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## OFAC Rejects Most Calls to Revise Enforcement Guidelines

Treasury's Office of Foreign Assets Controls (OFAC) has rejected most comments urging it to revise its interim Economic Sanctions Enforcement Guidelines, but in the final version published in the Nov. 9 Federal Register, it offered some clarifications of its policies. The part of the guidelines that drew the most comments and the fewest changes dealt with how voluntary self-disclosures can mitigate potential penalties. The guidelines are intended to explain how OFAC will impose penalties when it enforces the International Emergency Economic Powers Act (IEEPA) and various trade sanctions and embargoes.

OFAC received eight comments objecting to the self-disclosure provisions of the interim guidelines published in September 2008 and particularly to its definition of a self-disclosure (see **WTTL**, Sept. 15, 2008, page 4). It devoted more space in the preamble to the guidelines addressing these concerns than to any other part of document. "Although the final rule slightly amends this definition, it does not do so in the ways suggested by the comments," OFAC stated.

Other comments questioned whether OFAC was moving away from the risk-based compliance policy it established in 2006. "OFAC is reissuing a slightly edited and consolidated risk matrix as an annex to the Enforcement Guidelines and clarifying that the adequacy of a Subject Person's risk-based compliance program will be considered among the General Factors considered by OFAC," the agency said. It also clarified its policy on tolling. "OFAC is amending the Guidelines to make clear that while entering into a tolling agreement may be a basis for mitigating the enforcement response or lowering the penalty amount, a Subject Person's refusal to enter into such an agreement will not be considered against the Subject Person," it stated.

## CIT Says Change in "Zeroing" Policy Complies with Law

Commerce's abandonment of "zeroing" in antidumping cases to comply with a World Trade Organization (WTO) ruling against the practice is permitted under the Trade Act, Court of International Trade (CIT) Judge Richard Eaton ruled Nov. 6 (Slip Op. 09-129). Citing previous decisions by the Court of Appeals for the Federal Circuit, Eaton rejected a suit by rectangular steel pipe and tube makers who claimed zeroing is required under the trade statute. "When *Timken* and *Corus Staal I* are read together, it is apparent that the Federal Circuit has found Section 1677(35)(A) [of the Trade Act] to be ambiguous both in the context of investigations and administrative reviews," he wrote. "It is equally apparent, however, that neither case found



that zeroing is unambiguously *required* by the statute,” Eaton stressed. Because of the ambiguity, Commerce had discretion under the *Chevron* doctrine to interpret the law and it “reasonably interpreted an ambiguous statute,” Eaton said. Based on the appellate rulings, “the court finds that Commerce’s methodology of offsetting positive dumping margins with negative dumping margins in calculating the weighted-average dumping margins is a permissible interpretation” of the law, he wrote. He also said Commerce was permitted to revise its regulations to comply the WTO ruling. “The court holds that plaintiffs are mistaken in their claim that the WTO ruling and United States law are in conflict,” Eaton ruled.

## **Baucus Expects Extensions of Tariff and Preference Programs**

Congress is likely to extend current trade preference programs and miscellaneous tariff bills that are due to expire at the end of the year just long enough to give lawmakers a chance to take a closer look at these measures in 2010, Senate Finance Committee Chairman Max Baucus (D-Mont.) predicted Nov. 10. “I think we will take them up and pass them before the year’s end,” he told the Washington International Trade Association. The extensions would cover the Generalized System of Preferences (GSP), the Andean Trade Preferences Act (ATPA) and the annual Miscellaneous Tariff Act.

He said Congress will “just extend the two preference programs to give us time enough next year to dig into them in a more meaningful way.” Baucus said he wants to extend the programs “long enough so that significant parties can rely on them; not six months, but not too long.”

The GSP program has been criticized because most of its benefits go to a few advanced developing countries, such as Brazil and India, while least-developed countries get a small share of the benefits from tariff-free treatment. In addition, lawmakers, particularly Sen. Charles Grassley (R-Iowa), have complained about India and Brazil getting GSP benefits but not making adequate offers in the Doha Round negotiations. “Some of these countries have grown a little bit since the programs have begun and some are loosely more friends than others,” Baucus said. “These are issues that we are going to take up next year in greater detail,” he said.

An ATPA bill may provide a shorter extension for Ecuador than for other Andean countries, Baucus indicated. “I suspect we will probably include Ecuador in a short extension, but long enough to address all the Ecuador issues,” he noted. “But Ecuador is not helping itself. Just a word to the wise. If they want to continue, a lot of that is in their hands,” he warned.

The warning to Ecuador came the day after Ecuadorean officials met with Assistant U.S. Trade Representative Everett Eissenstat as part of a meeting of the U.S.-Ecuador Trade and Investment Council. According to the U.S. Trade Representative’s (USTR) office, the talks covered trade and investment-related issues, including the U.S.-Ecuador Bilateral Investment Treaty, worker rights, intellectual property, ATPA, technical barriers to trade and non-tariff measures. “This type of engagement is critical to promoting mutual understanding and the pursuit of shared interests,” Eissenstat said in a statement.

## **Weak Review Mechanism Okayed for U.N. Corruption Convention**

Faced with opposition to tougher oversight of anti-corruption measures from several emerging-market countries, particularly Russia, China and Egypt, countries attending a United Nations conference Nov. 9-13 agreed to a watered-down mechanism for reviewing the implementation of the U.N. Convention against Corruption (UNCAC). “This is very disappointing,” says Christiaan Poortman, director of global programs at Transparency International. The conference of states, held in Doha, Qatar, adopted a mechanism to review anti-corruption steps taken by governments, but the mechanism “has a number of very important flaws,” Poortman contends. Poortman says the mechanism has loopholes for countries that don’t want to go beyond self-assessment and reporting in a secret manner. Groups belonging to the UNCAC Civil Society

Coalition, including Transparency International, which were looking for concrete ways to spur transparency and openness, will be disappointed, Poortman states. Despite these shortcomings, Poortman sees progress in the agreement. "It's not perfect, but at least we have a mechanism, and now it's a matter of gradually building on that," he argues. The legally binding UNCAC obliges 142 countries to prevent and criminalize corruption, promote international cooperation, recover stolen assets and improve technical assistance and information exchange.

"Under the new mechanism, all states will be monitored every five years to see how they are living up to their obligations," explains the U.N. Office on Drugs and Crime (UNODC), which oversees convention implementation. Findings, based on self-assessments and peer reviews by experts, will be compiled in country review reports. The executive summary of these reports will be made public but not the whole report. Under the review mechanism, country reports will supposedly identify gaps in national anti-corruption laws and practices.

U.S. officials participating in the meeting had supported a strong review mechanism. "We will have failed our governments, and more importantly our peoples, if we do not produce a review mechanism that is itself transparent and inclusive and that allows our experts to have a candid dialogue about each nation's anti-corruption efforts," U.S. Attorney General Eric Holder told the Global Forum on Fighting Corruption and Safeguarding Integrity Nov 7. Elizabeth Verville, deputy assistant secretary of State, told the Doha meeting that future work is needed to enhance the convention's unique roadmap for facilitating asset recovery.

## Geneva Prepares for Protests during WTO Ministerial

Although some anti-trade groups have said they don't intend to hold major protests in Geneva during the Nov. 30-Dec. 2 WTO ministerial meeting, Swiss authorities say they are preparing for demonstrations anyway (see *WTTL*, Oct. 26, page 3). The Swiss and Geneva governments are making usual preparations for the ministerial, but aren't taking exceptional measures for the demonstrations, a spokesman with the Geneva police department told *WTTL*. Nonetheless, the authorities are still assessing the possible threat, he said. Left-wing groups and perhaps farming groups may come, he said.

"Ten years after Seattle! Fight the Neoliberal Agenda!" said one demonstration organizer's website. The organizer, backed by 36 other organizations, has called for a November 28 march through Geneva and past the WTO headquarters to the United Nations building. Negotiations with Geneva authorities for the required permit are ongoing.

"I don't anticipate anything like we've seen in the past," said one trade official who wasn't privy to security preparations being made by Swiss authorities. However, there could be some violence, he said; citing violence during WTO ministerials in Cancun, Hong Kong, Seattle and Geneva. Authorities in host cities have always made precautions to ensure participant safety, WTO spokesman Keith Rockwell told *WTTL*. The farm groups will likely be the most vocal protestors, a trade official said. They may use tractors and dump products such as manure or milk in protest, he said. South Korean farmers have been authorized to demonstrate, officials said. The number of Korean protestors is known because they need visas to get into Switzerland. It's not known how many European farmers and other groups will show up, because they don't need visas to enter the country.

## Opposites Join in Statement on Climate-Change Border Measures

One of the strangest pairs of bedfellows ever seen in trade emerged Nov. 13 in a joint editorial article penned by staunch free-trade supporter Fred Bergsten and equally staunch trade critic Lori Wallach in the *Washington Post*. The two agreed that current WTO rules don't adequately address climate-change measures and negotiations are needed to address how those rules should

be applied to border measures before any new laws are enacted. “There is little doubt that current WTO negotiations do not fully address the real problems confronting the world and the trading system itself,” wrote Bergsten, who is the director of the Peterson Institute for International Economics, and Wallach, who is director of Ralph Nader’s Global Trade Watch.

They agreed that U.S. manufacturers would be at a disadvantage if Congress were to adopt cap-and-trade climate legislation that imposed restrictions on American companies without dealing with foreign producers that won’t have to meet those rules. They noted that both of their organizations have warned that under current rules “allowing the WTO adjudication process to handle trade disputes over climate matters is a recipe for discord and impasse.”

Their column appeared after Senate Finance Committee Chairman Max Baucus (D-Mont.) said border measure should be in cap-and-trade legislation pending in Congress. “We should put in border measures in climate-change legislation that we think will work but also will respect our international trade obligations,” Baucus told the Washington International Trade Association Nov. 10. “That could be a template for other countries, as well,” he added. Later, Baucus told reporters that he did not expect to complete work on a climate-change bill this year.

### \* \* \* Briefs \* \* \*

MCTR: BIS in Nov. 9 Federal Register amended EAR to implement changes in export controls adopted in November 2008 by Missile Technology Control Regime. BIS claims most changes will have no or minimal impact on licensing. Change in rules on accelerometers adds note that ECCN 7A101 does not include accelerometers designed to measure vibration or shock. “BIS expects these two changes to have no impact on license applications as BIS has always interpreted this ECCN in this manner,” agency explained.

FCPA: Charles Paul Edward Jumet of Fluvanna County, Va., pleaded guilty Nov. 13 in Richmond, Va., U.S. District Court to conspiracy to pay bribes to Panamanian government officials to secure maritime contract for Ports Engineering Consultants Corporation. A two-count information had charged him with violating the Foreign Corrupt Practices Act and making a false statement. “In connection with his guilty plea, Jumet admitted that from at least 1997 through approximately July 2003, he and others conspired to make corrupt payments totaling more than \$200,000 to the former administrator and deputy administrator of Panama’s National Maritime Ports Authority and to a former, high-ranking elected executive official of the Republic of Panama,” Justice Department press release stated.

MORE FCPA: Paul G. Novak, former consultant for Willbros International Inc. subsidiary of Willbros Group Inc., pleaded guilty Nov. 12 in Houston U.S. District Court to conspiracy to violate FCPA by paying more than \$6 million in bribes to Nigerian government officials and members of a Nigerian political party to assist Willbros in obtaining and retaining Eastern Gas Gathering System (EGGS) Project, which was valued at approximately \$387 million. Plea follows convictions of several other Willbros executives and consultants on related charges. In May 2008, Willbros Group and Willbros International entered settlements with Justice and SEC for their role in violations and paid \$32.3 million in criminal fines and disgorgements (see WTTL, May 19, 2008, page 4).

MORE FCPA: Frederic Bourke was sentenced Nov. 11 to one year and one day in prison for violating FCPA with bribes paid to government officials in Azerbaijan. He was also fined \$1 million and ordered to serve three years of supervised release after prison (see WTTL, July 20, page 4).

TRADE FIGURES: Trade deficit in September in goods and services surged to \$36.5 billion from \$30.8 billion in August, Commerce reported Nov. 13. Jump in deficit, however, may be harbinger of coming job growth, because most of increase was due to increase in imports of raw materials, especially oil, and capital goods, suggesting rebound in manufacturing. Goods imports of \$138 billion were still down 22.4% from September 2008, and goods exports of \$90.3 billion were off 14.8% from year ago.

COPPER PIPES: Three ITC members made preliminary determination Nov. 13 that imports of allegedly dumped seamless refined copper pipe and tube from China and Mexico may be injuring U.S. industry, and three commissioners found imports may be threatening injury.

STEEL WIRE: ITC voted 6-0 May 10 in “sunset” review that revoking countervailing duty order on imports prestressed concrete steel wire from India and antidumping orders on imports from Brazil, India, Japan, Korea, Mexico and Thailand would lead to renewed injury to U.S. industry.