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A Weekly Report for Business Executives on U.S. Trade Policies, Negotiations, Legislation, Export Controls and Trade Laws

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OFFICIALS URGE VOLUNTARY DISCLOSURES IN FCPA CASES

Justice Department and Securities and Exchange Commission (SEC) officials who enforce the Foreign Corrupt Practices Act (FCPA) say there are benefits from making a voluntary disclosure of suspected FCPA violations, especially if a firm expects the government to learn about them anyway. Companies should not feel that voluntary self disclosures always results in large fines. "I do want to get across the point that there are many, many self disclosures that come in that do not result in actions," said Richard Grime, assistant director of the SEC enforcement division. "We don't bring every case," he told an FCPA conference sponsored by the American Conference Institute in Washington.

Mark Mendelsohn, deputy chief of Justice's fraud division, told the conference that voluntary self disclosure is one of the factors under the Federal Sentencing Guidelines that could help reduce a potential penalty for an FCPA violation. "There will be a significant benefit at the end of the day," he said.

Mendelsohn pointed to the penalties that Schnitzer Steel paid in a recent case and noted that the fines were less than they could have been because the firm had made a self disclosure (see **WTTL**, Oct. 23, page.4). Voluntary reports also play a role in Justice's decision to defer prosecution and whether it will go after a parent company or limit its case to a subsidiary, he said.

Grime, who noted that he was expressing his own views and not those of the SEC, said the commission isn't being inundated with self-disclosures, although there has been "an uptick" in disclosures. Most of the self-disclosures filed with the SEC and Justice involve minor matters. "We do not see big problems walking in the door," Mandelsohn said.

COMMISSION MEMBER EXPECTS BIS TO RECONSIDER CHINA PROPOSAL

The chairman of the U.S.-China Economic and Security Review Commission says he expects the Bureau of Industry and Security (BIS) to take its China catch-all proposal "back to the drawing board." Speaking to reporters on the formal release of the commission's annual report, Larry Wortzel said he expects BIS to seek a new approach that would get Japan and Europe to join in imposing similar controls on exports to China (see **WTTL**, Nov. 6, page 1).

Wortzel said the concerns that Rep. Don Manzullo (R-Ill.) raised about the proposal were correct. "I know there are a number of members of Congress who were unhappy with the way those draft regulations went out and with the fact that there had not been a dialogue in advance with our European allies," Wortzel told reporters. "I think unilateral controls in some areas

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still have utility,” he said. “There are some particular industrial processes and technology that only the United States has...So when it’s a unique American capacity, I think we all agree there is room for unilateral controls,” he added. “If you cannot get other countries to sign on to certain forms of controls, they will not be as effective,” he said.

The commission’s final annual report, which was publicly released Nov. 16, stresses its concerns about China’s military build up and the lack of transparency about its intentions. A potential conflict with Taiwan is not the only factor driving Chinese defense spending it notes. “We do not believe that Taiwan is the issue,” Wortzel explained. “Chinese military development and its military growth is beyond Taiwan and is more about how China as a nation will be able to articulate its own interest,” he said.

Carolyn Bartholomew, the commission’s vice chairman, said it’s not a question of China’s right to develop its military but what the implications are for the United States. “It would be foolish for us to not be paying attention to the possibility of what the Chinese are doing and might be interested in doing,” she told reporters. “It’s about a worse-case scenario future. We can hope and work for a peaceful future but we need to be thinking about the possibility that that might not be the case. That we don’t wake up one day and find out that there is indeed power projection abilities that we weren’t aware of,” she stated.

The report also complains about China’s failure to comply with commitments it makes in trade agreements and its failure to comply with its WTO obligations. In particular it cites the under valuation of the Chinese currency. “None of us have any illusions that China’s significant currency revaluation would solve our trade deficit problem, but it would get rid of some of the unfair trade practices the Chinese government is engaging in and it would help U.S. manufacturers make decisions,” Bartholomew said. Wortzel conceded that retaliation against China might just shift import sourcing to other countries in Southeast Asia. “But if we’re dealing with Indonesia or Malaysia, you don’t have a country with 24 intercontinental missiles with warheads aimed at the U.S.” he argued.

EARLY COMMENTS ON CHINA RULES FORESHADOW OBJECTIONS

A preview of objections that exporters will raise to BIS’ proposed China catch-all regulation is seen in the initial comments filed with the agency. Areas of concern include proposed new controls on certain types of software, requirements for end-use certificates and the operation of the Validated End User (VEU) mechanism. On the other hand, the pro-controls Wisconsin Project on Nuclear Arms Control claimed the proposal was too weak. “We recommend that the proposed rule be withdrawn for further consideration by the department.” the group wrote.

The Business Software Alliance urged BIS not to rollback controls on software, including products containing encryption elements, that are widely available through retail channels. In particular, it objected to new controls on Export Control Classification Numbers (ECCNs) 5D992 and 5D002, which are now eligible for License Exception ENC. BSA said new controls would be difficult to enforce. “Rampant software piracy in China is a clear indication of this,” it wrote.

The group also complained that the Certified End User provisions will hinder the industry’s ability to compete in China against foreign firms. “In addition, we are skeptical that China’s Ministry of Commerce has the capacity and staffing to fulfill their end of the commitment and perform in a timely fashion,” BSA said. The VEU process “would be extremely difficult to police and would most probably inundate companies with compliance burdens,” it added.

A trade group representing makers of software design products, the Electronic Design Automation Consortium, voiced concern that the proposal would restrict products that are exempted from controls on the Wassenaar Arrangement list. While the Chinese market for EDA software is not large, it “is the fastest growing market segment in the world for EDA software,” the

group told BIS. The Wisconsin Project urged BIS to go back to its original broad catch-all concept. "To have a greater impact, the scope of the rule should be expanded by enlarging the list of items subject to new control or even by eliminating the list altogether," the organization wrote. It said the rule should cover exports intended for any military purpose in China. It also urged BIS to identify more Chinese entities that should require licenses. "Other countries have warning lists that are much broader, and so should the United States," it suggested.

LAMY ASKS DOHA NEGOTIATING CHAIRMEN TO RESUME WORK

World Trade Organization (WTO) Director General Pascal Lamy Nov. 16 invited the chairmen of the various Doha Round negotiating committees to resume work at the experts' level to try and move some of the "quiet diplomacy" of the last six months toward the formal resumption of negotiations. "I am therefore encouraging the chairs to carry out contacts and consultations as they judge most appropriate, bearing in mind the different circumstances of the various negotiating groups," Lamy told the Doha Round Trade Negotiations Committee. Some chairmen, including New Zealand Ambassador Crawford Falconer, who heads the agriculture committee, have already started this process.

Most of the quiet diplomacy conducted so far has been among small groups of countries, including the newly minted non-G-6 (see **WTTL**, Nov. 13, page 3). "Today there seems to be widespread support for multilateralizing these contacts and bringing them back to the negotiating groups," Lamy said. "While I believe we are ready to start technical work at the level of experts, it would be, in my view, premature to move on to ministerial negotiations," Lamy stated.

Sources in Geneva continue to say that the Doha talks won't get restarted until the U.S. steps up and makes a new offer to reduce farm subsidies further than it has already promised. U.S. Trade Representative (USTR) Susan Schwab, however, continues to reject that approach. Speaking to reporters during the APEC minister meeting in Hanoi Nov. 15 she, "No single country, no single group of countries will be able to unilaterally put the Doha Round back on track." Schwab repeated the list of concessions that need to come from the European Union, India and Brazil before the U.S. makes a new offer.

WHO DROPPED THE BALL ON VIETNAM PNTR?

Like any retreating army, discipline among House Republicans appears to be falling apart following their election defeats. That may be one reason the House failed Nov. 13 to muster the two-thirds vote needed to approve giving Vietnam permanent-normal-trade-relations (PNTR) status. There was talk about bringing the measure back to the floor by the end of the week, but that didn't materialize. With the House in adjournment until December, another vote may come when lawmakers return, but that isn't certain, and the vote may be put off until January. Vietnam is expected to join the World Trade Organization (WTO) by the end of December, so the U.S. may face a delay in getting and giving the benefits of Vietnam's accession.

The House needed 285 votes to pass the bill (H.R. 5602) under a procedure known as suspension of the rules rather than a mere majority. The final vote was 228-161, 57 votes shy. There were 66 Republicans voting against the legislation. Democrats contributed 90 votes toward its approval. Among Democrats supporting the measure were Speaker-to-be Nancy Pelosi (D-Calif.) and Ways and Means Chairman-to-be Charles Rangel (D-N.Y.).

GOP leaders were criticized for rushing the vote for the Monday when lawmakers were just coming back to Washington. Many didn't arrive in time, with 43 registered as not voting, including 28 Republicans. The White House wanted the bill passed before President Bush arrived in Vietnam for the Nov. 18-19 annual APEC meeting. Because the vote was expected to be an easy win, Republicans apparently didn't "whip" their members aggressively. Some

Republicans from textile states voted against the measure even though it included “clawback” provisions that would allow the U.S. to reimpose quotas on Vietnamese apparel imports if Hanoi fails to keep its promise to end subsidies to its industry. “The textile industry got paid twice and they still didn’t vote for the bill,” one trade attorney said.

Meanwhile, administration officials are defending the promises they made to Sens. Elizabeth Dole (R-N.C.) and Lindsay Graham (R-S.C.) to monitor textile and apparel imports from Vietnam and to self-initiate an antidumping case against imports that are shown to be surging and injuring U.S. industry after quotas are lifted. Commerce Assistant Secretary for Import Administration David Spooner and USTR Chief Textile Negotiator Scott Quesenberry spoke Nov. 14 to USA-ITA, the apparel importers’ association, but refused to be quoted on the record.

The Bush administration is caught in a squeeze between Dole and Graham on one side and Sens. Diane Feinstein (D-Calif.) and Gordon Smith (R-Ore.) on the other. Feinstein still has a “hold” blocking the PNTR bill in the Senate because of her objections to the potential restrictions on apparel imports. Having gotten Dole and Graham to lift their “holds” on the bill in exchange for the promise of self-initiation, the White House is now negotiating a letter with Feinstein and Smith trying to assure them that antidumping cases won’t be brought unless there is a domestic industry that makes a “like product.” Apparel importers want Commerce to include in its monitoring regulations a provision that would limit monitoring and self-initiation of cases to products for which domestic makers of “like products” have said they want monitoring and would be willing to provide needed data to support a case.

* * * BRIEFS * * *

EXPORT ENFORCEMENT: EPMed Systems of West Berlin, N.J., has will pay \$244,000 civil fine as part of settlement with BIS to resolve 23 charges related to its exporting of Workmate heart monitoring systems to Iran without licenses from OFAC and evading regulations by transshipping equipment through Europe.

CUSTOMS: GAO report (GAO-07-50) released Nov. 15 says it’s too early to determine success of continuous bond policy imposed on imports of shrimp. But GAO found policy “lacked transparency and consistency.” Because shrimp policy will be model for implementation of legislation expanding continuous bond requirements for imports subject to antidumping and countervailing duty orders, Customs needs to conduct formal review of shrimp case and to obtain importers’ views, it said (see WTTL, Sept. 4, page 4).

ATPA: Bush administration told officials from Peru and Colombia Nov. 14 that it supports renewal of Andean Trade Preferences Act. “We expressed our support for extending ATPA preferences to Colombia, Peru, Ecuador and Bolivia in a timely fashion, so as to minimize any business disruptions,” said Deputy USTR John Veroneau. He said administration reaffirmed its commitment to work with Congress to move FTAs with Peru and Colombia “at the earliest possible date.” U.S. and Colombia will sign FTA Nov. 22.

BIS ADVICE: BIS has posted new advisory opinion on its webpage, trying to explain why restrictions on License Exception RPL in EAR Section 740.10(b)(2)(iii) apply to North Korea but not China.

INDONESIA: U.S. and Indonesia signed MOU Nov. 16 pledging to work together to fight illegal timber trade through sharing of information and cooperation in law enforcement.

RUSSIA: Democrats may insist on including safeguard mechanism in Russia PNTR legislation. During floor debate Nov. 13 on Vietnam PNTR, Rep. Sander Levin (D-Mich.), who is expected to be chairman of House Ways and Means trade subcommittee, complained about lack of safeguard in Vietnam deal. “I don’t think we should be approving PNTR bills, for example, with Russia, until there is a safeguard mechanism negotiated in the agreement itself. I believe all of us on this side who are speaking today will be dedicated to making sure that there is such a safeguard mechanism, so that if there is that surge of exports to us, we have a mechanism to deal with it,” Levin said. He voted to support Vietnam PNTR.

EU CUSTOMS: Both U.S. and EU claimed victory in WTO Appellate Body ruling released Nov. 13 on U.S. complaint against EU customs procedures. In mixed decision, which reversed and upheld numerous different findings of a dispute-settlement panel, AB supported U.S. complaint that EU tariff classification of liquid crystal display monitors violated WTO rules on non-uniform administration of customs rules, but on broader issue, it upheld EU position that WTO doesn’t require uniform administrative processes.