHIP processed five electronic funds transfers, totaling approximately $472,861, that pertained to payments associated with blocked vessels owned or controlled by Islamic Republic of Iran Shipping Lines (IRISL). OFAC designated IRISL in September 2008. MID-SHIP did not voluntarily self-disclose apparent violations.

CASINGS: CAFC May 2 affirmed CIT decision classifying sausage casings as made-up textiles under HTSUS subheading 6307.90.98 instead of plastics under HTSUS Chapter 39 in *Kalle USA v. U.S.* "Although Kalle's casings may be 'embedded' in plastic because the plastic coating is fixed to the fabric and fills the fabric's interstices, the casings are not 'completely embedded' because their inner surfaces are free of plastic," Circuit Judge Todd Hughes wrote in concurring opinion.