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Industry Groups Seek More Clarity on FCPA Guidance

Three months after Justice and the Securities and Exchange Commission (SEC) released their long-awaited Foreign Corrupt Practices Act (FCPA) compliance guidance, 33 industry groups are saying, “Yes, thank you very much, but...” In a Feb. 19 letter to Assistant Attorney General Lanny Breuer and SEC Acting Director of Enforcement George Canellos, the groups identified six main issues that need additional clarification.

The guidance needs to address compliance programs and voluntary disclosures, definitions of “foreign official” and “instrumentality,” parent-subsidiary liability for anti-bribery violations, successor liability, *mens rea* standard for corporate criminal liability and declination decisions, the letter suggested. SEC and Justice issued their compliance guide in November 2012, several months after those same industry groups had previously expressed their concerns (see **WTTL**, Nov. 19, 2012, page 3).

“Many, but not all, of those concerns were addressed in the guidance. As issues relating to FCPA compliance evolve, we look forward to regular updates to the *Resource Guide* and to further discussion with you and your colleagues regarding the enforcement of the FCPA, including the issues identified in this letter,” the most recent letter noted. Among groups signing the letter were the U.S. Chamber of Commerce, U.S. Chamber Institute for Legal Reform, National Association of Manufacturers, National Foreign Trade Council and Pharmaceutical Research and Manufacturers of America.

Small Iran Transactions Being Reported to SEC

Companies are digging deep into their foreign operations and those of foreign affiliates to find transactions to report in Securities and Exchange Commission (SEC) filings to comply with the provisions of the Iran Threat Reduction and Syria Human Rights Act (TRA), initial filings with the agency indicate. So far, 16 companies have filed information about Iran transactions in annual or quarterly reports to the SEC under the requirements of Section 219 of the act. Because TRA has no “materiality” standards, which is the criterion for other information submitted to the SEC, filers appear to be acting conservatively and reporting even minor activities. For example, Hyatt Hotels

reported that its Park Hyatt Hotel in Hamburg, Germany, had rented rooms on 33 nights under a contract with a German bank that has been named as an affiliate of an Iranian Bank. Toyota Motor Credit Corp. reported that a Toyota dealer in Indonesia had sold two vehicles to the Iranian Embassy in Jakarta.

These early filings are important because they are setting the standard for what other firms will report, noted John Winter, a partner with the law firm of BakerBotts in New York, during an audio-conference briefing sponsored by WTTL and our sister publication, *The Export Practitioner*, Feb. 19.

There is a “pact mentality” when it comes to SEC filings and other firms are likely to follow the example of these first submissions, he said.

With no definition of materiality in the TRA, firms will “have to leave that on the side and determine if there were any activities” that need to be reported, Winter said. Because of the broad coverage of the statute, reportable activities are not limited to prohibited acts, he pointed out.

Under the new law, the SEC will have to report these submissions to the president, who will be required to open an investigation of each action, and to committees of jurisdiction in the House and Senate. Firms will be “telling on themselves,” said Matthew West, a partner in BakerBotts’ DC office. In preparing their reports for the SEC, firms may also consider filing a voluntary disclosure with Treasury’s Office of Foreign Assets Control (OFAC), but it is still not clear whether OFAC will consider such disclosures as voluntary if they are made under the requirements of the TRA, he noted. Nonetheless, firms may get the benefit of cooperating with OFAC as a mitigating factor if OFAC decides to take enforcement action, West suggested.

Among other firms filing early TRA notices are TRW Automotive, ArcelorMittal, Alliance-Bernstein, Honeywell, Schlumberger and United Technologies Corp. (UTC). UTC reported that in 2009 it adopted a corporate policy prohibiting new business in or with Iran. “In 2012, two of our non-U.S. affiliates engaged in activities related to the orderly winding down of legacy business involving the sale of fire safety equipment through procurement agents to entities owned by the government of Iran,” it reported. It also said foreign non-affiliates of its Otis elevator division performed service on Iranian diplomatic premises in France, Kuwait and Hungary, but those contracts have ended.

Schlumberger said certain non-U.S. subsidiaries in 2012 provided oilfield services to the National Iranian Oil Company and some of its affiliates. “Schlumberger has not bid on any new contracts relating to Iran’s petroleum production since March 2009,” it said. Alliance-Bernstein, a mutual fund company, said a subsidiary of AXA, its French parent company, had sold 15 insurance policies to entities in France that were related to the Iranian government. [**Editor’s Note:** A copy of the CD recording of the briefing on the SEC reporting requirements and the speakers’ PowerPoint slides can be ordered on the WTTL website, www.WTTLOnline.com.]

Charges Against Honey Brokers Not Too Sweet

A scheme to avoid paying more than \$180 million in antidumping duties on Chinese-origin honey has netted federal charges in Chicago U.S. District Court against two domestic honey-processing companies and five individuals, Immigration and Customs

Enforcement (ICE) and Customs and Border Protection (CBP) announced Feb. 20. Honey Holding, doing business as Honey Solutions, of Baytown, Texas, and Groeb Farms Inc., of Onsted, Mich. – two of the nation's largest honey suppliers – have both entered into deferred prosecution agreements (DPAs) with Justice, which has prosecuted several cases against illegal honey imports. Under the DPAs, Honey Holding agreed to pay \$1 million in fines and Groeb Farms will pay \$2 million. Both companies have also agreed to implement corporate compliance programs.

The individual defendants include three honey brokers plus Douglas Murphy, the former sales director for Honey Holding, and Donald Couture, the president of Premium Food Sales Inc., a broker and distributor of raw and processed honey in Bradford, Ontario.

In June 2011, after the discovery of the scheme, an undercover special agent from Homeland Security Investigations (HSI) assumed the role of the director of procurement at Honey Holding, which by then was cooperating with the investigation, HSI noted. That undercover operation led to the charges against the companies and the individuals. Commerce first imposed antidumping duties on Chinese-origin honey in December 2001.

ITA Talks Aim to Cull List of Products

Diplomats working to expand the WTO Information Technology Agreement (ITA) want to cut the list of products that will become the subject of negotiations during technical talks starting the week of Feb. 25. The goal is to eliminate some 20 to 30 lines from the roughly 300 tariff lines that have been proposed by countries before negotiations on sensitive items begin. Delegations have been talking bilaterally since January to boost support for certain products or to reconcile descriptions of products that aren't harmonized, a trade negotiator told WTTL.

Meetings starting March 18 will be “a bit of a higher-level meeting,” one official noted. That meeting could signal the “final stretch” before the WTO's summer break, he said. By then, the list would “hopefully” be consensus based, and “final,” he said. Talks in the fall would seek to tie up loose ends ahead of the WTO ministerial meeting in December.

The scaling back of the number of tariff lines on the draft list of products doesn't necessarily reflect less ambition, officials say. Some tariff lines represent several products, while others represent a single one. Some of the proposed products were clearly never going to make it for serious consideration, they suggested.

About 40% of the proposed items for tariff-free treatment are in the form of so-called x-outs, which represent specific products at the six-digit level of the Harmonized Tariff Schedule. X-outs aren't ideal because customs can't always identify x-out products from the rest of the products in the six-digit harmonized system category, one official said. Canada is leading efforts on how to coordinate positions on x-outs, he said.

About 40 lines were removed from the draft list during a recent meeting. If more are removed during the coming technical meetings, the list would be mature enough for negotiations over sensitive items, he said. An ambassadorial-level meeting scheduled for the week of Feb. 25 is a sign the process is “maturing,” he said. There appear to be few

sensitive products that are expected to face the toughest differences in the ITA negotiations, a high-ranking trade official told WTTL. Audio visuals, such as TVs, could be among the most sensitive. Other sensitive items include home appliances, medical devices, various cables, wires and products with multiple uses, a second negotiator said.

Whether a product falls under the definition of information technology (IT) is more of a concern for some products than their multi-functionality, the official said. For example, there is pressure to remove home appliances from the list, he said. Talks on medical devices are focused on where to draw the line. There are “some sensitivities” in talks on trade in medical devices, the official said.

China will send a negotiator from Beijing for talks the week of Feb. 25. That’s a “good sign” that China is still “very engaged,” one official said. There were worries after Chinese officials didn’t attend a recent meeting. “We’re hoping they come with a bit more of a mandate to actually negotiate,” he said; noting that it’s not possible to do much in the IT sector without China. China has been “fairly passive” in its comments, a second negotiator said. Indonesia, Turkey and Vietnam are also preparing to join the talks. The main countries in the European Union are also taking a decision. Russian officials say they want to get involved although they’re not yet members of the ITA.

Funding for Cotton Initiative in Doha Round Ends

Seven European countries have ended their funding for a project aimed at helping cotton producers in Africa win concessions in the World Trade Organization’s (WTO) Doha Round negotiations. The 10-year project, which was run by IDEAS Centre in Geneva, a trade consulting group, was terminated because of changes in world cotton trade and subsidies, improvements in the income of cotton farmers in the so-called C4 countries, Benin, Burkina Faso, Chad and Mali and lack of hope that the Doha Round will be concluded (see WTTL, Dec. 19, 2011, page 5). Funding for the project had come from Switzerland, Denmark, France, Germany, Netherlands, Sweden and the United Kingdom.

“Things have changed a great deal since the beginning of the Cotton Initiative,” said the final monthly report issued by the IDEAS Centre Feb. 21. “Cotton prices are significantly higher than they were. In 2003, the situation was urgent because African cotton growers could not live from their work and were obliged to give up ‘white gold’; today, prices are high enough so farmers can once again make a profit,” it said.

In addition the importance of the U.S. and its subsidies has diminished. “World prices are set more by China’s trade policies (control of world stocks) rather than by U.S. or EU subsidies,” the report said. “The players on the world cotton market have changed, like India, which in five years has gone from a cotton-importing country to the second largest cotton exporter after the U.S.,” it added.

The Centre urged trade ministers to continue to include cotton in their negotiations, particularly at the next Ministerial Convention in Bali, Indonesia, in December. “We all know that cotton is not one of the subjects where we can expect a solution at the Bali Ministerial, despite the decision of all Ministers in Hong Kong to ‘address cotton ambitiously, expeditiously and specifically,’” it said. “The African countries realize this and

grudgingly accept it. Yet it is essential – for them and for the system – for cotton to be on the Bali agenda, even modestly, and for this Ministerial to continue to restore the poor countries’ hope that cotton will in the future be dealt with substantively within the framework of the Doha Round,” it stated.

U.S., EU Trusted Trader Agreement Fully Implemented

Even before President Obama announced comprehensive trade talks with the European Union (EU), the logistics part of transatlantic trade has become easier for some U.S. exporters. A mutual recognition (MR) arrangement between the Customs and Border Protection’s (CBP) Customs-Trade Partnership Against Terrorism (C-TPAT) program and the EU’s Authorized Economic Operator (AEO) program became fully implemented Jan. 31, CBP announced Feb. 8.

This final phase of the accord provides reciprocal benefits, including lower risk score and less exams when shipping cargo, to C-TPAT members when exporting to EU member states. Phase I of the agreement, implemented in July 2012, provided these benefits to EU members exporting into the U.S. The agreement was signed in May 2012 (see **WTTL**, May 7, 2012, page 4).

“The goal of MR is to link the various international industry partnership programs so that together they create a unified and sustainable security posture that can assist in securing and facilitating global cargo trade,” a CBP fact sheet noted. “It means end to end supply chain security based on program membership,” it added. In addition to the EU, CBP has MRAs with Canada, Japan, Jordan, Korea, New Zealand and Taiwan.

CIT Upholds Preference for “Single Surrogate Country” Data

Court of International Trade (CIT) Judge Richard Eaton issued a ruling Feb. 20 upholding the International Trade Administration’s (ITA) policy of using data from a “single surrogate country” in antidumping cases on imports from a nonmarket economy (slip op. 13-22). In affirming ITA’s remand determination in an administrative review of the order on chlorinated isocyanurates from China, Eaton said the agency adequately justified using data only from India even though other data was available from the Philippines.

“The court holds that Commerce’s decision to use the Indian data was supported by substantial evidence,” he wrote. In addition, the preference to use a single surrogate country is directed by regulation, he noted.

“The preference is also reasonable because, as Commerce points out, deriving the surrogate data from one surrogate country limits the amount of distortion introduced into its calculations because a domestic producer would be more likely to purchase a product available in India,” Eaton explained. “Thus, the use of a ‘single surrogate country’ is justified when, as here, all other factors are ‘fairly equal’ because minimizing distortion supports a finding that Commerce relied upon the best available information on the record,” he added. Eaton noted that Commerce had compared the data from India and the Philippines in reaching its determination that the Indian data remained the best available information. “Because Commerce actually performed this analysis, the court reaches no conclusion as to whether the comparison is required by statute,” the judge stated.

Abe Visit Stirs Talk of Japan Joining TPP

As WTTL was going to press ahead of Japanese Prime Minister Abe's visit to the White House Feb. 22, there was much speculation about whether Japan would join Trans-Pacific Partnership (TPP) talks. Regardless of what Abe and President Obama were to say after their meeting, administration officials and industry representatives were warning that Japan's road to the TPP would be difficult politically and for its domestic industry, as well as for its impact on the ongoing negotiations already underway for 18 months. Obama administration officials say there will be no product or sector carve-outs in the talks, but Japan reportedly wants exceptions for its automotive, rice or beef industries.

"We've made very clear from the start that addressing critical, outstanding issues including those... in the motor vehicle sector were an important precondition for considering Japan's interest in joining TPP, and that's been one of the subjects of consultations over the last -- almost a year now. So we take those concerns very seriously, and we are in consultations with Japan over those issues," said Deputy National Security Advisor for International Economics Michael Froman in a Feb. 21 White House briefing.

Business Roundtable President John Engler, former governor of Michigan, said bringing Japan into the TPP talks could derail the negotiations. "I think we are far enough down [the road] that it would take a lot of time to bring Japan in and then bring them up, and I think it brings several other issues to the table," Engler said. "I think the better approach is to make it very clear that there would be strong interest in Japan coming in as soon as we had a high-quality agreement put in place, but not necessarily an invitation to come now," he told reporters in Washington Feb. 21.

* * * Briefs * * *

EXPORT ENFORCEMENT: Vitali Tsishuk was sentenced Feb. 14 in Philadelphia U.S. District Court to 24 months in prison for conspiring to export military-grade night vision devices to Belarus without State or Commerce licenses. Tsishuk was indicted Aug. 10, 2011, and pleaded guilty Oct. 28, 2011. Also indicted were Yahor Osin, Aliaksandr Belski, Aliaksandr Stashynski and Ernest Chornoletskyy, who have all pleaded guilty and are awaiting sentencing. Volha Dubouskaya pleaded guilty and was sentenced Feb. 6 to six months in prison and three years' supervised release.

MORE EXPORT ENFORCEMENT: Brian Keith Bishop, employee of U.S. Embassy in Jordan, was convicted Feb. 4 in bench trial in Alexandria, Va., U.S. District Court of violating Arms Export Control Act and delivering 9,446 rounds of ammunition, including 9mm, 7.62 X 39mm, 45 caliber and 12 gauge shells, to common carrier without notice and without export license.

CARBON STEEL FLAT PRODUCTS: In 6-0 negative "sunset" vote Feb. 15, ITC determined that ending countervailing duties on corrosion-resistant carbon steel flat products from Korea and antidumping orders on carbon steel flat products from Germany and Korea would not cause renewed injury to U.S. industry. Vote will lead to revoking existing duties on these imports.

OFAC: American Optisurgical, Inc. (AOI) in Lake Forest, Calif., agreed Feb. 21 to pay \$404,100 to settle OFAC charges of violating Iranian Transactions and Sanctions Regulations and Reporting, Procedures and Penalties Regulations for 36 exports or attempted exports of unlicensed medical goods and services to Iran from May 2005 through April 2010. In addition, OFAC alleged that AOI failed to respond fully to two administrative subpoenas in 2009. AOI did not voluntarily self-disclose matter.