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Customs Issues AES Penalty Mitigation Guidance

Initial violations of the mandatory use of the Automated Export System (AES) for filing export documentation under the Foreign Trade Regulations will be treated leniently by Customs and Border Protection (CBP), according to its new penalty mitigation guidelines. The guidelines, published in the Jan. 2 Customs Bulletin, would provide for fines much lower than the maximum of \$10,000 permitted under the regulations. The new guidelines, which became effective Feb. 1, were developed in coordination with the Census Bureau, the Bureau of Industry and Security (BIS), and Immigration and Customs Enforcement (ICE) and will serve as enforcement policy for all these agencies when policing AES compliance.

The guidelines identify mitigation and aggravation factors CBP will use to determine penalties for: (1) failure to file in AES; (2) late filing; (3) failure to file all the necessary information or filing incorrect information; (4) failure to comply with other requirement of the FTR; and (5) failure of the exporting carrier to provide certain documents or certain information to CBP. Besides first-time violations, other mitigating factors include the filing of a voluntary self-disclosure and taking remedial measures to prevent future violations.

Aggravating factors that could increase a fine include having several violations, intentional violations, or evidence of a criminal conviction for violating the Export Administration Regulations (EAR). **[EDITOR'S NOTE:** Copy of the new CBP Penalty Guidelines will be sent to WTTL subscribers on request.

Obama Directive May Be Needed for Buy America Provisions

With chances slim that Congress will drop or further dilute the Buy America provisions in the pending stimulus package (H.R. 1), the impact of the provision on international trade relations may depend on the instructions the Obama administration will issue on how states and federal agencies should spend the money in the legislation. In response to concerns President Obama voiced about the provision, the Senate modified its wording Feb. 4 to ensure that it "shall be applied in a manner consistent with United States obligations under international agreements."

There is still pressure on the White House from major trade groups and U.S. trading partners to drop or modify the amendment further in the House-Senate Conference, and the issue still has the top attention of administration officials, sources report. The new Senate language is so vague and open-ended that it leaves broad discretion for the administration to invoke or ignore



the provision. While adopting the change, the Senate resoundingly defeated an amendment by Sen. John McCain (R-Ariz.) to strip the provision out completely. That message will make it hard for lawmakers to drop the provision in conference unless Obama steps in again.

Trade experts appear to agree that the provision by itself would not violate U.S. obligations under the World Trade Organization's (WTO) Government Procurement Agreement and its impact may be more symbolic than economic. The concern is other countries will read the provision as an invitation to adopt their own trade barriers or to raise tariffs, thus setting off a new round of trade protectionism (see story below).

According to one former U.S. trade negotiator, the procurement agreement only applies to the 37 WTO members who have signed the accord. While that includes most of America's leading trading partners, including the European Union (EU), Canada, Japan and South Korea, it does not include nonsignatories such as China, India and Brazil. Moreover, the agreement applies only to programs countries have specifically identified in their schedule of commitments and omits scores of other program not specified, including defense and highway spending. Most state and local spending is also outside the accord.

Even if the provision is WTO consistent, the problem is "other countries will raise their applied tariffs to the WTO bound rates, and we can do nothing to fight it," Calman Cohen, president of the Emergency Committee for American Trade, told a Feb. 5 conference. Jeffrey Schott, a senior fellow at the Peterson Institute, told the meeting the provision won't help the steel industry, the intended beneficiary of the original version of the House Buy America provision.

"Even before the financial crisis, the Bureau of Labor statistics predicted that employment in the steel industry would decrease by 25% between 2006 and 2016. As the automobile sector collapsed, steel producers lost a large volume of sales," Schott said. "The additional U.S. steel production fostered by the Buy American provisions will amount to half a million metric tons. This in turn translates into a gain in steel industry employment equal to roughly 1,000 jobs," he said; contending that is small number compared to U.S. labor force of 140 million people.

Lamy Steps Up WTO Focus on Trade Barriers

Although there is growing concern that countries will turn toward trade barriers in response to the current economic crisis, only limited evidence has emerged so far of increases in tariffs, non-tariff barriers or other trade remedy actions, according to WTO Director-General Pascal Lamy's report on recent trade-related developments. "To date, most WTO Members appear to have successfully kept domestic protectionist pressures under control," the report states.

The report, covering only the fourth quarter of 2008, will be considered Feb. 9 during a previously scheduled WTO Trade Policy Review Body (TPRB) meeting. The meeting has been scheduled for two months and isn't an emergency meeting as some news reports have portrayed it, said WTO spokesman Keith Rockwell(see **WTTL**, Jan. 26, page 4).

All WTO member are invited to the meeting where they may report on other trade developments they've seen in other markets or pressures from domestic interests. Recommendations also may emerge on how to improve the information in the report, which came from numerous sources. The report notes that developed countries have taken significant action to boost state aid to certain industries, notably the automobile industry.

Other measures compiled primarily from press reports include those in India, which raised tariffs and issued notifications restricting imports of some steel products in November. Members of Latin America's Mercosur group provisionally agreed in November to raise their common external tariff by 5% for certain products, and Ecuador raised tariffs by 5% to 20% on 940 products. Indonesia restricted imports to only five ports. Argentina recently imposed

licensing requirements on certain consumer products deemed sensitive. South Korea will raise crude oil import tariffs 1-3% in March. The Ukrainian parliament approved in December a temporary 13% import surcharge, which was subsequently vetoed by the president. The European Union (EU) will reintroduce export subsidies on certain milk products, according to the report. China increased VAT rebates on some textiles, clothing, bamboo products, plastics and furniture. It also raised tax rebates on exports of about 3,770 items. Russia has added state subsidies for domestic carmakers and raised import duties on new and used cars and trucks.

Bipartisan, Bicameral Deal Reached on TAA

At press time Friday, Feb. 6, Senate leaders were still discussing whether to add an amendment to the pending multibillion dollar stimulus bill (H.R. 1) to include bipartisan provisions extending and expanding Trade Adjustment Assistance (TAA) for workers displaced by trade. Democrats and Republicans on the Senate Finance Committee and House Ways and Means Committee Feb. 5 reached an agreement on a TAA package, which may have to be added to the stimulus bill in the House-Senate Conference, if the Senate doesn't get to add it before final passage of the stimulus legislation (see **WTTL**, Jan. 26, page 3).

Supporters of the amendment say the changes in TAA would make it more flexible and accessible. Among its provision, the TAA amendment would extend the law through 2010, expand eligibility to workers in service industries and the public sector; increase funds for training programs by nearly 160%; provide more flexible training for covered workers; increase health care benefits; assist trade-affected firms; aid communities negatively affected by trade; increase support for farmers, ranchers and fishermen; and make benefits available to workers whose jobs are sent offshore to any country

WTO Negotiators Wonder When U.S. Will Be Ready to Talk

Meetings the week of Feb. 2 of the Doha Round's rules negotiating committee found members as wide apart on potential changes in WTO rules as they were in December, but overshadowing the meeting was concern about when the new Obama administration would be ready to resume serious talks in the round. A lurking question is whether the U.S. will hold out for two or three years before it comes back, one trade diplomat told **WTTL**. Another overarching issue raised at the meeting is whether any real progress can be made in the rules talks without movement in agriculture, industrial market access and other areas.

Negotiators are still discussing how to recommence work on the Dec. 19 draft rules text offered by the chairman of the rules negotiations, Uruguay's ambassador to the WTO, Guillermo Valles Galmès. At the meeting, speakers from China, Mexico, Japan and other countries said negotiations on subsidies and countervailing measures have taken on new importance due to the economic downturn (see our story page 2).

The meetings also revealed continuing disagreement over how to treat "zeroing" under WTO antidumping rules. Brazil and members of a group supporting antidumping talks said they welcomed new provisions to exclude the legalization of zeroing. China suggested removing zeroing and anti-circumvention from the negotiations. But the U.S. said zeroing must be addressed in a final rules agreement. Other topics that drew comments at the meeting dealt with rules on transparency, pricing of natural resources, the complexity of WTO rules, export financing, fisheries, and special and differential treatment for developing countries.

Meanwhile, the WTO Appellate Body Feb. 4 ruled again against Washington's interpretation of zeroing. Ruling on appeal brought by the European Union (EU), the Appellate Body said use of zeroing by the U.S. in administrative reviews of antidumping orders and in making "sunset" review determinations is inconsistent with the WTO Antidumping Agreement. It also agreed

with the EU's complaint that "continued use of the zeroing methodology in successive proceedings in which duties resulting from the 18 antidumping duty orders are maintained, constitute measures that can be challenged in WTO dispute settlement."

Chinese May Already Have Access to Advance Aviation Parts

There already may be foreign availability in China of advance aviation parts controlled under the U.S. Munitions List (USML) and Commerce Control List (CCL), according to members of the Bureau of Industry and Security's (BIS) Transportation and Related Equipment Technical Advisory Committee (Transtac). The Chinese government has indicated that China has the domestic capacity to design, build, and install fly-by-wire engine control systems. Such fly-by-wire systems are covered by a blanket ban on exports of Full Authority Digital Engine Controls (FADEC) components. Donald Stevenson, senior manager for export compliance at Honeywell, told the Transtac Feb. 4 that "there is a company in China by the name of Factori, which is manufacturing flight control systems for Chinese aircraft."

This disclosure highlights the need to define clearly which FADEC components to protect and which should be permitted to be exported due to foreign availability, Transtac members said. The Chinese previously would not give out this information to Honeywell, Stevenson noted. "Only now that we have a large enough commercial relationship did China allow this information to be shared," he reported. "China has flight controls that it is putting in its aircraft – flight controls that include fly-by-wire engine controls," Stevenson said.

The Transtac has been trying to reach a recommendation on dealing with FADAC components for months. "For FADEC, we have given up trying to identify a threshold for [ECCN] 9E003. We are going back to the functional-based application that we began with," Stevenson said. Michael Osborn, also of Honeywell, said it was important to move forward on the review of controlled items. "We can't blindly assume tech in the U.S. is not found abroad. Maybe for 30 or 40 years, but that is not the case today," Osborn said.

* * * Briefs * * *

HMT: CIT Judge Leo Gordon Jan. 29 (slip op. 09-9) upheld Customs rules requiring exporters to provide supporting documentation to justify refunds of unconstitutional Harbor Maintenance Tax (HMT) paid before July 1, 1990. He denied Chrysler Corp.'s suit for refund of \$782,407 in HMT payments.

EXPORT ENFORCEMENT: BIS apparently missed "suspicious inquiry" report submitted in July 2008 about activities of California firm called Cheerway, Inc., but later reports led to criminal complaint filed Jan. 12 against William Chai-Wai Tsu, Cheerway's vice president, on charges of exporting integrated circuits to China without license and violating IEEPA and EAR. According to affidavit filed by BIS Special Agent Willie Lo in Los Angeles U.S. District Court, BIS received first inquiry from Aeroflex Corporation of California on July 22, 2008. Aeroflex was not only company Tsu was contacting for purchases, affidavit alleged. As early as March 2008, Tsu had contacted RFMW, Inc., of San Jose, Calif., distributor for products made by Triquint Semiconductor, Inc., M/A Com, Inc., and other manufacturers.

MORE EXPORT ENFORCEMENT: Two German nationals and their company were indicted Feb. 5 in Boston U.S. District Court on one count of conspiracy to export \$200,000 worth of pump parts to Iran without approved licenses. Hans Werner Schneider, Christof Schneider and Schneider GMBH were charged with conspiring with unnamed person in Jordan to acquire parts in U.S. and to ship them through Germany to Iran for use in centrifugal sulphuric acid and sulphur pumps.

TRADE PEOPLE: Former USTR negotiator Christopher Parlin has moved to law firm of DLA Piper in D.C. from Miller & Chevalier...Myron Brilliant named Chamber of Commerce VP for international affairs.

SOFTWOOD LUMBER: Binational NAFTA panel Jan. 30, agreed to dismiss review of all disputes over U.S. antidumping and CVD orders on softwood lumber from Canada based on 2006 agreements between U.S. and Canada. It noted concern, however, that termination of all proceedings also ended expedited review request of Gorman Bros. Ltd., leaving it covered by Canada's export measures on lumber.