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JUSTICE GIVES FCPA OKAY TO ACQUISITION OF CONVICTED FIRM

After an extensive and expensive due diligence investigation, involving 115 lawyers, 100 forensic accountants and 44,700 hours of work, a group of investors has gotten the Justice Department's blessings to acquire a firm that has been convicted of violating the Foreign Corrupt Practices Act (FCPA) without being held liable for those violations. The department's recently released opinion was one of three it issued in response to requests for advice on the application of the FCPA. The other two said it was okay for sponsors of conferences in China to pay the travel and lodging expenses of Chinese officials attending the meetings.

> In an opinion originally issued in July, Justice told a group of investors led by JP Morgan Partners Global Fund that it had adequately insulated itself from the violations that led ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd. to plead guilty in July 2004 to violating the FCPA. Based on the information presented by the investors, the department "does not presently intend to take an enforcement action against the requestors or their recently acquired entities for violations of the FCPA committed prior to their acquisition of ABB," Justice stated.

In their request for the opinion, the investors described how they had lawyers and forensic accounts review 1,600 boxes of printed e-mails, documents, and CDs containing 4 million pages of information and conduct interviews in 21 countries to examine the actions of the two subsidiaries of Switzerland's ABB Ltd. The group also provided a detailed program for how it intends to assure compliance with the FCPA in the future, including new written procedures, a "helpline" for employees to report violations, and board of directors oversight of compliance.

BIS "SAFE HARBOR" PROPOSAL RAISES "RED FLAGS" HURDLE

Exporters who want the Bureau of Industry and Security (BIS) to agree officially that they have eliminated any doubts about the legitimacy of a prospective customer will have to delve deeper than before into that client's background and business. In a proposal published in the Oct. 13 Federal Register, BIS offered to give exporters a "safe harbor" from future legal action, if they follow expanded "Know Your Customer" advice and resolve a longer list of "red flags" that might raise suspicion about the end-user or end-use of an export order.

As expected, the long-promised proposal would amend the Export Administration Regulations (EAR) to provide what BIS considers to be clearer guidance on what constitutes "knowledge." The revised definition of knowledge would apply wherever the EAR imposes requirements on exporters based on the premise that the exporter knows or has reason to know a fact or

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circumstance exists that would trigger an EAR requirement. Included in the proposal is a mechanism through which an exporter can submit a report to BIS identifying any red flag that was found and providing "all material information relating to the red flag and the steps the party took to resolve the concerns raised by the red flag." After reviewing this submission, usually within 45 days, BIS may send a letter to the firm saying it concurs or doesn't concur with the exporter's judgment that the red flag issue has been resolved or advising the exporter that it "is informed" that a license is required or an export prohibited.

> If BIS concurs with the firm's judgment, the firm "will not have knowledge imputed to them" and "will be eligible for a safe harbor from any enforcement action arising from the red flags they have addressed," BIS said in the preamble to the proposed rule but not in the actual rule. Industry is likely to ask BIS to be more explicit in the regulation about what safety a safe harbor actually provides.

To get a safe harbor letter from BIS, exporters will have to check prospective customers against a longer list of red flags – 23 instead of 12 – that BIS proposes to add to the EAR. The proposal would raise new red flags if shipments are destined for free trade zones or post office boxes; if transactions involve parties on the BIS Unverified List; if parts are going to someone who never ordered the original equipment; if documentation has different spellings of the customer's name; or if the customer doesn't have the appropriate facilities for the items ordered. Exporters would also have screen customers against various government denied party lists and make sure that no other licensing requirement applies to the export.

In addition, the proposal expands the "Know Your Customer" advice to suggest that freight forwarders have a role in identifying "incongruous" intermediate locations for shipments. Such knowledge would be a red flag for the freight forwarder. The change also makes it clear that manufacturers of specially ordered products may have a greater responsibility for checking end users than firms that sell off-the-shelf products (see **WTTL**, Sept. 20, page 1).

The proposed change to the definition of knowledge would add a "reasonable person" standard. "Under this revised definition, a party would have knowledge of a fact or circumstance, if a reasonable person in that party's situation would conclude, upon consideration of the facts and circumstances, that the existence or future occurrence of the fact or circumstance in question is more likely than not," BIS said. Awareness of fact also may be inferred, if the party has shown "conscious disregard of facts and is also inferred from a person's willful avoidance of facts."

CIT'S RESTANI ORDERS ITC TO ISSUE NEGATIVE RULING IN NIPPON STEEL

In an antidumping case that has had more returns than a U.S. Open tennis ball, Court of International Trade (CIT) Chief Judge Jane Restani Oct. 14 again remanded (Slip Op. 04-131) to the International Trade Commission (ITC) its injury determination on coated steel sheet from Japan with instructions to issue a negative material injury determination. In her third and latest ruling in the case, Restani argued that she was able to issue the order to the ITC without violating an appellate court ruling, in *Nippon Steel v. U.S.*, which reversed and vacated an earlier order she gave the ITC to make a negative determination.

> Restani's new opinion, which is likely to face another appeal, has ramification beyond the steel case, because the Court of Appeals for the Federal Circuit's ruling in Nippon was cited in the recent NAFTA Extraordinary Challenge Committee's (ECC) decision on pure magnesium from Canada. That opinion, in turn, has been cited as support for an expected U.S. appeal to an Extraordinary Challenge Committee of a NAFTA binational panel's ruling on the ITC's threat-of-injury determination on softwood lumber from Canada (see story page 3).

The CAFC in Nippon said the ITC can remand a decision to the ITC but cannot order a reversal of the commission's decision. "The Federal Circuit's statement must be read in the context of the principles of administrative law," Restani wrote. She said the Administrative Procedure

Act gives courts the power to set aside agency rulings that are unsupported by substantial evidence. "Neither Congress nor the appellate court could have intended endlessly futile remands," she stated. "Rather, a remand with specific instructions would appear consistent with case law and the statute."

U.S. COUNTERATTACKS AGAINST LOSSES ON SOFTWOOD LUMBER

After a string of losses before World Trade Organization (WTO) dispute-settlement panels and NAFTA binational panels, the U.S. is mounting a counterattack to defend its antidumping and countervailing duty (CVD) actions against softwood lumber from Canada. After Oct. 25, it will file a formal request for an Extraordinary Challenge Committee (ECC) review of a NAFTA panel's order to the ITC to revoke its threat-of-injury determination in the cases. It also expects the ITC to use the Section 129 process to come up with a new determination to answer the WTO's complaints that commission's original ruling didn't comply with the WTO Agreement on Subsidies and Countervailing Duties.

> The NAFTA panel reviewing the lumber case formally accepted the ITC's revised negative determination on Oct. 12. The U.S. request for the ECC got a boost with the ECC ruling in pure magnesium from Canada (see **WTTL**, Oct. 11, page 4). "The ECC's reasoning provides a strong basis for our argument that the lumber panel misapplied the standard of review in a similar manner," said Neena Moorjani, spokesperson for the U.S. Trade Representative (USTR). Allegations about the conflict of interest of one NAFTA panelist also are expected.

The U.S. defense of the lumber rulings drew a strong response from Canadian Trade Minister Jim Peterson, who said Canada will continue to fight for its interests in the case. Peterson has been under pressure from Canadian producers and U.S. importers to oppose any deal with the U.S. that would let U.S. producers keep any of the duties deposited for lumber under the rulings. "All along, Canada has maintained that the American industry is not injured by Canadian softwood. Our position will not change," he asserted.

Under Section 129 of the Uruguay Round Agreements Act (URAA), USTR Robert Zoellick has asked the ITC to determine whether it could issue a new determination on softwood lumber that would meet the objections of the WTO panel. At an Oct. 13 hearing, the ITC heard representatives of the Coalition for Fair Lumber Imports and the Canadian government disagree over whether the commission can look at new data to support its injury determination. The Coalition, represented by lawyers from Dewey Ballantine, said it could; Canada, represented by lawyers from Weil, Gotshal and Manges, said it couldn't.

Citing the ECC ruling in pure magnesium, Commissioner Jennifer Hillman asked the parties whether data received after the original ruling could be used in the Section 129 determination. Noting an appellate court ruling in *Nippon Steel*, Coalition attorney Alan Wolff said "the question of reopening the record is within the sole discretion of the commission."

Wolff also pointed to the Statement of Administrative Action (SAA) accompanying the URAA, which said the Section 129 process was intended to gather additional information if necessary. "To us, it's crystal clear on that basis that you can certainly reopen the record," Wolff said. He also cited court rulings which say courts should not base decision on erroneous information if subsequent information would allow it to base a ruling of correct information. In the lumber case, the Coalition claims revised data from Statistics Canada supports its injury argument.

C-TPAT INSPECTIONS FIND HIGH LEVEL OF COMPLIANCE

Customs and Border Protection (CBP) has begun to conduct "security validations" of firms that have joined the Customs-Trade Partnership Against Terrorism (C-TPAT) and has found most firms meeting the commitments of the program but 95% needing to make some improvements,

reported Robert Perez, director of the Customs C-TPAT Office. Some 400 of the more than 7,000 participants in C-TPAT have already been subject to audits, he told a Washington International Trade Association program Oct. 14. Perez brushed aside criticism often heard from participants that they are not getting quicker or better treatment from Customs as they were promised when joining the program. If firms are in C-TPAT just for faster handling by Customs, "we don't want them in the program," he said. The focus of C-TPAT should be the benefits firms get from securing their own facilities and assets, including reduced cargo theft.

> Perez also responded to complaints from foreign firms that can't participate in the program. Customs has extended participation to 250 foreign operations in Mexico, he noted. He said CBP is working with the World Customs Organization and the European Union on ways to expand membership to foreign firms.

The way Customs has implemented the many new border security measures it has adopted in the last three years has gotten generally good marks from the business community, said Bill Primosch, director of international business policy for the National Association of Manufacturers (NAM). "I'm not hearing a lot of complaints about these systems and their impact on the border," he said. Primosch applauded the U.S. "Smart Border" initiative with Canada and Mexico, but noted problems firms are having getting truck drivers who qualify for the program and are willing to undergo background checks. In addition, inadequate infrastructure at the borders means truck drivers have to wait behind slow-moving cars anyway.

CBP plans for Operation Safe Commerce, which is aimed at developing technology to secure containers, may be premature, warned former Customs Associate Commissioner Bonnie Tischler, who is now a vice president with Pinkerton. "We are not ready for smart containers yet," she declared. Current designs for radio-frequency monitors that would be attached to container doors to prevent tampering can't endure a sea voyage, have battery limits and need costly technology and staff to implement, she noted. The real problem is still people, she said.

* * * BRIEFS * * *

FSC/ETI: EU remains cagey about when it will lift sanctions on U.S. exports following Senate approval Oct. 11 of FSC/ETI legislation (see WTTL, Oct. 11, page 4). "We will now carefully study the details in the final compromise between both chambers, in particular regarding transition periods, grandfathering clauses, as well as all other relevant fiscal provisions," said EU Trade Commissioner Pascal Lamy.

CIT: Court of International Trade's 13th Judicial Conference will be held Nov. 8, 2004, in New York. Details on CIT website at www.cit.uscourts.gov.

SUGAR: EU quickly announced plans to seek Appellate Body review of WTO panel ruling, which was released Oct. 15, declaring European subsidies for sugar producers to be incompatible with WTO agriculture rules. "W are dissatisfied with this ruling and will appeal it. But the EU's appeal will not prevent the EU to plough on with a radical overhaul of its sugar regime," said EU Agriculture Commissioner Franz Fischler. WTO panel found EC subsidizing domestic sugar and sugar exports in excess of levels permitted under WTO Agriculture Agreement.

MISCELLANEOUS TARIFFS: House late Oct. 8 passed Miscellaneous Trade bill (H.R. 1047) by unanimous consent (see **WTTL**, Oct. 11, page 4). Measure failed to get Senate approval before adjournment because of continuing disagreements over several provisions, including Sen. Herbert Kohl's (D-Wis.) objections to granting Laos normal trade relations. Wisconsin has large population of Hmong tribesmen who fled Laos after communist takeover.

TRADE FIGURES: U.S. merchandise exports in August were $67.4 billion, up 15.7% from last August. Goods imports, however, jumped 21.6% to $124.8 billion. Services exports were $25.6 billion, gain of 10.7% from 2003. Services imports, which are one measure of outsourcing, rose 16.5% to $25.2 billion.

CAMBODIA: Asian nation became 148th member of WTO Oct. 13.

TEXTILES: U.S. textile industry has begun to file promised safeguard actions against imports from China that are coming off quota in January (see **WTTL**, Oct. 4, page 1).