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BIS Has Revised Its Advice on Compliance Self-Audits

Exporters will have a better idea of whether their export compliance programs meet the expectations of the Bureau of Industry and Security (BIS) by using the revised and expanded “Audit Module: Self-Assessment Tool” the agency posted on its website Feb. 19. BIS officials say the module will help firms determine whether their compliance programs are adequate enough to warrant a significant mitigation of potential fines and penalties under BIS penalty guidelines, if they face administrative settlement negotiations with the agency.

The 31-page module mostly comprises a checklist of elements that should be in an effective export compliance and management system. For each item on the checklist, exporters are asked to answer yes, no, or uncertain or undetermined.

“Each company has unique export activities and export programs; therefore, this is an example to build upon and does not include ALL Export Administration Regulations restrictions and prohibitions,” BIS states. “This tool is a combination of best compliance practices implemented by U.S. companies, auditing practices, and Export Administration Regulations requirements,” it explains. The module also includes a pre-audit checklist of things to do to prepare for the audit and a post-audit checklist of actions to take after the audit.

[Editor’s Note: The new audit module and coming changes in BIS guidance on export compliance programs will be the subject of a March 4 audio-conference briefing WTTL is co-sponsoring with our sister publication *The Export Practitioner*. Speakers on the program will be Acting BIS Assistant Secretary for Export Enforcement Kevin Delli-Colli and Export Management and Compliance Division Director Tom Andrukonis. Information on the program can be found on our website, www.WTTOnline.com under heading of Briefings.]

China Could Recover Faster Than U.S. from Economic Crisis

China has the potential to recover faster than the U.S. and other developing countries from the current global financial crisis because it has lots of money to spend on its own stimulus plans and its banks are not loaded with the same risky investments as U.S. and European banks, witnesses told the U.S.-China Economic and Security Review Committee Feb. 17. Beijing’s increased spending on infrastructure, a shift toward more domestic consumption and new programs to improve the economic and health safety net for Chinese workers could also help to improve China’s economy by the end of the year. “China has the prospect of bottoming earlier than any other country in the developing world,” Nicholas Lardy, a senior fellow at the



Peterson Institute, told the commission. China also has the potential to recover faster than the U.S., he said, suggesting that China could become “a net contributor to global expansion.”

Stephen Roach, chairman of Morgan Stanley Asia, cautioned against placing all the blame for U.S. economic troubles on China. He pointed out that the U.S. had a trade deficit with 100 countries in 2008. “No one forced U.S. consumers to live beyond their means,” Roach said. He said poor decisions were made across the U.S. economy. “It is incorrect to think China is responsible for those poor decisions,” he told the commission.

Robert Cassidy, a trade consultant with Kelley, Drye & Warren, who helped negotiate China’s accession to the WTO when he was assistant U.S. Trade Representative, said Beijing needs to do more to open its own internal market, noting that distribution costs are higher in China than for exports because of internal tolls and shakedowns. He said the Chinese currency is still undervalued and its appreciation stopped in the second half of 2008. “The undervalued currency is the best Buy China policy,” he said. Cassidy said China’s accession to the WTO has been good for corporations and financial institutions but he has not seen these benefits on the trade side. “Everyone is better off with China in the WTO, but I can’t prove it,” he said.

China’s economic growth will be helped by the \$2 trillion in foreign reserves it has and can spend on its domestic stimulus programs. Its infrastructure construction programs are likely to be launched faster than those in the U.S. “In China, everyone has a shovel,” Roach said. “When they say dig, they dig.” Although Chinese banks in the 1990s were insolvent because they were loaded with bad debts from loans they gave for manufacturing and property investments, the system has been dramatically transformed in the last 10 years, Lardy said. China has adopted stronger accounting and regulatory policies and more governance of banks.

Appellate Court Upholds Constitutionality of Byrd Amendment

On a split 2-1 vote, the Court of Appeals for the Federal Circuit (CAFC) Feb. 19 upheld the constitutionality of Byrd Amendment provisions that limit the distribution of collected antidumping and countervailing duties to petitioners and supporters of petitions in trade remedy cases. The ruling, *SKF v. U.S. Customs and Border Protection*, overturns a 2006 decision of the Court of International Trade (CIT) which declared the disbursement part of the law unconstitutional because it denied the First Amendment rights of domestic parties that opposed the petitions and barred them from sharing in the duties collected under the trade orders.

“The Byrd Amendment is within the constitutional power of Congress to enact, furthers the government’s substantial interest in enforcing the trade laws, and is not overly broad,” wrote Judge Timothy Dyk for the majority. “We hold that the Byrd Amendment is valid under the First Amendment,” he declared. “Because it serves a substantial government interest, the Byrd Amendment is also clearly not violative of equal protection under the rational basis standard,” Dyk added.

Although Congress in December 2005 repealed the Byrd Amendment in response to a World Trade Organization (WTO) ruling that the law violated the WTO subsidies agreement, distribution of funds was still permitted on goods entered into the U.S. before Oct. 1, 2007. Because of the delayed effective date of the repeal and the continuing collection of duties under administrative reviews for earlier entries, millions of dollars in collected Byrd money is at stake in the CAFC ruling.

There reportedly are 10 other cases pending at the CIT where plaintiffs that did not support antidumping or countervailing duty petitions are seeking a court ruling that they are eligible to receive Byrd funds. The ruling in *SKF* is also likely to be applied to a separate pending constitutional appeal at the CAFC involving *PS Chez Sidney v. ITC*. That case has been stayed pending the outcome of *SKF* (see **WTTL**, July 7, 2006, page 1). The CAFC ruling comes two days after President Obama signed the economic stimulus bill (H.R. 1), which includes a

provision (Section 1801) barring Customs from seeking refunds of any already distributed Byrd money that came from duties on imports from Canada and Mexico. A separate CIT ruling had said the Continuing Dumping and Subsidy Offset Act of 2002, the formal name of the Byrd Amendment, violated NAFTA and could not be applied to Canadian and Mexican imports.

In his ruling opinion, Dyk said Byrd passed constitutional muster because it supports a legitimate government purpose and because courts can reward money to prevailing parties in litigation. He also said Byrd falls under Supreme Court rulings on commercial speech. “The language of the Byrd Amendment is easily susceptible to a construction that rewards actions (litigation support) rather than the expression of particular views,” Dyk wrote.

Dyk also cited the Supreme Court’s ruling in *Central Hudson* on commercial speech. “Under *Central Hudson*, regulation of lawful and non-misleading commercial speech is permissible if (1) ‘the asserted governmental interest is substantial,’ (2) ‘the regulation directly advances the governmental interest asserted,’ and (3) the regulation ‘is not more extensive than is necessary to serve that interest’. The Byrd Amendment satisfies this test, even if we view the Byrd Amendment as regulatory in nature,” he declared.

In his dissent, Judge Richard Linn argued that Byrd has nothing to do with rewarding helpfulness during trade investigations as the majority suggests. “There is nothing in the statutory text or legislative history of the Byrd Amendment to suggest that its purpose was to reward assistance or cooperation with the government’s investigation of dumping. To the contrary, the purpose of the Byrd Amendment was to compensate domestic producers injured by dumping,” Linn wrote. “I am aware of no case in which the Supreme Court has applied the doctrine of constitutional avoidance—as the majority does here—to determine the asserted purpose of an unambiguous statute in a constitutional challenge,” he declared.

Because of the millions of dollars involved in pending cases, a petition for a writ of certiorari to the Supreme Court is possible, trade attorneys suggest. In addition, they note that the commercial speech doctrine relied upon by Dyk was not raised in court briefs or oral arguments. “I would not be surprised if the plaintiff here filed a petition for cert,” said Michael Shor of Arnold & Porter, which is counsel to PS Chez Sidney in the other case involving Byrd distributions. “There is a very real First Amendment problem here,” he told WTTL.

Proposal Calls for “Re-Positioning” Doha Round

The Doha Round should be “re-positioned” to address new emerging protectionist measures that are not covered by existing World Trade Organization (WTO) rules and are not on the round’s current agenda, two economists are recommending. Aaditya Mattoo of the World Bank and Arvind Subramanian of the Peterson Institute say countries are adopting “low-grade” protectionist measures that don’t violate WTO rules but could lead to more serious protectionism because of the global financial crisis. The Doha Round should be re-positioned to anticipate these types of measures and to adopt rules to prevent them, they told the Washington International Trade Associations Feb. 19.

In the U.S., the combination of the deep recession and a stronger dollar “is a recipe for serious protectionist actions,” Subramanian said. As countries implement stimulus packages to help their economies, protectionist pressures build because constituencies don’t want that aid to “leak into imports,” he said.

The pair identified several new types of protectionist measures including undervalued exchange rates, environmentally motivated restrictions, government procurement, financial nationalism and resource nationalism. They also warned that the adoption of tougher financial regulations could include protectionist elements unless there is global cooperation on new regulatory instruments. “The biggest single threat to the multilateral system is environmental protectionism,” Mattoo said. A defense of the Doha Round came from Carlos de Abreau, the deputy

chief of mission at the Brazilian Embassy. He warned that attempting to re-position or change the mandate for the Doha Round at this stage “would unravel the whole process.” He suggested the proposals could be part of a new round “a few years down the road.” With commodity prices coming down, the proposed liberalizations in the Doha Round are more valuable, he said. “This is the best antidote we have now against protectionism and nationalism,” de Abreu said.

Obama Continues to Soften Stand on Changing NAFTA

President Obama, in Canada Feb. 19 to meet with Prime Minister Harper, continued to back track on his campaign statements criticizing the North American Free Trade Agreement (NAFTA) and calling for its renegotiation. At a joint press conference with Harper after their meetings, Obama said the two talked about trade and the possibility of putting the NAFTA side letters on labor and environment into the agreement formally. “My hope is that as our advisors and staffs and economic teams work this through, that there’s a way of doing this that is not disruptive to the extraordinarily important trade relationships that exist between the United States and Canada,” the president said (see **WTTL**, Jan. 19, page 1).

“It strikes me if those side agreements mean anything then they might as well be incorporated into the main body of the agreement so that they can be effectively enforced,” Obama said. “And I think it is important, whether we're talking about our relationships with Canada or our relationships with Mexico, that all countries concerned are thinking about how workers are being treated and all countries concerned are thinking about environmental issues,” he added.

In answer to press questions on NAFTA, Harper emphasized the benefits of NAFTA as well as the earlier U.S.- Canada Free Trade Agreement. “Trade agreements between our two countries have been nothing but beneficial for these two countries,” he said. Harper left open the door to potential talks on NAFTA. “Our position is that we're perfectly willing to look at ways we can address some of these concerns, which I understand, without opening the whole NAFTA and unraveling what is a very complex agreement,” Harper said. “But we had a good discussion on that and I think -- I'm hopeful we'll be able to make some progress,” he added.

Obama also gave an endorsement to the benefits of trade. “Now is a time where we've got to be very careful about any signals of protectionism, because, as the economy of the world contracts, I think there's going to be a strong impulse on the part of constituencies in all countries to see if we -- they can engage in "beggar thy neighbor" policies,” he said. “And as obviously one of the largest economies in the world, it's important for us to make sure that we are showing leadership in the belief that trade ultimately is beneficial to all countries,” he added. Obama also commented on the Buy America provisions in the stimulus legislation (H.R. 1) he signed Feb. 17. “Let me just reiterate -- and I said this very clearly before the bill was passed and before I signed it -- that I think it was very important to make sure that any provisions that were there were consonant with our obligations under WTO and NAFTA,” the president stated.

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TRADE PEOPLE: Ted Posner, former director of international trade and investment at the National Security Council (NSC) has joined Crowell & Moring law firm in DC. Prior to NSC, he was at USTR’s office where he litigated cases at WTO. He can be reached at 202-508-8750

LCD MONITORS: EU Court of Justice Feb. 19 ruled EU had incorrectly classified certain LCD monitors as TVs when they should have been classified as computer components. Decision supports position of importers and undercuts EU claim products are not subject to WTO Information Technology Agreement.

STEEL PIPE: ITC Feb. 19 made final ruling on 6-0 vote that imports of welded stainless steel pressure pipe from China that are subsidized and dumped are injuring U.S. industry.

OFAC: Stena Bulk, LLC, Swedish oil transport firm, has agreed to pay \$426,486 civil fine for allegedly transporting oil from Sudan for unidentified customer in violation of Sudanese Sanctions Regulations.